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RESEARCH ARTICLE

Land-Law Reforms in Vietnam and Myanmar: "Legal Transplant" Viewed from Asian Recipients

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Abstract

This paper focuses on the conflict of norms in the interface between the "transplanted" formal law and the local social norms in the land-law reforms in Vietnam and Myanmar, each representing different legal families, while sharing commonness in that both have attempted law-making in the post-colonial independence period in order to restore the basis of the livelihoods of the local population. Both of the legal concepts of "land-use right" (*quyen su dung dat*) in Vietnam and "land-use right for cultivation" (*loat paing kwint*) in Myanmar have been the product of law-makers' restorative attempts at farmland security, while intentionally avoiding usage of the term "ownership" that would result in the capitalist transaction of land as a commodity. However, the contemporary land-law reforms led by donor-oriented "legal transplant" in these countries have resulted in the plunder of such policy, by reintroducing the same mechanisms of land exploitation as existed in the colonial days. Roaring protests of the local agricultural population seem to be a rising-up of the social norm descended from the immemorial past as an unwritten Constitution to bring an end to the centuries-long movement of "legal transplant" of the modern capitalist law.

Keywords: legal transplant; Vietnam land law; Myanmar land law; land-law reform; law and development

1. Introduction

1.1 Legal transplant vs. living law

While "legal transplant" is a theme that has been repeated in legal history, this paper purports to incorporate the context of contemporary legal reforms in Asian emerging economies into the mainstream of the study of "legal transplant." Since Alan Watson,[1] legal comparativists have placed the reception of Roman law by early modern Europe as the first generation of legal transplant and looked at the spread of the Napoleonic Code, despite the debates between the natural law and the historical schools of jurisprudence, throughout the European continent in the nineteenth century as the second generation of legal transplant, which invited the formation of colonial law in the Americas, Asia, and Africa as the extension of colonial territory. Then, today, the legal reforms in transition economies that started with the collapse of the Soviet system at the end of the twentieth century are referred to as the third wave of legal transplants.[2] Based on this "legal-transplant" view centring on Western capitalist law, there is a thriving "legal-origin" theory by the new institutional economics that evaluates economic results of

[1] See Watson (1974).
[2] See e.g. Berkowit, Pistor, & Richard (2003); Graziadei (2006); Cordero (2012).

the choice of legal system of the countries around the world between common law, civil law, and others,[3] following the categorization in mainstream comparative law.[4]

However, when viewing the contemporary legal transplant from a perspective of legal sociology, a simple story of positive law reforms turns to the complex phenomena of normative conflicts. While "legal transplant" is an act of top-down reform of positive law, whether statutory law or case-law, legal sociology turns its eyes to the reality of social reaction to such positive law reforms that Eugen Ehrlich, deemed as a founder of legal sociology, is said to have acquired the idea of "living law" (Lebendes Recht) during his days of lecturing on Roman law at Chernivtsi University in Ukraine, when realizing the fact that positive law did not make sense within the courtroom where judgments applied local norms. He proposed the science of law of looking at the facts beyond the words of the law.[5] Ehrlich, however, did not disregard positive law, known for emphasizing the role of the jurists in guiding the development of positive law (*juristische Wissenschaft*). The source of law that Ehrlich thought the jurists should pick up to form positive law was not the Roman-law principles to meet the internal necessity of the day (F. C. Savigny, G. F. Puchta), nor teleological free jurisprudence (R. Jhering), but rather the folks law of Volksgeist that the Germanists (G. Beseler, O. Gierke, et al.) inherited from Savigny's mainstream historical school of jurisprudence to identify.[6]

The act of Ehrlich lecturing on Roman law in Ukraine itself would be called nothing other than "legal transplant" in today's vocabulary. Today's third generation of legal transplant is also unable to avoid encountering local social norms, as if reliving Ehrlich's experience. However, today's donors are different from Ehrlich, aiming for the faithful "acceptance" of transplanted legal models,[7] by way of imposing financial conditionalities and applying legal indicators to evaluate the degree of reception. Such an enlightening stance is reminiscent of the Romanist ethos that led the second generation of legal transplant in the nineteenth century. Ehrlich's attention on "living law" raised doubts about the footing of Romanism that led the second-generation legal transplant. Similarly, Asian legal sociology is expected to direct academic interests towards the collisions of norms that the third-generation legal transplant has brought through the imposition of positive law reforms in the interface with the social norms that have been passed through generations in each society, to re-examine the normative validity of positive law being transplanted in light of such a time axis of local norms.

Based on this understanding, this paper addresses the dynamics between positive law and social norms in some parts of Asia that have been the major targets of intensive legal-reform assistance by donor agencies, with a focus on the cases of land disputes that have arisen following the positive law reforms as a result of contemporary "legal transplant."

[3] David (1968/1985); Zweigert & Köts (1998).

[4] La Porta et al. (1998); La Porta et al. (2007).

[5] See Ehrlich (1913).

[6] See Mori (1973) regarding the essence of the source of Ehrlich's "living law."

[7] The European Bank for Reconstruction and Development (EBRD), which pioneered "legal transplant" in countries transitioning from socialist regimes in the first half of the 1990s, began providing model laws to guide legislative reform and also introduced assessment indices called the "Legal Indicators Survey" that rated the level of faithful introduction of such model laws. In addition to evaluating the degree to which model laws were followed in each country's legal reform, these indicators also evaluated the implementation (enforcement) of the laws in the court process. Such evaluations only measured the direct transplantation of the model laws and did not evaluate the societal impact of the model laws. The World Bank's "Governance Indicators" and others have been developed since the second half of the 1990s as a means of measuring societal results, but its subjectivity that depends on country risk assessment for investors is a problem. See also Berkowit, Pistor, & Richard, *supra* note 2.

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1.2 Repeated "legal transplants" in Asian countries

Most Asian countries experienced their first "legal transplant" during the colonial era. The modern spirit that propagated the Napoleonic Code throughout every corner of the European continent in the first half of the nineteenth century turned to the Romanism that invaded the colonies in the latter half of the century. Transplant models were a colonial creation, but often justified by borrowing the authority of pre-modern doctrines. In the British colonies, the "Indian Code" was introduced as the codification of centuries of British case-law, though, in reality, it was a creation of the drafters that deviated greatly from the home law in Britain[8]: contract law which prioritized the bona fide purchaser that was linked to the capitalist codification movement of that time such as the New York Code. In the area of land law, the method of vacant-land nationalization was justified by the anachronistic doctrine of regalia and Torrens-style title registration was compulsorily implemented in colonies, whereas the same system had never rigorously been applied back in England until the 1990s. These colonial-law models also penetrated the French and Dutch colonies,[9] affected Japanese land-revenue reform, and reached its colony, Manchuria.[10]

Even in the contemporary version of "legal transplant," it is clear from observing the formation process of the transplanted models that they were nothing other than a creation by law firms around the beltway of Washington, DC, quickly put together by the American models representing the deregulation trend.[11] But they are strongly promoted as the international standard, leaving no room for co-ordination with different models.[12] Even Max Weber's theory has been used as evidence to justify it as a rational formal model law.[13]

When it is remembered that the first generation of "legal transplant" itself was a creation of new positive order of capitalist law by using parts of Roman law in response to the demands of the industrial class that wanted to write over canon law and feudal order, it is possible to think of the entire "legal transplant" to date as a series of activities that formulate and propagate modern capitalist law. It has been dedicated to identifying individuals as the subject of commercial transactions exercising free will, to form property law mobilizing all types of assets as the objects of transactions, and to establish contract law that maximizes free transactions. After spreading worldwide during the second period of the "legal transplant," it was shaken by the emergence of socialism but, after the collapse of the Soviet Union, the third "legal transplant" was plastering the world.

The contemporary "legal transplant" uses the substantive content that maximizes the freedom of capitalist transactions, while other policy considerations are, as will be seen in this article, merely mentioned secondarily. The reason why radical capitalist law needs to be so enthusiastically pursued has not been known. Natural law explained that it serves the desire of human nature, but legal realists have revealed the political choice of legislators and judges. Modern economics argues that free transactions lead to increasing welfare, but the economic reality is that poverty increases and there are repeated economic crises.

Today, the dispute-resolution process in Asia and Africa reminds us that the "living law" in the various parts has been descended despite the repeated attempts of the

[8] See Kaneko (2019a).

[9] See Jaluzot (2019) for French colonies, and also Rudy (2019) for Indonesia.

[10] Kaneko (2019b), p. 15.

[11] Kaneko (2009); Kaneko (2004).

[12] There are many cases in which legal-assistance activities led by Japan's Ministry of Justice have had to make concessions due to opposition to the model laws promoted by the World Bank, ADB, etc. See for details Kaneko (2010a); Kaneko (2010b); Kaneko (2011); Kaneko (2012); Kaneko (2020).

[13] Pistor & Wellons (1999).

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transplantation of capitalist law. It may be merely that the same phenomenon of the objections of the silent majority from the bottom of society—something that has been historically repeated throughout the world as the penetration of the "legal transplant" of capitalist law—is now being repeated in contemporary Asia and Africa. Yet, this may be the last opportunity to provide the voice of objection to, or give the guidance to cure, the self-glorified modern capitalist law, which has placed an overwhelming burden on the finite global environment and has become self-contradictory.

