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CHALLENGES AND OPPORTUNITIES OF RECOGNIZING AND PROTECTING CUSTOMARY TENURE SYSTEMS IN VIET NAM

Policy Brief



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Key Messages

- Foster and accelerate the re-allocation of land and natural resources currently managed by state forest enterprises and commune people's committees to local communities and households.

- Strengthen land allocation to local communities by supporting government institutions to implement the legislation and raising awareness among rights holders about their land rights.

- Strengthen communities' capacity to manage land and natural resources in accordance with customary tenure rules.

Background

This policy brief was developed in order to enable a meaningful engagement and policy dialogue with government institutions and other relevant stakeholders about challenges and opportunities related to recognizing customary tenure in Viet Nam. It aims at strengthening the recognition and legal protection of customary tenure systems in the country in line with the key principles of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) (FAO/CFS, 2012).

Viet Nam has 54 officially recognized ethnic groups, of which the Kinh majority accounts for 87 percent of the population (Ewers, 2011). Most ethnic minority groups reside in rural, mountainous areas such as the Central Highlands and the Northern Mountains, in particular. While these communities only constitute 13 percent of the total population in Viet Nam, customary tenure issues affect a large number of people due to the country's overall population.

For thousands of years, ethnic minority communities have created a special relationship with their natural environment through their social structure and systems of customary tenure. They have been fairly self-sufficient through collective land and forest use, which has ensured both daily consumption and spiritual needs. With differing types of organisation, villages traditionally possess or have collective rights to an array of land used for various purposes, such as residential land, burial grounds, lowland rice fields, shifting cultivation land (including fallow areas), grazing areas, forest land (including sacred areas), and areas for watershed protection and forest collection. Certain forests and other areas are recognized as being inhabited by spirits.

In theory, all community members have equal access to land and resources, but issues

related to women's land rights persist. Strict rules prevent one village from encroaching on the land of another. Studies have shown that the vast majority of villages have their own regulations to manage and protect forests and regulate agricultural land use under customary practices, although these rules are often not written down. In general, customary tenure rules are well adapted to specific village situations and are observed and respected. Village elders and clan leaders are in charge of resolving land disputes and other conflicts.

After 1960 in the north, and 1975 in the south, state centralisation and collectivization began to seriously influence customary resource use systems. Large areas of forest land in the mid- and upland regions were assigned for forest use under the management of state forest enterprises (SFEs) (World Bank, 2004). This meant the end of customary tenure arrangements, leading to the exclusion of traditional lands used for agriculture, hunting and collection of non-timber forest products. New state policies overrode customary land management in mountainous areas, and resulted in a severe decline in Viet Nam's forest resources. Furthermore, the system of exclusion implemented by SFEs has been a major contributing factor behind local conflicts, many of which have been ongoing for years and new ones still emerging.

Especially in mountainous areas, attempts to transform rural resource use and traditional social structures were made because the uplands have increasingly been seen as a source of land for a fast-growing lowland population, a destination for lowland migrants, and as a site for hydropower development (Ironsides, 2017). Large-scale resettlement programmes were also carried out, with 1.9 million people being resettled in 1185 communes over a period of 20 years. Furthermore, upland areas have historically been sites for land-based investments and agricultural expansion, such as large-scale cash crop production of cashew, coffee and rubber.

The pressure on land and land resources has increased substantially, with some

natural resources becoming scarce and often inaccessible to ethnic minority groups. As a consequence, ethnic minorities in Viet Nam are economically and socially disadvantaged across a range of dimensions. They represent the largest proportion of impoverished communities, comprising 45 percent of the poor and 59 percent of the hungry.

In order to strengthen forest management and protection, forest and forest land allocation (FLA) policies have been implemented since 1990. FLA regulations have tried to decentralize state management, and devolve forest management to non-state entities such as individuals, households and organizations. As of 2015, 26 percent of forest land has been allocated to individual households, but only 2 percent to collective community management (in total, 4.3 million hectares, or ha). However, some community members complain that the land they are allocated is of poor quality, inaccessible from their villages, and/or entirely lacking tree cover, making it almost impossible to earn a sustainable livelihood from forest management alone. SFEs have been able to keep much of the better quality forest land.

Nationwide, 164 SFEs continue to control 2 222 330 ha of forest land (Markussen, 2015).

