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CHALLENGES AND OPPORTUNITIES OF RECOGNIZING AND PROTECTING CUSTOMARY TENURE SYSTEMS IN MYANMAR

Policy Brief



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Key Messages

- In accordance with the National Land Use Policy, develop the new Land Law and its implementation guidelines with the broad participation of civil society organizations and local communities, outlining clear mechanisms and procedures for recognizing customary tenure systems in Myanmar.
-
- Promote harmonized documentation and mapping activities of customary tenure at the community level, and make use of the resulting provisional maps for declaring interim protective measures.
-
- Develop and test pilot procedures for respecting and protecting customary tenure systems, and the potential registration of customary lands.
-
- Review the 2012 Farmland Law, the 2012 Vacant, Fallow and Virgin Land Management Law, and the 1992 Forest Law, based on the principles of the National Land Use Policy, and taking into account the views of all stakeholders, including local communities, smallholder farmers, women and other vulnerable groups.

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 and protecting customary tenure in the Republic of the Union of Myanmar. 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).

The current Government of Myanmar (GoM) took office in April 2016, with strong commitments to addressing land governance issues, increasing land tenure security and making peace with ethnic groups. One of the goals of peacebuilding in Myanmar is to establish a functional federal state model with strong decentralized powers to manage land and natural resources, resulting in benefit sharing between the national, state and local government levels.

Vast amounts of land in Myanmar are not titled. The deployment of land administration services and, consequently, the registration of land (use) rights under colonial law and currently the Farmland Law (2012), was and is mainly confined to central Myanmar and the delta. Cadastral maps (Kwin maps) do not exist for many upland areas. All unregistered land is, in fact, considered as being at the disposal of the GoM, although communities claim it legitimately as customary land. In the absence of specific legal measures for the recognition and protection of community and/or village lands, these systems are under threat of alienation. Around 30 percent of the land area in Myanmar is classified as forest land and is under the administration of the Ministry of Natural Resources and Environmental Conservation (MoNREC).

Data on the extent of land under customary tenure in Myanmar are unavailable, and there is no unified clear definition of customary tenure on which to base a census. Yet, it is recognized that the major part of the land area in Myanmar is held through customary or informal tenure arrangements. There are many different types of customary tenure systems in Myanmar, and these vary depending on history, geography, resource base, ethnicity, population density, and factors such as the extent of market integration. Customary tenure is widespread throughout the country, and is the norm in upland areas, where shifting cultivation has historically prevailed. Customary tenure systems have been maintained by communities that have been governing themselves and have not been under the direct administration of the central state. They are based on traditional practices, which set rules about how land is used and how decisions are made regarding land use. Customary tenure pertains both to communal plots (i.e., those held at level of village or community, clan or ethnic group) and individual plots (i.e., those claimed by individuals or households). Usually it is a mix, but Ewers (2016) notes that in some cases it may consist of all land inside the village territory being subject to individual or family claims, but where claims still cannot be alienated to outsiders.

Traditionally, customary tenure encompasses agricultural land, pastures and forests, as well as inland fisheries. It also includes spiritual and cultural areas, burial sites and natural features of cultural significance. Customary land tenure arrangements in the uplands are characterized by relatively secured access and socially legitimate rights, providing that outsiders do not claim the land. Customary tenure can be individual, claimed by households or individuals, or communal; where customary tenure is communal, this may relate to large tracts of shifting cultivation land.

The National Land Use Policy (NLUP), adopted in January 2016, includes provisions for recognizing customary tenure, thus indicating a constructive development in the acknowledgement of such rights.