The reason why Asian social norms should attract attention is because there is a possibility that very strong norms have survived through repeated "legal transplants" and live in the foundation of society. Prior to colonization, each region in Asia had its own order of positive law, consisting of statutory laws and case-law. For that reason, the nineteenth-century "legal transplant" in Asian colonies took, instead of the assimilation policy, the dualism of applying local positive law to the local people under the name of "customary law" while applying the "legal transplant" to Europeans in the colony; as a result, the pre-colonial "living law" was preserved to some extent. Of course, there was significant penetration of Western capitalism at the point of economic exchange between Europeans and locals but, at least in property law, the exploitative mechanism of the colonial land-law regime became the first object of reform after independence from colonialism, allowing the formation of post-independent laws that reflected the "living law" that succeeded the pre-colonial era.[14]

We will also be able to give the same attention to the "legal transplant" of Western capitalist law into Japan since the Meiji modernization period. In the starting period of legal sociology in Japan in the 1920s, its founding fathers had already cast their eyes on the changing land orders in Asia, including in rural Japan,[15] where farmers were quickly losing traditional titles to farmlands and turning to the status of tenants or landless agricultural workers or migrants into cities. The land-revenue reform in Meiji Japan was nothing more than an introduction of the Torrens-style title-registration system with conclusive effect, which the old 1890 Civil Code drafted by a French scholar Gustave Boissonade attempted to overcome through the introduction of a land-record-type registration system with a mere publicity effect, as well as by defining the status of vulnerable farmers and city migrants as having real rights. Even though this Code was never implemented, the 1899 Civil Code succeeded some of the attempts of Boissonade such as the registration system as land records and the real-property lease, followed by case-law development and a series of special civil legislations during the 1920s up to today toward the security of land as a basis of living, including the postwar aggressive farmland redistribution and the 1952 Farmland Law to secure its results, to modify the excessive results of capitalism. The concern of this paper on the "legal transplant" in Asia is to follow the same path as the accumulated works on Japan's legal sociology that have continued to pay attention to the social changes in Japan as Western capitalist law has penetrated into rural society.

Today, the contemporary "legal transplant" has resulted in the repeal of post-colonial independent laws in many Asian countries, as will be seen in this paper, as if attempting a return to the nineteenth-century colonial law in many aspects. A notable characteristic in the land-law sphere includes the reinstatement of the Torrens-style land-title-registration system, the wasteland-nationalization system, and the utilization of compulsory expropriation systems for privatized projects. The land disputes that erupt today are thought to be the manifestation of the "living law" that has been inherited in the foundation of society and re-emerging on the verge of crisis.

[14] Kaneko, *supra* note 10; Kaneko (2021).
[15] Suehiro (1924); Toshitani (1972).

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1.3 Scope and method

This paper will focus on the facts associated with the contemporary land-law reforms in Vietnam and Myanmar guided by international donors. The author already raised concern on the reviving exploitation mechanisms of colonial land law by contemporary donors' legal transplants in her previous work submitted to the XVIIIth International Congress of Comparative Law in 2010, which focused on Cambodian land-law reform.[16] This paper inherits the same concern but applies more results of empirical observations based on repeated field surveys. There is a commonality between the two target countries, Vietnam and Myanmar, in that not only have both been under intensive land-law reforms led by donor agencies during this decade, but also their farmland-security policies were pursued throughout the twists and turns of post-colonial independence, yet those basic policies are today being disrupted by the acceptance of "legal transplant," both moving towards land mobility. It is also possible to observe the differences in the outcomes between the two countries, as Vietnam has experienced the French-Code system dating back to the colonial era and accepted Japanese legal assistance for Civil-Code drafting, whereas, on the other hand, Myanmar has inherited British colonial law.

In particular, land titling through the introduction of the Torrens-style registration system is the centrepiece of land-law reform promoted by international donors. The Torrens-style registration system is said to be an invention by Sir Torrens consolidating the experience in British colonies during the nineteenth century,[17] known for the absolute effect of a title certificate often called "statutory magic" functioning as definitive proof of the newly created complete title (mirror effect), effectively killing off various existing private rights and interests (curtain effect). Donors contend that, by establishing exclusive indefeasible title rights, transactions making the most of the exchange value of land are made possible, maximizing the chances of agricultural finance and advanced use of the land, which contribute to economic development.[18] Such land titling as a mechanism of land mobilization is, however, often unacceptable for the local agricultural communities that have maintained control against farmland alienability.[19]

Another focus of donor-led land-law reform has been the promotion of expropriation or requisition procedures for the benefit of privatized development projects. In response to recent movements such as the UN's Guiding Principles on Business and Human Rights, there is a growing tendency to incorporate human rights considerations such as participatory decision-making procedures and alternative dispute-resolution systems to the project process, but the prioritization of development remains the same.

The essence of contemporary land-law reform is a conversion mechanism of land use from being agricultural-based to industrialized. The governments hoping for economic development do not hesitate to rewrite the positive law following such donor-led reform models, but agricultural households with their livelihoods founded upon farmland have strengthened opposition, deepening political instability.

Vietnam is a typical example of this. Vietnam has been the recipient of "legal transplant" since the early 1990s on the path of Doi Moi that transitions to a market economy while maintaining a socialist system, with background pressure from the structural-adjustment conditionalities set by the World Bank and the Asian Development Bank (ADB) as well as the US–Vietnam trade-agreement negotiation. In the field of property law, the Ministry of Natural Resources and Environment has jurisdiction over the land-law amendments (1993, 2003, 2013) toward the promotion of land mobility under the influence of international donors, causing tens of thousands of land disputes to erupt.

[16] Kaneko (2011), *supra* note 12.
[17] Torrens (1882).
[18] World Bank (1975); de Soto (2000); Bruce (2006); World Bank (2005); World Bank (2011).
[19] For details, see Kaneko (2019b).

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The Ministry of Justice, as the recipient of Japanese drafting support for the 1995 Civil Code (revised in 2005 and 2015), aimed to develop a legal design to cope better with such land disputes.[20]

Myanmar, in contrast to the other former British colonies such as Malaysia and Singapore that continued adherence to the colonial system of appeals to the British Privy Council for decades after independence, is characterized by its prompt independence from the English judicial system through the establishment of the Supreme Court under the 1947 Constitution. However, the substantive legal order after independence maintained the colonial Indian Code (Burma Code) derived from English law, with a minimum fundamental reform in the land-law sphere by the 1953 Land Nationalization Act. As the ordinary court system was suspended during the Burmese way of socialism since the 1960s, the formation of case-law has also been frozen, while the major dispute-resolution process through administrative complaints seems to have largely depended on "living law." Myanmar finally embarked on legal reform under the current 2008 Constitution and has encountered the contemporary "legal transplant" by international donors,[21] focusing mainly on the legal areas directly relevant to foreign-investments promotion, such as the 2012 Farmland Law, 2016 Foreign Investment Law, and 2017 Company Law, causing severe social discord.[22] The fact that "living law" has been preserved by taking the administrative route has made the distance between such social norms and the newly transplanted land law remarkable, which is thought to have sharpened the discord.

In this paper, following the general introduction in this section, land-law changes in response to the contemporary "legal transplant" will be first reviewed and then the norm conflicts reflected in land-dispute cases will be studied in Section 2 for Vietnam and in Section 3 for Myanmar. An overall analysis on such changes will be given in Section 4.

2. "Legal transplant" and land disputes in Vietnam

2.1 Land-law reform and donor support

Behind the land disputes that have shaken Vietnamese society along the path of market-economization policy or Doi Moi, which was equivalent to Perestroika in the Soviet Union since the late 1980s, there are several changes in the system of land law. The 1987 Land Law appeared in the early Doi Moi period, followed by a series of reforms under the 1993 Land Law, the 2003 Land Law, and the 2013 Land Law that have led to the explosive increase in land disputes. The main cause of disputes is the mobilization of farmland. It is said that more than 1 million hectares of farmland were converted to non-agricultural land use throughout the 2000s. The mechanism was primarily the relaxation of restrictions on land transfer and on the conversion of land usage started under the 1993 Land Law, as well as the introduction of the new title-registration system. The second mechanism is the land-expropriation procedure that extends not only to public-purpose projects, but also to private development, as introduced since the 2003 Land Law under the name of the restoration (*thu hoi dat*) of state-owned land.[23]

Behind these institutional changes, there was the involvement of "legal transplant" by donors. The World Bank had started to make policy proposals as early as the 1993 Land Law; however, a new policy-proposal statement was published to respond to the eruption in land disputes after the 2003 Land Law,[24] which encouraged the enactment of the current

[20] See Kaneko (2010a), *supra* note 12; Kaneko (2011), *supra* note 12.

[21] See USAID (2013); UNDP (2017); World Bank (2017).

[22] Kaneko (2018).

[23] There are reports that the Ministry of Natural Resources and Environment was inundated with 30,000 land disputes during the three years from 2003 to 2006. See World Bank (2011), *supra* note 18, p. 2.

[24] World Bank (2012b).

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2013 Land Law. This policy proposal, under the name of enabling effective land use and strengthening the rights of farmers, called for a policy of further mobility of "land-use rights" over farmland, especially recommending the lengthening of the period of land use (to 50 years), an increase in the upper limit of farmland holding (30 hectares), and the abolition of the permit system for land-use conversion.