Beginning with Doi Moi in 1986, the Government of Viet Nam started its return to private land use. Private use rights for agricultural and forest land for up to 50 years have been documented by the issuing of Land-Use Rights Certificates (LURCs or “red books”). This has replaced all kinds of customary arrangements. National surveys have confirmed a national coverage of LURCs of around 78 percent in 2014. Yet, land allocation in mountainous provinces with higher proportions of ethnic minorities is lagging behind. In general, land allocation is mainly carried out in areas where there are no major land conflicts (see Ironside, 2017).

Despite all of these changes, the geographical isolation of many ethnic minority communities has meant that customary practices, while severely weakened by law, have persisted in practice. In many communities, these practices continue to play a more significant role in regulating community access to land and resources than state law.



Regulatory framework

Since 1975, customary tenure systems have been recognized in Viet Nam's laws and policies, but have also been superimposed by state control mechanisms and undervalued in the implementation of the law (Wells-Dang et al., 2015). The long established idea of a community and its land and natural resources managed by village elders was replaced with a state-appointed village head and a multitude of individual land users with allocated use rights (see Ironside, 2017).

The 2005 Civil Code recognizes state, private and common ownership. Article 5 of the Constitution, and Article 8 of the 2005 Civil Code also allow the right of every ethnic group to use its own language, to preserve its ethnic identity, and to promote and respect customs, habits, traditions and culture. Multiple ownership by a community means "ownership by a family line, hamlet, village, tribal village, mountainous hamlet, ethnic hamlet, religious community or other community of property that is formed in accordance with customary practice" (art. 220). Boundaries of immovable property may also be determined "in accordance with customary practice or according to boundaries that have existed for thirty or more years without dispute" (art. 265). This does not, however, necessarily translate into the recognition of ethnic minorities' customary tenure rights on land and other natural resources in practice.

The 2003 Land Law, for the first time, formally recognized communities as land users. While the 2003 Land Law allows the allocation of forest land to communities,

this has not generally occurred (USAID, 2013). In addition, the law did not explicitly mention communities as forest land users, nor did it recognize customary rights of communities. The latest Land Law of 2013 states in Article 4 that land belongs to all of the people, with the state acting as the owner's representative and uniformly managing land. The state will hand over land-use rights to land users in accordance with this law. Article 5 of the 2013 Land Law allows for land allocations to ethnic minority communities. The state is responsible for adopting policies on residential land and land for community activities for ethnic minorities, in conformity with their customs, practices and cultural identities and the practical conditions of each region. Community representatives are responsible for the use of the allocated or recognized land of the community (art. 7). Article 27 allows ethnic minorities to have land for agricultural production and Article 54 allows for state allocation of land for agriculture to communities. Article 136 allows the allocation of protected forest land to communities, which can be given responsibility for managing land for religious practices (art. 160).

Each household or individual can be allocated up to 30 ha of either protection forest or production forest for a period of up to 50 years with the issuing of a LURC. Communities can be allocated agricultural land and have recognized land-use rights by the state in order to preserve national identities associated with the traditions and customs of the people (art. 131). Communities are entitled to be allocated land with protected forest for protection and development (art. 136). Communities using land, however, may not exchange, transfer, lease or donate land-use rights or use their land-use certificates for mortgage or as capital (art.181).

The re-concentration of authority at the provincial level – enacted as part of the

2013 Land Law – also has implications for recognizing customary tenure because it has decreased the decision-making powers away from the commune level (Wells-Dang et al., 2015).

The 2004 Law on Forest Protection and Development gives some limited recognition of customary tenure. Communities are able to file applications to District Peoples' Committees "to be assigned forests they are managing or using efficiently, or which hold water sources in direct service of the communities or other common interests or forests which lie in the areas adjoining villages, communes or districts" (art. 29). Both production forests and protection forests can be assigned to "village population communities", giving priority to the assignment of forests associated with the customs and traditions of ethnic minority people (Art. 20). There is no restriction on the area that can be claimed. Rights are granted based on customary use or management. The Ministry of Agriculture and Rural Development has issued guidelines for communities to develop forest protection and development conventions. By 2010, 34 767 of these conventions had been established throughout the country. While forest management plans are required prior to receiving forest rights, this has not been widely implemented in practice. Benefits can be shared freely among members. Communities have no rights to sell, lease, inherit, mortgage, or divide forest-use rights.

However, some shortcomings have been discovered in parts of the Law on Forest Protection and Development (2004), such as: i) it does not recognize the community as a forest owner, such as the forest management boards of the state; ii) access rights to natural forest land for utilization and management remain limited, and there are fewer benefits to the community when compared with state forest owners; iii)

indigenous peoples' customary practices in the management and use of forest and forest land are not legally recognized; and iv) the lack of participation of local people in classifying forest types.