For many years, it has been the national policy to eliminate shifting cultivation and systematically encourage terrace cultivation. Swidden land is often classified as “wasteland” under the current land-use classification system. Even the manifesto of the governing National League for Democracy considers that shifting cultivation has a negative impact on the environment, and proposes to provide education and practical assistance to adopt Sloping Agricultural Land Technology. Under the Vacant, Fallow and Virgin Land Management Law (VFV Law), the lands on which shifting cultivation is practiced are considered as being fallow or vacant (lands that are not visibly used or abandoned) or virgin (reserved lands still to be allocated for first clearance or older secondary forest) and can be allocated to smallholder households or agrobusinesses. However, this detrimental view of shifting cultivation seems to be changing because the NLUP suggests that lands under shifting cultivation and customary tenure systems should be protected. Furthermore, the 2018 Agriculture Development Strategy and Investment Plan recognizes the importance of shifting cultivation, suggesting that “the recognition, documentation and registration of customary land rights, often of a communal nature and sometimes established under shifting cultivation and agroforestry systems, is not only necessary to protect the land rights of smallholders but also for success in national reconciliation efforts”.

The GoM has pro-actively promoted the allocation of large-scale plantations on land classified as vacant and virgin, with most of it falling under customary tenure, and accelerated this process with specific legislation around 2012. It is estimated that between 1992 and 2016, around four million acres of land were allotted to companies or individuals as VFV land; however, only 14.5% of this land is actually utilized (San Thein et al., 2017). Land and associated natural resources are a major source of conflict in Myanmar at all levels (e.g., between local communities and concession holders).

Due to numerous conflicts and civil war, there are still many internally displaced people (IDP) in Myanmar as well as refugees in neighbouring

countries, most of whom originated from ethnic states or regions partially under dual administration. Their return to areas of origin, and their integration in areas of displacement or resettlement, will need to be taken into account in the national peace process, and fair procedures for doing so should be developed, as suggested in the NLUP. In terms of land-related issues, this entails reintegration of IDP into their customary lands and/or identification of available land for allocation to these now landless people as compensation for their losses.

In recent years, the GoM has embarked on a national community forestry initiative, and in 2017, new community forestry guidelines were promulgated. In the absence of appropriate mechanisms, community forestry is one alternative measure by which legitimate customary land resource tenure claims could be recognized and protected. By 2016, there were about 840 community forests covering 83 204 ha (FAO, 2016). The government has set a target of allocating 919 000 ha of forestland to forest user groups by 2030.



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Regulatory framework

Colonial powers in Myanmar often administered land indirectly through customary leaders. This indirect form of administration formally recognized customary systems and recognized shifting cultivation practices in law. The modern state of Myanmar takes an ambiguous attitude towards customary systems: they are not formally recognized in law but in practice they are tolerated.

Poorly harmonized and often antiquated legal frameworks in the country do not presently provide adequate mechanisms for the recognition and protection of customary tenure claims, and limit public participation in decision-making processes that might impact such claims.

The Constitution (2008) states that the Government of Myanmar “is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union” (art. 3), but recognizes private property rights. The Constitution does not exclude the recognition, protection and registration of rights in customary tenure as land use rights.

The Farmland Law (2012) gives farmers land tenure rights for cultivation through the delivery of land use certificates (LUCs), and individuals can buy, sell and transfer land with these certificates. Overall, this law is more adapted to lowland cultivation practices or permanently cultivated cropping fields. There are no specific provisions for the allocation of land to individuals or communities with customary tenure systems. However, in a study for the Land Core Group (Ewers,

2015) the fact that the Farmland Law includes a “farmers’ organization” as a potential right-holder, this was used to define procedures for land registration in the name of the community as a legally incorporated entity or an association. The Farmland Law is currently under revision.

The Vacant, Fallow and Virgin Land Management Law (2012), with its definition of “vacant” and “fallow” land, puts customary land, and particularly shifting cultivation land, at high risk of appropriation. Under this law, active fallow land under rotational cycles can be legally transferred to private ownership because fallow lands are regarded as “vacant” and unused. This law is mainly designed to allocate land to private interests, and causes problems for IDPs who may return to their land in the future to find it has been declared vacant and allocated to someone else. If the land of local people is mistakenly included in VFV lands, there is no formal independent mechanism to address grievances or resolve conflicts between companies and local people. The Vacant, Fallow and Virgin Land Management Law is currently being revised and amendments were proposed in late 2017.