It is easy to understand that this kind of farmland-mobility policy is a system design that further accelerates the removal of small-scale agricultural households from their land and aims to consolidate farmland into large-scale agricultural enterprises or for other commercial uses. The rational given by the World Bank for such a sacrifice of small-scale farming is that they can obtain a better profit upon land sale when they leave their farm, because the purchase price of farmland will generally increase due to the farmland-mobility policy.[25]

The World Bank's proposal to Vietnam secondly focuses on land disputes that are rapidly increasing over land expropriation (restoration) by the state. However, it shows support for the state policy itself of promoting development projects by utilizing the land-expropriation method and only recommends improving the loss compensation to land value as a comfort for residents; by elaborating on detailed measures such as a system for third-party assessment of the compensation amounts, a profit-distribution system, a public-utility-provision system in parallel to the loss compensation to land value that has been successful in Japan and Korea, and an objection system are described in detail.[26]

Can such donor-recommended "legal transplant" contribute to the resolution of land disputes in Vietnamese society? In the following, the mobility of land title, which was the centrepiece of the series of land-law reforms, and the reform of the land-expropriation system will be looked at, followed by an examination of movements in the Civil-Code reform to redefine farmers' rights from the outside of the land law, and finally a focus upon trends in dispute resolution in the courts.

2.2 *Changes in the concept of "land-use rights"*

"Land-use right (*quyen su dung dat*)" is the expression of a farmer's right to use farmland given under the land-law regime in present Vietnam.

The origin of "land-use right" goes back to the pre-colonization era when the household ownership of cultivated land was protected under the land-registration system (Dai Bo) that dates back to the statutes of the fifteenth-century Lê dynasty, and it was placed under the jurisdiction of the village. The French colonial government forced the introduction of a Torrens-style title-registration system while relying on the Nguyen-dynasty Dai Bo system,[27] and also implemented the wasteland-nationalization and grant system on a large scale.[28] As the independence war in Vietnam was developed through the build-up of farmers' resentment against land concentration to the capitalists, the 1953 Farmland Reform Act attempted a several-hundred-thousand-hectare scale of farmland redistribution to the farmers as the flagship of revolution. What meant an uncompensated seizure of land for the vested class was the restoration of farmland for the farmer class, and has formed the basis of the farming households' ties to their farmland to this day. After the unification of North and South Vietnam, the collectivization of farmland accelerated, but it is said that, even during that period, farmland allocation to households was implicitly continued.[29] The

[25] See World Bank (2011), *supra* note 18.
[26] *Ibid*., pp. 6–8.
[27] 1925 Decree. For empirical researches on this system, see Ono (1997).
[28] See Takada (1984).
[29] Le & Nguyen (2014), pp. 283–4.

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farmland-management contract system initiated in the early stage of Doi Moi was a practical route that drew upon the traditional ties of farming households to their farmland.

The 1987 Land Law, which appeared under the Doi Moi policy, did not yet explicitly describe the farmers' land use as private property, under the official stance that all land belonged to the entire people's ownership as provided in the 1980 Constitution. It merely mentioned long-term land use by individuals in addition to those by state-owned farms, farming co-operatives, production collectives, etc., while the disposal of land such as transfer or provision as collateral was prohibited (Article 3). It is thought that the essence of such long-term land use was close to emphyteusis in civil-law terminology, or a perpetual-tenancy right for cultivation, equivalent to the farmland-management-contract system being developed in China at that time.

However, the 1992 Constitution known as the Doi Moi Constitution appeared and explicitly referred to "land-use rights" (*quyen su dung dat*) that were vested with transferability (Article 18). Based on this, the 1993 Land Law prescribed the "land-use rights" of farming households and individuals (Article 1), vested with not only the rights of occupation and use, but also a right for transfer, exchange, leasing, inheritance, and providing as collateral if use was within the same range (Article 3(2)). As a result, the legal nature of private rights of farmers is now considered to have changed from an individual perpetual right of tenancy to a leasehold with transferability. However, this "land-use right" did no more than to ratify the disposal of land between farmers, which was for the further promotion of the farmland-contract system only, and did not liberalize the trading of farmland as a commodity.

On the other hand, the 1993 Land Law (Article 80) stipulated a "land lease" (*cho thue dat*) that the government individually granted to commercial and industrial investors, which was separate from the "land-use right" for farmland. This separation between farmland and urban land was a notable policy stance at that time, with the promotion of the contract-out system over the former, while placing the latter as lessee under close supervision by the government as direct lessor.

At the time, China had already introduced the concept of a "land-use right" that could be disposed of freely, which referenced the fixed-term leasehold under English law, with the intention of legalizing the mobilization of land in special areas such as the Shenzhen Special Economic Zone, where an experimental capitalist economy was pursued. As a result, there was conflict with the farmland-contract system as the nationwide expansion of the "land-use right."[30] China finally came to enact the 2007 Property Rights Act and resolved this systemic contradiction by establishing the series of real rights for private entities over the state or collective land ownership, namely the farmland-management-contract rights, as well as the land-use rights for construction and the land-use rights for residential use for urban land. By comparison, Vietnamese law had already established the separate system of a land-rights regime between the "land-use right" for farmland and "land leases" for urban land at an early stage in the 1993 Land Law. However, due to the conceptual gap in terminology on "land-use rights" between China and Vietnam, it seems that confusion arose so as to create the two expectations placed upon the single "land-use right" term under the 1992 Constitution, namely the expectation of a Chinese-style transferable fixed-term-leasehold right and the expectation of farmland-use security under the 1993 Land Law.

The 1993 Land Law was initially implemented to meet these two expectations by admitting the transferability of the "land lease" for commercial and industrial use, while maintaining the control of "land-use rights" over farmland. The Standing Committee of the National Assembly introduced a series of laws with this attempt, including the 1994 Ordinance on the Rights and Obligations of Foreign Organizations and Individuals

[30] Qiao (2017); Upham (2018), pp. 53–8.

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who Lease Land in Viet Nam, its implantation regulations (No. 11-CP/1995), the Ordinance on the Rights and Obligations of Domestic Organizations to Which Land is Allocated or Leased by the State, and its implementation regulations (No. 18-CP/1995), which greatly liberalized the transferability of the "land lease" that was attached to the mortgage, transfer, sublease, and investment in properties over such land.[31]

However, this farmland and urban-land separation did not last long. The Amendment to the 1993 Land Law in 1998 recognized the creation of transferable "land lease" over the farmland to corporations. Then, the 2003 Land Law narrowed the difference between the concepts of "land-use right" and "land lease" towards the same transferability. It changed a "land-use right" into a fixed-term leasehold that had a limit of duration (20 years for single-year crops and 50 years for plural-year crops as provided in Article 67) and, together with "land lease," explicitly made it possible to "legally" exchange, transfer, lease, sublease, inherit, gift, and collateralize the "land-use right" (Article 106).

In this way, the concept of Vietnam's "land-use right" has seen an increase in the degree of mobilization with each revision of the land law and is now no different from the concept of ownership in capitalist countries.

2.3 *Expansive use of land expropriation*

When the legal nature of the "land-use right" of farmers is changed from a perpetual-cultivation right as basis of livelihood to a fixed-term leasehold as a commodity for transactions, a natural consequence is the weakening of farmland security against land acquisitions for development projects. Vietnam's 2003 Land Law (Article 39) explicitly included private development projects as the target of the land expropriation, beyond the scope of "public purpose" in the classical sense. This expansive use of land expropriation invited severe social criticism. To respond to such criticisms, the above-mentioned World Bank policy recommendations suggest limited use of the "compulsory" expropriation method only for public construction projects, while maintaining a stance to permit land restitution for private development projects through "voluntary" sales,[32] as had already been adopted by the 2003 Land Law (Article 40). The current 2013 Land Law is considered a direct result of such donor intervention, which has adopted a new expression—"socio-economic development that contributes to the national and public interest" (Article 62), as if it dealt with only development projects for the public benefit. But a closer reading will easily detect a newly introduced list of project types eligible for expropriation, which maintains the same coverage of private development projects as before, including urban development and industrial parks, etc. (Article 62(d)).

It is true that the 2013 Land Law has added some adjustment procedures that consider the participatory decision-making process: in the first stage of land-development planning by each level of the People's Committee (Article 63–2), a public hearing is expected to be held at the level of district-level considerations (Article 43). However, there is no detailed procedural guarantee and the participation of residents is seen as a mere formality in practice.[33] A negotiation procedure with each household was also newly incorporated into the stage after the decision to expropriate has been made (Article 69).

The 2013 Land Law merely succeeded the 2003 Law in terms of compensation provisions. Though the Law provides that the principle-of-loss-compensation method is

[31] For details Kaneko (1999).

[32] World Bank (2012a), p. 5.

[33] According to the author's interview with the Director of the Land Disputes section of the Department of Natural Resources and Environment in the People's Committee of Van Giang County, Hun Yeng Province, in March 2019, the participation of residents at the planning stage consists only of one-sided explanatory meetings by the administration that lack substance.

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primarily the provision of alternative land, if this is difficult, then monetary compensation is admissible together with certain livelihood assistance (Article 74). In reality, the monetary compensation is the majority of the practice.

On the other hand, the 2013 Land Law has featured various means of dispute-settlement procedures, starting from the declaration of the general principle of supervision by the people (Article 199), providing for compulsory mediation to proceed to administrative complaints and litigations (Articles 202–204).[34] The limited degree of "judicial independence" also stands out in the litigation process, with the tradition of judges being recommended for people's courts by the People's Committee of the same level, even after the revision of the Constitution in 2001, which consolidated judicial personnel matters to the Supreme People's Court. In the administrative litigation at the district-court level that the author targeted in a field survey, the court's attitude of favouring the government was evident, casting doubt on judicial independence.[35]

Thus, the trend for land-law reform in Vietnam seems to be following a path of land mobilization for economic development that is compliant with the donors and procedural measures are only in place as a response to the boiling social criticism.