The Land Law (2013) and various decrees (as well as FLA practices) have always prioritized individual households over land allocation of agricultural and forest land to communities. Today, it is estimated that communities only have legally recognized land-use rights over 0.5 million ha. In most cases, these areas fall within donor or non-governmental organization-supported project areas, with the majority dating back to the period 2000–2009. Given the enormous socioeconomic success of allocating private land-use rights for agricultural land, the same approach was implemented in forest management and protection, which has substantially weakened collective land management under customary systems. The Central Highlands contain the country's largest forest area, but only 4 percent of ethnic minorities report that they have forest use access (USAID, 2013). It is particularly difficult for communities living in special use or protected forests, because in these areas communities cannot be issued LURCs. Some reports show that granting user rights to the whole community yields better results for forest protection and for curbing illegal logging than granting user rights to households (see Ewers, 2011; World Bank, 2004).

In practice, the recognition of customary land often depends on the acceptance by the local authorities. Yet, state administrators and local communities mostly remain unaware of the local customary systems for managing resources, and the legal options for allocating land to communities. Overall, the relevant laws and regulations in Viet Nam give much more room to the allocation of collectively used land than is generally assumed. Some

legal experts maintain that the Civil Code still does not recognize communities as a legal entity, which poses a key challenge for the recognition of customary tenure. There is also an ongoing debate in Viet Nam about what constitutes a community. Nevertheless, local authorities will sometimes consider granting land rights to rural communities based on the request. This depends on the availability of suitable and undisputed land, and an actively pleaded claim for customary tenure. Furthermore, while communities can, in theory, receive collective LURCs, they do not possess any formal governance powers over land, such as deciding about land-use classification within communities.

A new forestry law was passed in November 2017. Various stakeholders have engaged in efforts to support the law's development process to strengthen legal recognition of customary rights, and the forest and forest land use rights of local communities, particularly ethnic minorities. A recent study found that Vietnamese laws and regulations diverged from VGGT principles in a number of places (FAO/VAFS, 2016). This mainly concerns aspects of consistency of laws, transparency of decision-making, and the participation and/or consultation of stakeholders. The application of the key principles of the VGGT could assist in strengthening the recognition of customary tenure rights and their registration by ethnic communities. In this sense, the new law brings positive elements as it addresses these challenges by strengthening the recognition of ethnic communities' customary rights related to forests. The law gives priority to forest allocation to ethnic communities who have customary use of forests (art. 14.8). It defines communities as "groups living in a same village and having the same customs and traditions" (arts. 2–24), and recognizes for the first time that communities can be forest owners (art 2.9).

Challenges

Viet Nam's rapid economic development is also reaching into remote areas, changing livelihoods and management systems. Competition over natural resources continues to intensify. Forest and former shifting cultivation land has been converted to coffee, rubber, cashew and other commercial crops, limiting access to land by the poorer minority groups and turning them into plantation labourers. The need to modernize will likely continue to drive agricultural policy development, with significant implications for customary systems (Wells-Dang et al., 2015). Without being presented valid and competitive alternatives, farmers abandon customary practices to implement high input models, which can increase livelihood insecurity and inequality.

If land consolidation and other policies are not supported by adequate safeguards, women, ethnic minorities and other vulnerable groups who do not have secure access to land, capital, and technology, will likely face adverse effects. National projects favouring industrialization and urban areas, combined with a lack of customary users' voices in decision-making, creates significant obstacles to a fair acknowledgement of customary tenure rights. Little room is provided for considerations on how to incorporate diverse agro-ecologies, communities and customary practices into state legal and management frameworks. When state enterprises and management boards contract individuals or families in the community to protect the forest this undermines community-level institutions and can cause internal disputes. Many local people face access restrictions to forest areas endangering their livelihood and religious needs.

The widely present view that ethnic minorities and customary resource practices are in need of modernisation contrast with the revaluation of these as being well adapted and well tailored to often difficult environmental conditions.

Presently, few examples of indigenous communal right-holding systems in Viet Nam remain, except in very remote villages or as part of a new modality of community forestry. In general, shifting cultivation is not encouraged because it is believed to destroy the forest. After forest land, allocation much of the land previously used for cultivation and livestock husbandry becomes forest land. In other areas, the allocation of individual land-use rights has weakened communal tenure for agricultural lands. This has caused severe economic hardship for communities and led to serious conflicts with forest protection officers. In many provinces, severe land conflicts between SFEs and local residents are ongoing.