2.4 *Redefining private rights in the Civil Code*

The land law that strengthens the orientation towards land mobilization in Vietnam is within the jurisdiction of the Ministry of Natural Resources and Environment. In response, the civil-law drafting team at the Ministry of Justice made an ambitious attempt at increasing the protection for farmers by redefining the "land-use right" from a private-right angle during the recent drafting of the Civil Code in 2015.[36]

That is, the 2015 Civil Code abolished the chapter on the acquisition and loss of the "land-use right" that appeared in the 2005 Civil Code and newly introduced Part 2, "Ownership and Other Property Rights," where the new concept of a "surface right" was introduced with an attempt to give a new definition to the "land-use right."[37] The original intention of the drafters was to protect farmland from easy seizures via expropriation by clearly establishing the legal basis of a "land-use right" as that of a real right, with the expectation that the value of compensation for farmers as to the restitution of such transferable real rights should be highly evaluated. This idea of the civil-law drafters was based on suggestions from the legal support team from Japan's ODA.[38]

Part 2 of the 2015 Civil Code is entitled "Ownership Rights and Other Property-Related Rights" and establishes the Pandekten-style general provisions at the beginning to reflect the Japanese influence and, after providing for the ownership right, elaborating for the adjacent land servitude, the usufruct right, and the surface right as property-related rights (Article 159, paragraph 2). The Civil Code declares that these property rights continue to

[34] After going through grassroots mediation and commune mediation, if the commune mediation does not succeed then, if there is a title certificate, there can be an immediate appeal but, if there is no title certificate, the matter must go through mediation by the district-level People's Committee (Art. 203).

[35] According to the author's interview in December 2014 with three farmers who were the leaders of the plaintiff group in an administrative lawsuit objecting to land restoration by the commune-level People's Committee for a private development project in a suburban commune near Hanoi, the district court determined the cases of more than 30 litigants individually and gave different judgments regarding compensation, despite the principles of the socialist procedural law, which require all parties to participate in litigation. The parties said that they felt that the court had intended to create division between the parties that led to the government's obtaining a favourable conclusion.

[36] According to the author's interviews in October 2017 and December 2019 with Nguyen Hong Hai, a member of the Civil-Code drafting committee of the Ministry of Justice of Vietnam, during his stay in Kobe University, Japan.

[37] Nguyen (2019), Notes 30, 41.

[38] According to the above-mentioned interviews with Nguyen Hong Hai, *supra* note 36.

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exist over a property even if the ownership of the property is sold (Article 160, paragraph 1, Article 166, paragraph 2), making it clear that these rights are an independent property right, rather than a personal right created by contracts and subject to "a sale breaks a lease" rule. In addition, the principle-of-loss compensation for expropriation for defence and national interests was explicitly specified (Article 163). From among these newly provided property rights, the Civil-Code drafters intended that the "surface right" in particular should correspond to the "land-use right" under land law.

It is worth noting that the Code drafters in Vietnam are willing to provide a fundamental solution to land disputes through creating the general provisions governing the property-rights regime. This attempt is a Pandektenist's challenge indeed, to borrow the authority of the established terminology of *numerus clausus* in the continental property law that dates back to Roman law in order to secure the factual reality of Vietnamese farmers' historical ties to farmland. This is a challenge unique to Vietnamese jurists who have a certain history of conceptual jurisprudence: since the fifteenth-century Lê dynasty criminal code and Nguyen-dynasty Gia Long code,[39] as well as the Indochina Civil Code during the French colonial era and the 1967 Civil Code that was in force in South Vietnam prior to unification. Even though the Vietnamese codification process in the Doi Moi era seems to have been a struggle for a better systemic structure, starting from the 1995 Civil Code, which was a mixed product of combining the framework of the Institutiones style inherited from the French Civil Code with the elements of the Pandekten style that seemed to be under the influence of the Russian Code and Japanese support, succeeded by the 2005 revision of the Civil Code, and the 2015 revision strengthening the style of the Pandekten system for property regime, it appears that the major goal of codification has constantly been focused on establishing a basic law that guides the fate of socialist market economy.[40] It is natural that the 2015 Civil Code attempts to define the "land-use right," which is the foundation of the livelihoods of farmers nationwide, in its newly established property-rights part.[41]

However, it should be noted that using legal terms as a tool also has its dangers. According to the terminology of Civil-Code tradition, in expressing the "land-use right" of farming households as a property right, the concept of a perpetual-cultivation right over farmland (emphyteusis) was surely more appropriate than the surface right (superficies) that is used for residential and commercial use in urban areas and has strong transferability. Despite this, Vietnam's Civil-Code drafters were stuck with the concept of a "surface right" to identify the farmers' "land-use right" under the Land Law. It can be attributed to the impact of China's 2007 Property Law, which identified the term "land-use right" as a superficies. However, as mentioned above, China's Property Law defines a farmland-management-contract right as one of the restricted property rights (corresponding to emphyteusis), separate from the "land-use right" (corresponding to superficies), and in some way has maintained the farmland-conservation policy. By contrast, Vietnam's Civil Code gave a superficies definition to the "land-use right" despite its emphyteusis-like nature as the basis of a farmland-management contract.

Perhaps, the intention of Vietnam's Civil-Code drafters was to give attention to the social reality of the superficies nature of the "land-use right" that had already been highly commercialized since the removal of the ban on transferability under the 2003 Land Law. They chose to abandon the emphyteusis-like protection and provided for farming

[39] See Katakura (1987).

[40] The movement was influenced by the Russian Civil Code of 1995, as well as China's gradual establishment of a civil-law regime including the 1986 General Principles of the Civil Law, the 1997 Contract Law, and the 2007 Property Law. See Kaneko, *supra* note 10.

[41] As for the results of the last-minute struggle on the debate on whether or not to introduce the principle of separation between real and personal rights, see Nguyen Hong Hai, *supra* note 37.

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households to receive the maximum sale benefit for compensation value when they had no other choice but to leave farming.

According to the author's interviews with local attorneys, Vietnamese society tend to be cold to this newly introduced concept of a "surface right" in the 2015 Civil Code. For farming households that still have emphyteusis-like ties to their farmland, a "surface right" over the farmland does not make sense. The business community is also disappointed with the concept of the "surface right" due to its fluctuating definition: the Ministry of Justice identifies the "surface right" as a "land-use right," but the Ministry of Natural Resources and Environment has determined that it is a "land lease," giving it the impression of a dangerous concept.[42]

Perhaps the intention of the Ministry of Natural Resources and Environment is to maintain the farmland-protection policy in some way by keeping the concept of "land-use right" corresponding to the land use for the farmland-management contract—or, in other words, an emphyteusis-like right. Its stance is to separate the emphyteusis-like "land-use right" and the superficies-like "land lease," which is to follow the separation of the emphyteusis-like "management-contract right" and the superficies-like "land-use right" in China's Property Law. However, due to the misalignment in the usage of the term "land-use right" between two countries, this separation of terminology is causing confusion. In any event, the Ministry of Justice's natural legalism that borrows the authority of the Roman-law concept is found to be in direct opposition to those implementing the land law, who can be described as today's historicists.

2.5 Trends in case-law formation

As the mainstream of land-law reform in Vietnam guided by "legal transplant" proceeds on the path of land-mobilization policy, and the concept of the "surface right" attempted in the Civil Code is unable to exert influence, perhaps the court must be the last resort to draw upon for the social norms of living in daily life. Is it possible, however, to see case-law formation independently from the positive statutes in Vietnam?

Vietnamese law is open to the application of customary norms as a source of law. That is, the 2015 Civil Code (Article 5) specifies customary norms as a source of law as long as they do not violate the general principles of the law. In Vietnam, the saying goes since ancient times that village customary laws have overruled even royal law (*phep vua thua le lang*). French colonial government also attempted to codify them in customary codes such as the 1883 Abbreviated Civil Code for Cochin China, the 1931 Tonkin Civil Code, and the 1939 Annam Civil Code. After independence, the people's court system by lay judges was implemented under the socialist system, in which the role played by customary norms is considered to be substantial.

However, the court system in Vietnam lacks the freedom to attempt a bottom-up formation of case-law. The socialist Constitution adheres to the democratic concentration system that consolidates the right to interpret the law in the Standing Committee of the National Assembly and does not endorse the creation of law by the judiciary. Once the donors from common-law countries proclaimed the importance of case-law formation to overcome statutory rigidity,[43] this invited the promulgation of the Communist Party

[42] According to interviews with lawyers in Hanoi at Bizlink Lawyers, TC & Partners, and some real-estate companies in March 2019. When the 2015 Civil Code was first introduced, there was an expectation among the business circle that this new legal concept would be useful as a means for large-project financing by separating aerial and underground usage rights from the highly regulated "land-use rights" and "land leases" concepts, and also be an expedient method to make the re-leasing of land leases to corporations possible, which was otherwise forbidden. However, it seems that expectations cooled rapidly due to the conservative attitude of the relevant ministries.

[43] USAID (2008).

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Politburo's Resolution No. 48 and No. 49 of 2005 that declared the promotion of the system of case-law (*an le*) led by the Supreme People's Court. But the essence of this was nothing more than the introduction of selected cases to guide the lower courts in order to standardize the application of law within the judiciary, which was basically equivalent to China's guiding-case system. Based on these Resolutions, the 2014 revision of the Law on the Organization of People's Courts (Article 22.2 (c)) specified the binding nature of "an le." The 2015 Civil Code also explicitly mentioned "an le" as a source of law (Article 6(2)), and also consciously strengthened the deductive systematization with the intention of promoting unified interpretation by judges in areas of gaps in the code consisting of merely 689 articles.[44]

In this way, the "an le" system in Vietnam, which arrived with a fanfare, was a path that established the binding nature of the selected decisions by the Justice Council of the Supreme People's Court to strengthen central control over the lower courts. As a result, this actually put a brake upon the bottom-up formation of case-law flexibly absorbing social norms in the local area.[45]

In reality, what is the selection of norms in the Vietnamese "an le"? The selected cases by the Justice Council of the Supreme People's Court of Vietnam are currently the only authorized source of case-law, but only 29 cases had been selected as of 2019 and there are few precedents dealing with the legal character of the "land-use right."[46]

2016 Judgment No. 2 (Supreme Court Chief Justice's Decision 2016/220/QD-CA dated 6 April 2016, based on the decision of the Justice Council of the Supreme People's Court of Vietnam of the same date) recognized the cassation supervisory judgment by the Justice Council of the Supreme People's Court of Vietnam No. 27/2010/DS-GDT dated 8 July 2010 as an "an le" with binding authority. In this case, the plaintiff, who was a Vietnamese resident in the Netherlands and had purchased over seven hectares of farmland through her younger brother who was a farmer (the defendant) after the restriction on the transfer of "land-use rights" between farmers had been removed by the 1993 Land Law, was claiming payment of the value of the land sale made by the defendant to a third party in 2004. Title registration was held by the defendant. The lower court decided that the purchase of farmland in 1993 by the plaintiff was invalid (in violation of the farmland-transfer restrictions to non-farmers) and ordered the restoration of the original status. However, the cassation judgment interpreted the farmland transfer to the plaintiff valid as an "investment" and ordered that the parties should share equally the benefit obtained from the land sale according to the same ratio, since the ratio of the plaintiff's financial investment and the defendant's investment of labour was not clear. This judgment is recognized as an interpretation of Article 137 of the 2005 Civil Code (invalidation of illegal transactions and restitution of original status) and Article 235 (enjoyment of yields). It is peculiar in regard to its interpretation of an illegal land purchase as being valid based upon a theory of "investment" that was not asserted by either party. At first glance, this case appears to be an example of the Supreme Court's progressing the formation of case-law, but it can be thought of as a display of the Court's attitude of following the latest national policy. Perhaps this judgment was a result of a policy-based decision that took into account factors such as the change in land-law policy that originally saw the acquisition of farmland by overseas Vietnamese as illegal under the 1993 Land Law but then legalized it under the

[44] Nguyen Hong Hai, *supra* note 37, s. 2-2.

[45] The fact that the Japanese project to support to improve the independence of the lower-court judgments was temporarily suspended at that time is also evidence of this conservative orientation of the an le system. See Kaneko (2010a), *supra* note 12.

[46] The following refers to the English translation by Caselaw Vietnam (2019), which is a collection of precedents from the decisions of the Supreme People's Court of Vietnam's justices.

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2003 Land Law and the emphasis upon the evidential effect of the defendant's title certificate, probably for the protection of bona fide purchasers.

2017 Judgment No. 15 (Supreme Court Chief Justice's Decision 2017/229/QD-CA dated 28 December 2017, based on the decision of the Justice Council of the Supreme People's Court of Vietnam dated 14 December 2017) recognized the cassation judgment of the Justice Council of the Supreme People's Court of Vietnam No. 394/2012/DS-GDT dated 23 August 2012 as an "an le." It was a case between two farming households who received redistributed farmland in the 1960s and were cultivating each other's land under a temporary land exchange that was directed by the agricultural co-operative, when the nationwide simultaneous title registration was implemented under the 1993 Land Law. One party (the defendant) acquired title registration over the land that he was thus temporarily cultivating and refused to return it to the plaintiff. The cassation court overturned the trial court's and appeal court's decisions that ordered the return of the land to the plaintiff, and found that a "land-use right"-exchange contract had been concluded at the time of title registration under the 1993 Land Law. This judgment applied the 2005 Civil Code, which was not in force at the time of the dispute, and referred to the change-of-ownership provisions (Article 170(2)) without mentioning the provisions regarding "land-use right"-exchange contracts (Article 173(2), Articles 693–696). In contrast to the trial court's intention of finding out the true intentions of the parties to solve the dispute, the supervisory court reversed the decision and relied on the evidential finality of the title registration to deliver its judgment.

2.6 Summation

The essence of land disputes in Vietnam is the loss of farmland due to land-mobilization policy, behind which we can observe the land-law changes. Due to periodical changes in the legal nature of a "land-use right," transfer restrictions that were established for the safety of the perpetual use of farmland have been relaxed and the path of a land-expropriation system for private development projects has been pursued. The ambitious attempt by the Civil-Code drafters to redefine the "land-use right" as a mobile private right has not been socially pervasive. In the arena of judicial dispute resolution, the attitude of the lower courts can be seen towards finding the true intentions of the parties in order to determine the existence or non-existence of a "land-use right" in accordance with a farmer's actual intention rather than a title certificate held by an absent landlord. However, the decisions of the Justice Council of the Supreme People's Court of Vietnam have had a tendency to establish precedents that promote land transactions based on the definitive evidence of the title certificate. It is a situation of the lower courts' trying to absorb the "living law" but being rejected by the upper courts.

3. "Legal transplant" and land-disputes resolution in Myanmar

3.1 Contemporary legal assistance to Myanmar land-law reform

International support has been rushing into Myanmar under the 2008 Constitution, which dissolved the military regime that had ruled since the 1988 coup. Land-law reform is one of the priority areas of such international donors. The main pillar of recommendation is the legislation for the mobilization of farmland, while appealing to the human rights advocacy for farmers who lost their land under the military reign.

The result of the first round was a series of land-law reforms in 2012 that removed the prohibition on the transaction of farmland. The land-law guidance by the United Nations Development Program (UNDP) and the United Nations Human Settlement Program (UNHABITAT) criticized the previous land regime under the 1953 Land Nationalization

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Act as a legacy of socialism, which had been the grounds for farmland-protection policy after the postwar independence of Burma by way of the restrictions on farmland transfer and land acquisition by foreign investors.[47] With the introduction of the 2012 Farmland Law, the 1953 Land Nationalization Act was abolished, the prohibition on land transactions was removed, the restriction of land-use change was eased, and the previous land-record system under the 1953 Act was replaced by a land-title-registration system, which seemed to be a revival of the Torrens-style title-registration system adopted during the colonial period. The 2012 Law on Vacant, Fallow and Virgin Land Management was also introduced to revive the wasteland-nationalization method of the colonial time. Thus, the institutional infrastructure for the mobilization of farmland was re-established by the 2012 land-law reform.

However, after a dramatic eruption of land disputes after the 2012 land-law reform,[48] further involvement of international donors continued and, in 2016, a "National Land Use Policy" was published as a result, which outlines a recipe for a comprehensive land law to be legislated for the future. Such donor support, however, does not change the path of promoting land mobilization and the policy of promoting development projects through land expropriation is also maintained, while giving consideration to the participatory decision-making procedures and increasing compensation to sooth the residents. That is, the proposal made by the World Bank Group's International Finance Corporation (IFC) relies on the research conducted by Displacement Solutions, a human rights non-governmental organization, to give serious criticism to Myanmar's land-grabbing problem.[49] Yet, while the report advocates for human rights, it does not show an inclination towards restricting development for the protection of farmers, but rather praises foreign investment activities as improving their consideration of human rights.[50] As for the causes of the notorious phenomenon of "land-grabbing" in Myanmar, it does not separate the legal mechanisms of the compensated land acquisition in the context of the 1894 Land Acquisition Act and the wasteland nationalization under the 2012 Vacant, Fallow and Virgin Lands Management Law, confusingly providing a rough impression as if public expropriation in Myanmar is being regularly undertaken without providing any compensation.[51] The United States Agency for International Development (USAID) also stresses that land mobilization gives landless farmers the opportunity to buy cheap land and encourages rural finance,[52] without questioning the outcomes of land mobilization under the 2012 land-law reform. Whether these policies of donors are sufficient to bring about a fundamental solution to land disputes in Myanmar will be a question to test the outcome of "legal transplant."

In the following, the consequences of "legal transplant" in Myanmar land-law reform will be explored by first reconsidering the contents of the 2012 land-law reform that were the direct product of the first round of donor support, followed by an overview of the National Land Use Policy as the outcome of the second round of donor involvement, and finally a reference to the tendency of land disputes will be reviewed based upon the author's field surveys.

[47] UNDP/UNHABITAT/Norwegian MOFA (2009).

[48] According to the Executive Office of the President's report, as of April 2014, more than 7,600 cases of land deprivation were reported nationwide.

[49] IFC and Displacement Solutions (2015).

[50] *Ibid*., paras 37–38.

[51] Main proposals include evaluating Myanmar's land-expropriation procedures and compensation standards based upon the IFC's internal performance standards, focusing on transitioning from compulsory expropriation to voluntary negotiations, increasing support for the rebuilding of livelihoods, and promoting community participation and consultation. See IFC, *supra* note 49.

[52] USAID (2013), p. 13.

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3.2 Changes to property rights prior to the 2012 land-law reform

Many of current land disputes in Myanmar are complaints against land titling, objections to land expropriation and compensation by the government, and protests against uncompensated land enclosure by means of wasteland nationalization. Based on the author's surveys, the common background to these problems is the vulnerable nature of the property rights of farmers that succeeded from the colonial period.