Local courts are in charge of dispute resolution over land with and even without a LURC. In case no LURC has been issued, one party or all parties of the land dispute have the right to submit the petition on dispute resolution to the administrative authorities for settlement and also have the right to sue in civil court. Quite frequently, land disputes cannot be resolved in a fair and transparent way, leading to a gradual accumulation of cases.

A significant gap remains between existing policies aimed at ensuring rights to access land and livelihoods of ethnic minorities and other vulnerable groups, and the actual practice. SFEs continue to manage large areas of land, but if pressured to transfer land, they rather allocate it to private companies instead of to the local population. Several Government initiatives such as issuing Decision 755/2015 to tackle the problem of land shortage among ethnic minority households and to provide agricultural and residential land, housing and clean water to poor ethnic minority households have not yielded the expected results. Instead,

the National Assembly's 2012 report on the implementation of policies and legislation on residential and productive land for ethnic minorities showed that the problem of production and residential land faced by ethnic minorities had reached a critical point: more than 347,000 ethnic minority households lacked productive land and access to the forest (National Assembly Standing Committee, 2012).

The poor and marginalized are even less likely to obtain LURCs than others are. They often lack clear information and the means regarding the registration process, even for individual land-use rights. Although the Land Law stipulates that conjugal rights certificates must contain both the wife and husband's names, studies for ethnic minorities have shown that as few as 21 per cent of LURCs issued contain names of women (Markussen, 2015).

LURC issuance in general, while important for agricultural land, is an insufficient mechanism to promote forest land rights and improve forest management. It remains very difficult to obtain a LURC for a plot of land that was created by forest clearing. Finally, while LURCs provide some tenure security, revocation of the use rights is fairly easy and frequent. The mechanism allows the government to acquire individual land-use rights for "socio-economic development for national and public benefits".

Expropriation continues to be by far the major cause of households losing their land, accounting for 97 per cent of cases. Expropriations have increased in the North and the Central Highlands over recent years (Markussen, 2015).



Opportunities

While the government has more recently recognized the value of community forms of management, these have been seriously weakened in the past and rebuilding them will take special effort and experimentation. Recreating concepts of community management that follow customs and are clearly differentiated from models of collectivisation would be an important first step. Strong, well-organized communities have been able to claim back forest land allocated to households and request community allocation. There have been cases in the Central Highlands where forest allocation had to be re-done because communities refused individual use rights altogether. In other cases, villages have been able to sign a management contract with the district. Successful strategies often require building close collaboration with local authorities, building local peoples' capacity by informing them of their rights, and helping them to lobby for their rights, following legal and administrative processes. Also important is educating villagers on their rights following land allocation, ensuring LURCs are issued, and providing support for the local management of forest land (Ironside, 2017).

In cases where technical support has allowed for proper consultation, the allocation process has been more in line with community wishes for communal, rather than individual, land. In upland areas there needs to be a balance between land held individually and plots held by communities, depending on the land-use type and land location (see Ironside, 2017). This highlights the need for flexibility in varying the allocation process to suit the specific cultural and management contexts of ethnic minorities. Pilot studies in Dak Lak (1999–2002) and Son La (2001–2003)

have shown that through a participatory approach to land and forest allocation, communities decided to allocate 54 percent of the total area as communal land, 8 percent to groups of households, 18 percent to organizations (including mass organizations at the village level, such as the Youth Union, Women's Union, and others), and only 20 percent to individual households which was broadly in line with their customary rules.

In these situations, making use of VGGT principles regarding the need to ensure free prior and informed consent, transparency, participation and fair compensation in cases of expropriation, and supporting smallholder investment could help to develop models that are more appropriate for supporting local cultures and customs.

The 2013 Land Law recognizes “communities, including Vietnamese communities residing in the same village, hamlets and similar residential areas with the same traditions, customs or in the same extended family” (art. 5.3). However, this does not explicitly include the concept of a traditional ethnic community. A 2014 Joint Circular, developed with the assistance of the International Work Group for Indigenous Affairs, outlines the principles for identifying and recognizing customary elders and leaders. This could open the door for the recognition of customary communal management structures and their role in conflict resolution (Ironside, 2017). A review of the Land Law (2013) has recently begun, under the supervision of the Ministry of Natural Resources and Environment, which will provide an additional opportunity for the recognition of customary tenure.