Farmers' individual rights on farmland in Myanmar were historically guaranteed as perpetual tenures (*myay-thay*) or provisional tenures (*myay-sheng*) under the dynastic era's legal code, *Dhammathat*.[53] It is notable that not only myay-thay (e.g. Bo Ba Pain right established after three generations of continual cultivation), but also each category of myay-sheng (e.g. lands obtained through purchase) was an exclusive title corresponding to the ownership concept in Western modern law. However, under the 1876 Land and Revenue Act by British rule, most of the holding of farmland was not recognized as ownership and instead was given the common title of "landholder's right,"[54] which was a vulnerable right subject to cancellation by the government on failure to pay tax, cessation of cultivation for two or more years, or lacking registration under the Torrens-style title-registration system. Even though designed to be as weak as a tenancy, a "landholder's right" was transferrable, which was the peculiar character of this right of colonial invention, which corresponds to the right of *Erfpacht* applied in the Netherland East Indies.

The post-independence 1953 Land Nationalization Act laid out the restrictions on farmland transfer or diversion to non-agricultural uses, which were to guarantee the farmland for cultivator principles by unifying the owner and the cultivator. The intention of the Act was not nationwide collectivization, but was instead a farmland-redistribution system that nationalized the land held by absentee landlords in excess of the upper limit and redistributed it to farmers,[55] similar to Japan's 1951 Law Concerning Special Measures for the Establishment of Landed Farmers. Also, the structure of the farmland-conservation measures (sections 9–11), which restricted farmland transfer and diversion outside of agriculture, also corresponds to Japan's 1952 Farmland Law. In this regard, the international donors' argument is obviously incorrect in explaining that the 1953 Land Nationalization Act denied the private-ownership rights that existed during the colonial period and nationalized all farmland.[56] It was the British colonial law that denigrated the concrete land tenures that existed in the pre-colonial period to the unstable "landholder's right" with the nature of a transferrable tenancy, and the 1953 Act tried to raise it to the level of a perpetual right. However, the fact that the Burma 1953 Act maintained a similar system of confiscation of a farmer's right to colonial law for reasons such as abandoning of cultivation (sections 29–32) made the character of this right weak compared to the ownership structure of Japanese farmland reform. The succeeding implementation of the 1953 Act that redefined the farmers' property right as a "cultivation right" (*loat paing kwint*) added an implication of a mere tenancy.

On the other hand, the 1953 Land Nationalization Act abolished the Torrens-style title-registration system of the British colonial era where the title certificate provides definitive evidence to determine the existence of rights and transferred it into a land-record system.

[53] Property law was contained in Chapter 8 of the Manugye Dhammathat, which was not implemented until just before British colonization and later translated into English. Perpetual ownership (*myay-thay*) included a definitive title of Bo Ba Pain, which was acquired through continuous possessory cultivation by a family for three generations, while provisional ownership (*myay-sheng*) was a series of rights acquired through inheritance, purchase, passing of the time-bar period, or new development, but subject to objection by a third party.

[54] Saito (1985) provides an extensive analysis of the historical background of the British colonial land policy that introduced the "landholder's rights."

[55] The progress of farmland redistribution was stagnant and tenant-farmer-protection policies such as the 1963 Renting Land for Cultivation Law commenced. See Takahashi (1991); Takahashi (2000); and others.

[56] See e.g. the introduction to UNDP/UNHABITAT/Norwegian MOFA, *supra* note 47.

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Accordingly, there was no definitive effect of automatically denying a "cultivation right" even if registration was lacking.[57] Therefore, there was room for farmers to assert their right based on the fact of "cultivation," even when the government tried to requisite unregistered land as virgin or vacant land, or due to farmers' failure to meet the obligation to register. In this regard, it can be said that the "cultivation right" under the 1953 Land Nationalization Act strengthened the property rights of cultivators compared to the British era "landholder's right."

In contrast, the changes brought about by the contemporary land-law reform by the 2012 Farmland Law were, first of all, to revive the title-registration system and ease the restrictions on the transfer of the "cultivation right," which reinstated the transferable character of property rights close to the colonial-era "landholder's right." Therefore, even though the 2012 Farmland Law used the same term of "cultivation right" as the 1953 Land Nationalization Act, it made a "cultivation right" into a weak right that cannot be asserted if the title registration is lacking, regardless of how much evidence of actual "cultivation" exists.

On the other hand, the 2012 Farmland Law maintained the restrictive procedure on the diversion of farmland to non-agricultural use. Although the law made it possible to transfer the "cultivation right" outside of agriculture, it is still inconvenient for commercial transactions as long as the private right is a "cultivation right" that comes with the obligation to cultivate. Therefore, most investors instead apply to divert the use of the farmland (Article 30 of the 2012 Farmland Law). In the past, there was also a use-diversion procedure under the 1953 Land Nationalization Act (Article 39) that had been used as a method of circumventing the restriction of farmland transactions (known as La Na 39) and this misuse was long criticized. Therefore, the new implementation rule on Farmland Law (Ministry of Agriculture and Irrigation Notification No. 62/2012, Articles 78–94) has detailed the farmland-use-diversion procedures for public projects based upon national, regional, or state-government plans (Article 78); projects based upon regional-development plans or city plans (Article 79); and construction projects for public facilities such as hospitals (Article 80), for which the approval of the Central Farmland Management Committee is an essential requirement, and further detailed examination procedures for individual projects are prescribed (Articles 82–94). The 2012 Farmland Law is contradictory in the way in which it responded to the international donors' support by relaxing the restrictions on the transfer of farmland and introducing a title-registration system, while maintaining and detailing centralized supervision over the farmland-use-diversion procedure, which may have been intended to adjust between the policies of farmland conservation and mobilization.

Another feature of Myanmar's contemporary land-law reform has been the 2012 Law on Vacant, Fallow and Virgin Lands Management—an investment-promotion mechanism in which unused land is nationalized and conceded to investors. It follows the colonial exploitation method from the 1861 Rules for the Grant of Waste Land and was also the method abused by the military administration after the 1988 coup, namely the uncompensated taking of farmland using military force based upon the Vacant, Fallow and Virgin Lands Management Procedures of Notification 44/91, which was also called "land-grabbing" and remains the main cause of land disputes to date.

Thus, the essence of the land-law reform in 2012 was to revive the series of nineteenth-century farmland-exploitation mechanisms that were frozen by the farmland-preservation policies under the 1953 Land Nationalization Act. The reform reinstated the land transferability of property rights, the Torrens-style title-registration system, and the wasteland-management method through the abolishment of the 1953 Land Nationalization Act. While the restrictive procedures on land-use diversion that are

[57] See for details Kaneko, *supra* note 22; Kaneko (2021), *supra* note 14.

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described in the Farmland Law's implementation rule appear to have been retained as a minimal means of farmland-protection policy, its implementation seems to have been largely loosened, as observed in the author's fieldwork.[58]

3.3 Contradiction in the National Land Use Policy

In January 2016, amid the roaring land disputes that erupted following the 2012 Farmland Law, the National Land Resources Management Central Committee, which was specially entrusted by the Union President, published the National Land Use Policy. Alongside the statements of general principles such as sustainable land use (Preface, paragraphs 1,graph 6(a), 8(a)), conservation of property tenures as the foundation of livelihoods (Preface, paragraphs 3, 4, 6(b)), and respect for customary rights (paragraph 6(c)), the Policy also emphasized the need to apply international best practices, the utilization of market mechanisms, a land-title-registration system, and land-tax reduction (paragraph 8(d), (f)). Without elaborating on the substantive designs of law to balance such policy orientations of farmland conservation and economic development, the Policy details an attitude of dispute resolution (paragraph 6(d)), exclusively through community-based consensus-building (paragraphs 6(e), etc.).

That is, the disputes over title registration (issue of the title certificate Form 7) should be resolved through community consultation and a participatory land-tenure-determination method (paragraph 17(f)), but the substantive details of such land tenure and the evidential requirements for establishing such a right are not clarified.

The Policy is, on the other hand, eager to detail the procedural justification for the diversion of farmland use through a land-use-planning method incorporating a participatory decision-making procedure (paragraph 19 (c)). Specifically, the establishment of a "land-use committee" at each administrative level down to the fundamental village-tract and town level is recommended, where the elected representatives of farmers, ethnic minorities, and female groups should be incorporated (paragraphs 10(b) and 11 onwards). Among these, the district-level land-use committee takes the lead in identifying the individual property rights through consultation procedures with local residents when formulating land-use plans (paragraphs 21(d), 22, 25(b), 27).

The problem of "land-grabbing" is referred to in a confusing variety of contexts including (1) land acquisition under the 1894 Land Acquisition Act; (2) uncompensated seizure of land based on a declaration of nationalization of vacant or fallow land; and (3) land-restitution issues for migrants. The "National Land Use Policy" does not go into substantive legal theory for any problem, but is looking to depend upon procedural solutions.

Among them, the issue of land acquisition (1) is expected to be solved through law revision to incorporate participatory procedures from the early project-planning stage, anti-corruption measures, the optimization of compensation standards, and the strengthening of livelihood-recovery measures, while learning from international best practices (paragraphs 38, 40).

For the wasteland-nationalization problems (2), the Policy emphasizes the application of an Environmental and Social Impact Assessment (ESIA) procedure in the context of social-welfare protection for illegal occupants (squatters) who do not have substantive rights. The Policy separates the treatment for "public-purpose" projects where the participatory consultation between the government and residents is envisaged for the relocation planning of squatters (paragraph 32(a)) and the "private-purpose" projects where the project implementer should directly negotiate with individual residents (paragraph 32(b), (c)). The Policy even refers to land redistribution to the landless class (paragraph 32(f)). However, the Policy scarcely mentions a solution for the situations in which the

[58] For details, see Kaneko & Ye (2021).

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wasteland-nationalization method is wrongfully applied to farmland during the recess of cultivation of farmers who assert substantive rights, except a slight touch on dispute resolution involving farmer organizations (paragraph 41) and the establishment of a special court (paragraph 42). The Policy never refers to the reform of the 2012 Law on Vacant, Fallow and Virgin Land.

Regarding the protection of the customary rights of ethnic minorities (section 6(c), Chapter 8), the Policy emphasizes the protection of customary land use from wasteland nationalization by promoting a new registration system specially designed for customary land use (section 68). However, it does not mention to the risk of a cumbersome system that can instead result in a procedural hurdle that eliminates customary land use, due to the practical difficulties in implementing a series of meticulous systems consisting of a registry for customary land as the object of such a land right, a registry for ethnic-minority groups as the subject of such a right, and a registry for such a right itself (paragraph 69). Perhaps, instead of a cumbersome procedural system, the identification of substantive contents of customary rights is awaited for the effective protection thereof, but no such effort can be seen in the Policy.[59]

Prior to the introduction of a comprehensive land law that the "National Land Use Policy" envisaged, in August 2019, the Law on Land Acquisition, Resettlement and Rehabilitation was enacted as the first replacement for the British colonial-era 1894 Land Acquisition Act after 120 years. It is said that the law proceeded through Union Parliament members backed directly by international donor involvement, without taking the normal step of the submission of a Bill from the relevant union ministries. Regarding the criteria for "public purpose" as a fundamental condition for land acquisition, which the old law left solely to administrative discretion, the new law (Article 2) established a list of several categories, namely (1) national security; (2) projects based on national development policy; (3) socioeconomic-development projects based on a plan; (4) infrastructure and urban and town development; (5) relocation and livelihood rehabilitation projects; and (6) others. Here it is notable that private development projects are also eligible for public acquisition if endorsed by national policies and plans ((2), (3), (5)), which is similar to the situation in Vietnam as described above. On the other hand, the acquisition and redistribution of farmland were explicitly excluded from the scope of the law (Article 2(6)), while farmland-acquisition issues are solely entrusted to the Central Farmland Management Committee in accordance with the 2012 Farmland Law (Article 26) and its implementation rule (Articles 64–68). But, if the land-use-diversion system under the Farmland Law (Articles 29–30, Rule Articles 78–94) is used as a bypass to avoid such control by the Central Farmland Management Committee, the 2019 Act may function as a loophole for farmland acquisition.

Thus, the 2019 Land Acquisition, Resettlement and Rehabilitation Law is not an ultimate solution for the overall land-grabbing problems. Rather, the Law explicitly admitted the use of a compulsory-land-acquisition method to include private projects that are endorsed by national policies and plans. Land disputes concerning compulsory acquisition will likely further increase in the future in Myanmar.

[59] A reference should be made to Cambodia's 2001 Land Law, which was supported by the World Bank, ADB, and German GIZ, and was a model system for protecting land use by minorities. As for the problem of a systemic complexity consisting of the system for demarcating land boundaries, the system for registration as a minority-ethnic group, and the system for collective land use that must be cleared first before protection can be received, as well as the issues of the governance capabilities of the local government, see Kaneko (2010b), *supra* note 12; Kaneko (2011), *supra* note 12.

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3.4 "Living law" at the forefront of land disputes

As described above, similarly to that of Vietnam, Myanmar's land-law reform guided by "legal transplant" is moving forward with a land-mobilization policy that involves the repeal of the post-independence land-law system that intended the conservation of farmland. The 2012 land-law reform relaxed the restrictions on the transfer of "cultivation rights," revived a title-registration system that contributes to the promotion of transactions by eliminating existing rights, as well as the wasteland-nationalization method. The 2019 Land Acquisition, Resettlement and Rehabilitation Law, which materializes the "National Land Use Policy," has provided a clear basis for the use of public-acquisition procedures for private development projects, behind advocating for human rights.

In response to these positive law changes based on "legal transplant," what kind of norms are asserted in the actual dispute settlement in society? The 2012 Farmland Law (Articles 59–63) details dispute-resolution procedures over the titling of "cultivation rights" through a four-tiered system, with the farmland-management committee at the village-tract level conducting the first-instance hearing, and appeals are to be heard at the township, district, and state/region levels. State/region-level decisions are final and even bind the courts (Farmland Law, Article 25(c)).[60] Apart from farmland-title-dispute settlement, the Central Scrutinizing Committee on Acquisition of Farmlands and Other Lands was established under the vice president to follow up the "National Land Use Policy."[61] The author conducted interviews with the members involved in the farmland-management committees as well as the scrutinizing committees on land acquisition at each level of local administration, as shown in the following sections.

3.4.1 Disputes over title

The primary aspect of disputes is objections to the issuance of title certificates during the nationwide simultaneous title registration implemented in 2012 and 2013 under the 2012 Farmland Law. The background to the objections varies, according to the author's interviews: there are cases in which farmers are simply unaware of the simultaneous registration and have failed to make the application; there are cases in which minority-race farmers have suspicions that the local government intentionally did not notify the implementation of such a simultaneous title registration; many cases are disputes between cultivators and absent landlords; there are also cases concerning the execution of informal mortgages that were restricted under the 1953 Land Nationalization Act; in some cases, the entries in the registry were refused for the reason that cultivation of the land had been abandoned.

As of January 2017, the author had a chance of interviews in the Myeik District of Tanintharyi Region in southern Myanmar, which is a growth area due to economic exchange with Thailand. In the 2012 fiscal year in which the Farmland Law was implemented, there were 20 cases of title disputes at the base level, whereas four cases at the township level and three cases at the district level were heard. In the same fiscal year, the entire Tanintharyi Region (consisting of three districts including Myeik) had 11 cases at the township level, seven cases at the district level, and four cases at the regional-government level, which is the ultimate appeal level. However, the title disputes increased

[60] The finality of administrative dispute resolution has been clearly documented in the field of land law in Myanmar since the colonial period and judicial review has been rejected (see e.g. Art. 25c of the 2012 Farmland Law regarding title disputes). Writs issued by the Supreme Court are prescribed in the Constitution but, where the finality of administrative decisions is prescribed in substantive legislation, the decision will not be subject to writ review unless there is a clear exceeding of authority.

[61] The Central Scrutinizing Committee on Acquisition of Farmlands and Other Lands has expedited the farmland-grabbing claims resolution toward the 2020 general election, by introducing the revised principles for settling farmland-return cases. For details, see Kaneko & Ye, *supra* note 58.

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sharply from the 2013 fiscal year onwards (figures were not disclosed to the author) and finally began to decrease in the 2016 fiscal year (32 cases at the township level, 30 cases at the district level, and 19 cases at the regional-government level).

These figures show some implication, including the interestingly high success rate at the base level. The author had the opportunity to interview four publicly selected members from two village-tract-level farmland-management committees under the jurisdiction of the Myeik District. All of them asserted that the secret to success lay in a thorough search for the true facts. The core of such an investigation is the fact of "cultivation," which is the fundamental requirement of a "cultivation right" inherited by the 2012 Farmland Act from the 1953 Land Nationalization Act. Asked about the method of successfully discovering the truth, all of interviewees referred to a traditional method of "mediation" that does not solely depend on documentary proof, but makes much of an open-forum discussion that both parties must attend and continues until there is mutual admission of the facts and an agreeable conclusion is reached. It is said that, because the hearing period at this base level is defined by the Law as 15 days, the hearings often continue day and night.

It is interesting to see that disputes over title have continued to appear even after four years had passed since the simultaneous title registration in 2012. The original Torrens-style title-registration system has a short time limit for filing objections, with the aim of quickly cutting off claims and finalizing the title. Because Myanmar's 2012 Farmland Law does not clearly indicate a time limitation for claims, there are ceaseless objections to title even years after the title has been registered. From the "legal-transplant" donor's point of view, this situation can be said to be a failure of the transplantation of the Torrens-style registration system, but the committee members involved at the forefront of dispute resolution showed their enthusiasm to determine the truth until the last stroke.

3.4.2 "Cultivation" requirements

In August 2018, the author had the opportunity to interview the chairman and members of a farmland-management committee of a certain village tract (consisting of six villages) in the Lawei district on the outskirts of the capital, Naypyidaw. It could be confirmed from the historical land records and maps that the land-management system established during the British colonial period had been stably maintained in the area. Of the total 1,500 households, 40% were farmers and most were landed, and the remaining 60% were from the so-called landless class, but they had left farming and worked in offices or businesses. There were only two cases of direct objection to the issuance of title certificates under the 2012 Farmland Law, but there were other cases in which siblings had disputed the title certificates in connection with inheritance disputes. The dispute-resolution norms for these cases are the fact of "cultivation," as seen above regarding the Myeik District. The substantive criterion for acknowledging "cultivation" is continuous cultivation for a minimum of five years, based upon the operational standards under the 1953 Land Nationalization Act.

The dispute-resolution method is similar to that in the Myeik District described above, with thorough discussion in the presence of both parties through a public, adversarial mediation process. Some inheritance disputes were appealed and further disputed in court, but the courts tended to respect the decisions of the base-level farmland-management committee.[62]

Even in the era of the 1953 Land Nationalization Act, there were transactions such as land lease and loan collateral between farmers within the villages, but the existence of "cultivation rights" was not confusing because such transactions were authenticated by

[62] This is probably because the aforementioned 2012 Farmland Law (Art. 25c) prescribes the finality of administrative decisions.