One of the most important aspects to facilitate the process of reforming SFEs is to assess current land use of enterprises and to take back some land to distribute to local people. The state still maintains management rights over large areas of forest. In 2013, the National Assembly

considered and adopted the revised Land Law and, at the same time, the Politburo of the Communist Party issued Resolution No. 30-NQ/TW on the continued re-arrangement, renovation, development and improvement of effective activities of agriculture and forestry companies. The government then issued Decree No. 118/2014/ND-CP on the Implementation of Resolution No. 30-NQ/TW. The decree clearly defines the categories of land to be transferred to communities, households and local authorities, and provides highest priority to land allocation to local ethnic minorities who lack land for production. Furthermore, the decree abolishes the practice of lending or leasing state land to companies, and prescribes the re-allocation of such areas to local authorities.

The passing of the Land Law (2013) and Decree No.118/2014 has prompted several provinces to return more agricultural and forest land from state enterprises to local farmers, with up to 100,000 ha re-allocated primarily to ethnic minority households and communities in 2014/15 (Wells-Dang et al., 2015). This tendency will hopefully be continued and even increased. In addition, there are important land areas (2.37 million ha) under the direct jurisdiction of Commune People's Committees, which ideally could also be allocated to communities and households.

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Recommendations and ways forward

1. Promote the review of policies and laws to strengthen the recognition of customary tenure.

- Provide recognition of communities as legal entities in order to facilitate the recognition of their customary rights. Strengthen provisions for equitable allocation of rights with respect to ethnic minorities, women and others as provided for in the Land Law (2013).
- Clarify the rights and obligations of legitimate customary holders of land.
- Include provisions for the allocation of protection forests to communities, including the issuing of LURCs, same as the provisions for the allocation of natural production forests to communities and households. In each of these provisions, the benefit-sharing systems or incentives provided to the managing communities must be clearly defined. The rights and obligations of a community as a forest owner should be considered as equal to other forest owners, such as economic organizations, households and individuals. Recent assessments have shown that benefits from forest allocation have not been meaningful and practical enough to motivate local people to protect the forests through their customary laws.
- Identify sacred and cemetery places of ethnic minorities as special-use land to be allocated to the local community. The 2013 Land Law already recognizes and protects “land used for belief practices”.
- Revise the guidelines for the participatory drafting of village conventions, such that there is a strong emphasis on basing

these on customary rules and practices. The conventions will be applied for self-enforcement of land and forest management. Decentralize the approval of the village conventions to the commune level.

2. Strengthen and accelerate re-allocation of poorly managed land and forest resources to local communities and households based on consultation and customary rules; increase efforts for land dispute resolution between SFEs and ethnic minority communities.

- Develop comprehensive guidelines and criteria to evaluate the overall situation and effectiveness (economic, social and environmental) of SFEs in order to develop an action plan for further land and forest re-allocation to local communities and households. This needs to include standard criteria for assessing current and potential future land use in SFE land areas.
- Identify solutions and mechanisms to solve land and forest conflicts between SFEs and local communities. Identify and test improved conflict resolution mechanisms and procedures.
- Similarly, develop a consistent approach for the allocation of forest land resources under the current control of CPCs to local communities and households. An assessment of CPC-managed forest land is urgently needed throughout the country, as is the identification of options for allocating these areas to communities and households.
- Undertake awareness campaigns to secure full understanding and cooperation of local authorities on forest land re-allocation. Create better understanding of customary practices, and incorporate these in contemporary management regimes, local-level practices and contexts in harmony with formal legal and policy processes.
- Prepare action plans for each province on the re-allocation of suitable land resources from SFEs and CPCs to local

communities and households, which include sustainable funding mechanisms for their implementation.

- Ensure that communities and households promptly receive LURCs for all returned land and forest resources.

3. Undertake pilot activities to strengthen communities in their management of communal land and natural resources in accordance with customary tenure rules.

- Strengthen the capacity of communities to negotiate with government authorities and outside actors to strengthen their customary claims over land.
- Undertake systematic monitoring and evaluation of existing community-based forest management pilots from the early 2000s, especially in view of the impacts on livelihood improvement, poverty eradication and environmental benefits.
- Pilot test procedures for transparent and participatory re-allocation of land and natural resources, including forests and forest land previously managed by SFEs and/or CPCs to communities and households to ensure allocation is both in line with central government policy and responds to the needs of local communities.

4. Intensify efforts to document and map customary tenure systems and promote the allocation of agricultural and forest land to local communities. The Land Law (2013) already provides a good basis for land allocation to communities; what is lacking is its widespread implementation.

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