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concluding the contract in front of the village-tract head, and were recognized by way of addition to the map that was controlled by the Statistics Bureau of the Ministry of Agriculture and Irrigation at the township level. However, these villagers were concerned that the existence of "cultivation rights" could not be ascertained by the conventional method in the future if the number of transactions with a party outside of the village increased under the 2012 Farmland Law.

3.4.3 Nationalization of ethnic minorities' vacant land

In August 2019, the author had the opportunity to interview seven residents' leaders of four villages near Mawlamyine city in Mon State. All had disputes over the nationalization of vacant land that was the farmland of the ethnic-minority Mon people that were not successfully settled by the administrative dispute-resolution process by the farmland-management committee and were subject to petitions to the state legislature. In this region, ceasing of cultivation had been unavoidable because of a considerable shortage of labour due to the outflow of young migrant workers to Thailand, as well as flooding in recent years, and there had been a group of cases in which the government deemed that cultivation of the farmland had been abandoned and therefore took the land without compensation and provided it for development purposes such as irrigation-dam construction and private development projects. All of the disputed farmland was registered in the land-record system under the 1953 Land Nationalization Act, had the certificates of cultivation rights, and had retained tax receipts. However, during the simultaneous registration of title under the 2012 Farmland Law, the farmers did not receive notification from the government, so they did not apply for a new title certificate. As a result, it seems the land was confiscated as vacant land. The belief of these farmers is that the rights inherited from their ancestors are not disturbed, no matter how many years for which the land is not cultivated, which is seen as the "living law" of the Mon farmers. They fight based on the assertion that, if this "living law" contradicts the formal laws created by the Burmese people, then the human rights of ethnic minorities should prevail over such laws.

In these three regions, there is a feeling that dormant conflicts such as past compulsory acquisition, wasteland nationalization, or civil disputes have been brought to light through the simultaneous introduction of the title-registration system in 2012. Title registration is essentially a system model that constrains objections from those who lack title registration, but the base-level dispute-resolution arena is eager to identify true cultivators even after many years have passed since the simultaneous registration. The requirements of "cultivation" are key elements to determining the case, with reliance upon the repealed old law. Minorities were not aware of the title registration and will not give up on their notion of rights. It seems as if the "legal transplant" has revealed the social norms that were hidden in the peace.

4. Discussion: "living law" as a historical substantive norm

This paper has reviewed the changes in the positive laws under the guidance of "legal transplant" in the area of land law in Vietnam and Myanmar, and has paid attention to the current trend of dispute resolution in both countries. Both Vietnam's 1993 Land Law and Myanmar's 2012 Farmland Law were the beginnings of "legal transplant" that centred on the relaxation of restrictions on farmland transfer and the introduction of a Torrens-style title-registration system to confirm the result of free transactions. Furthermore, Vietnam's 2003 Land Law accepted another suggestion of "legal transplant" that utilizes the compulsory acquisition system for promoting private development projects and Myanmar's 2019 Land Acquisition, Resettlement and Rehabilitation Law displays the same character.

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Although the donors have further intervened in legislative reform on the grounds of helping to respond to the emerging land disputes in each country, the cause and effect are in reverse, as it is the "legal transplant" that has brought in the changes that have caused the land disputes. Such a contradiction of donor involvement in legislative reforms in Vietnam and Myanmar is only a repetition of what the author observed with regard to the Cambodian 2001 Land Law that was guided by the World Bank and the ADB under the slogan of "Land of Their Own" but resulted in the large-scale deprivation of farmland.[63]

This article has further focused on the choice of norms in the course of conflict resolutions. In Vietnam, the Supreme People's Court's cassation decisions have rejected the approach of lower-court judgments that search for the true intentions of the actual farmers instead of the existence of a title certificate, and instead progress on the formation of case-law that supports the transactions that rely upon title certificates. In Myanmar, objections continue to be heard several years after the simultaneous implementation of the title-registration system, and efforts to identify true rights-holders based upon the existence of actual cultivation are continuing in the base-level administrative dispute-resolution arena.

An implication can be gleaned from both countries that, at the base level of society, there is an undeniable belief maintained that land is the foundation of the livelihoods of farmers. It is notable that such a social norm is still evident, even though both Vietnam during the French colonial era and Myanmar under British colonial law have experienced the mechanisms of farmland mobilization, including the Torrens-style title-registration system, the wasteland-nationalization method, and the land-expropriation method for private development projects. Social norms that have continued to exist through the eras cannot be disregarded easily as Asian pluralism. In Western law also, in the lineage of the German historical jurisprudence, empirical research focusing on the folk's law that continues to follow the foundations of society has been attracting attention in recent years.[64] If we are able to detect strong norms that have been in place in the foundations of Asian society since long before colonization, which can be seen to manifest even after the infiltration of the contemporary "legal transplant," perhaps we should recognize them as formal norms that could be called unwritten Constitutions of a society. In the background of the Vietnamese farmers' strong awareness of norms, there is the history of land tenure that has been maintained by the village order since the old Dia Bo system of the Lê and Nguyen dynasties,[65] long before the land-registration system under the French colonial law that was brought in. Myanmar's farmers' awareness of norms must be the inheritance of the traditional land order that protects the continued occupation of land on a livelihood basis, not only for a perpetual tenure (*myay-thay*), but also for a provisional tenure (*myay-sheng*) that is in the process of upgrading into a myay-thay by three generations of continual cultivation, as described in the historical Dhammathat Code that dates back to the thirteenth century.[66]

Folk's law is not a nostalgic local custom, but may be accumulating the essence of the strongest social norms, which could be called an unwritten Constitution that has been established at the foundation of society over a historically long period. When the self-proclaimed formal laws brought about by the pressure of "legal transplant" attempt to surmount such fundamental social norms, the unwritten Constitution will resolutely

[63] See Kaneko (2010b), *supra* note 12; Kaneko (2011), *supra* note 12. Also see Trzcinski & Upham (2014) to which the author contributed when these American scholars formed the idea of a Cambodian study while staying at Kobe University in 2010.

[64] See Dilcher (2016), p. 37. The author states that the historical study by Heinrich Brunner, the successor of Georg Beseler and Otto von Gierke, found popular law that was present from the end of the Roman era through to the Middle Ages that was different from Roman law, and brought to light the unscientific nature of modern capitalist law that was created based on Roman law.

[65] Jaluzot, *supra* note 9; Takada (2003).

[66] Okudaira (2002); Kaneko & Ye, *supra* note 58.

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manifest and exert its physical effect. Even if the Supreme People's Court's supervisory decisions use the legal magic of the definitive evidence of title registration, it will not be possible to rewrite the historical norms that are rooted in the foundation of society.

Land disputes triggered by "legal transplant" are a substantive question over the essential definition of property rights. In the *sui generis* laws that are intended to overcome the colonial land regime that made farmland the subject of capitalist transactions, post-colonial Asian countries ventured to avoid the term "ownership" that commercializes the land and instead chose the principle of farmland for cultivators. Examples include Vietnam's "land-use right" (*quyen su dung dat*) and Myanmar's "cultivation right" (*loat paing kwint*), which protected the rights of occupation and cultivation as elements while regulating the right of disposal. A legal historical approach has told us that such a redefinition of private rights was no more than an attempt to restore the established norms that were rooted in the foundation of society prior to colonization.[67] Now, in the era of the contemporary "legal transplant," donors intervene while loudly advocating the protection of small farmers and customary law but, in fact, their legal designs are leading to the commercialization of farmland, through the freedom of disposal, land-expropriation law, vacant-land nationalization, and city-planning law, which draws farmland into the land market.

In the draft United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (United Nations A/HRC/WG.15/4/2) published in 2017, Article 17(3) called for "a degree of tenure security that guarantees legal protection against forced evictions," for all tenure rights including customary rights and tenant rights. But, in the declaration finally adopted in 2018 (United Nations A/HRC/RES/39/12), the same clause was turned to insert the phrase "not arbitrarily or unlawfully evicted." Under such an expression, the UN Declaration is to end with the endorsement of the "legal transplant" of exploitative land-law models, since the farmland-grabbing mechanisms such as the wasteland-nationalization and land-expropriation procedures can survive as far as they are expressed in "lawful" substance and with "non-discretionary" procedures by formal law.

Nevertheless, people will continue to raise their voices in anger and stand for direct democracy when the national legislation of Parliament strays too far from historically established social norms. Such anger will not ease until another legal reform restores the norms that have been inherited by the base level of society. Whether the path of such reform could be an immediate legislative reform or incremental formation of case-law through dispute resolution, the essential question is how the formal legal system can absorb the awareness of such fundamental social norms that have descended over generations. Ehrlich argued that jurists' ceaseless attempt is necessary to sustain the function of the formal legal system perpetually backed by living social norms and stems from the sense of justice,[68] and this spirit has guided the legal sociologists in Japan and other parts of Asia who have faced similar outcomes of transplanting Western modern law. Even when positive law dismisses the courageous absorption of social norms by Vietnamese lower courts and Myanmar's village-tract-level committees, jurists are expected to raise voices of support through case-law critiques that are linked to legislative reforms. In this way, when the legislative processes of Asia and Africa are freed from the restraint of "legal transplant," it may be possible to save the self-contradiction of modern capitalist law from the constraint of belief in perpetual growth and social evolution, through which the human race is placing an excessive load upon the global environment.

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[67] Hla Aung (2008).

[68] Ehrlich, *supra* note 5.

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