The Forest Law (1992), Forest Rules (1995) and Forest Strategy (2001) all consider forest land as part of the permanent forest estate (PFE), which is classified as either reserved forest, protected public forest, or protected areas. Lands held under customary tenure can be found within the PFE, especially shifting cultivation land, sacred forests and community-managed forests. Since an Executive Order in 2013, villages with over 50 households and a history of living in the area can have their village and permanent farmland removed from the PFE so that they can receive LUCs, but this has not been implemented in practice to any large extent. Shifting cultivation land usually remains within the PFE and the government recommends

that it should become agroforest and recognized by a community forestry certificate.

The recently revised Community Forestry Instruction (CFI) of 2016 (based on CFI 1995) provides the most common way to recognize collective claims to forest areas under current national laws. The issuance of a Community Forest Certificate includes a lease over the land for a period of 30 years, with the possibility of extension. Community forestry usually entails afforestation, regeneration of degraded forests and the establishment of woodlots, particularly in areas where there is a lack of fuel wood. In order to promote community forestry, the CFI was revised in 2016 and awaits an amendment to the Forest Law to strengthen its legal recognition. The recent revision to the CFI includes references to customary boundaries and management norms, and the removal of the prohibition on use of community forestry for shifting cultivation or permanent agriculture. The amended CFI also allows community enterprises to sell products from their forests, legalising sustainable commercial use of forests with the intention to generate income and reduce poverty. There is also an increased focus on the institutional strengthening of community forestry groups.

Community-based fisheries associations can obtain legal recognition and co-manage fisheries areas with the government. This is possible for inland freshwater fisheries by recognition under the Freshwater Fisheries Law of 1991, and along the coast for nearshore fisheries (defined as within 20 km from the shore) under the Marine Fisheries Law of 1990. Several states and regions have their own fisheries management legislation that further refines how recognition and co-management of these customary resources are to be handled.

The NLUP resulted from an inclusive and consultative process, and was adopted in January 2016 (GoM, 2016), states among its guiding principles: “to recognize and protect customary land tenure rights and procedures of the ethnic nationalities” and “to recognize and protect private and communal property rights of citizens as included in the constitution”. It demands to “legally recognize and protect legitimate land tenure rights of people, as recognized by the local community, with particular attention to vulnerable groups such as smallholder farmers, the poor, ethnic nationalities and women” and to “protect lands that are under rotating and shifting cultivation and customary cultivation practices”.

The NLUP also stipulates that “Customary land use tenure systems shall be recognized in the National Land Law” (currently being discussed by the GoM), including “formal recognition of customary land use rights, protection of these rights and application of readily available impartial dispute resolution mechanisms.” Furthermore, the NLUP states that “Land allocation of customary land to any land user, other than for public purposes, shall be temporarily suspended until these lands are reviewed, recognized and registered as customary lands”. For ethnic nationals who lost land resources where they lived or worked due to civil war, land confiscation, natural disasters or other causes, and who have the desire to resettle to their original lands, adequate land-use rights and housing rights will be systematically provided in accordance with international best practices and human rights standards. All of these stipulations in the NLUP are fully in line with the principles of the VGGT.

Although some challenges remain in the NLUP – such as an emphasis on centralized management, ambiguous wording, and a focus on land acquisition

procedures – it nevertheless presents a major opportunity for advocating greater recognition of customary tenure. The NLUP has been directly referenced in the Second Short Term Five Year Agriculture Policies and Strategic Thrusts issues by the Ministry of Agriculture, Livestock and Irrigation (MoALI) in 2016, as well as in the Agriculture Development Strategy and in the Presidential Instruction that mandates the creation of the National Land Use Council.

There is currently a draft Land Acquisition Law (2017) that seeks to repeal the previous Land Acquisition Act of 1894. It enables the state and companies to compulsorily acquire land where the state and companies assert that such land is needed for “public purposes”. The draft law further outlines relevant procedures, including notice periods, objections to acquisitions, the method of land valuation, the process for taking possession of land, court processes and appeals, procedures for the temporary occupation of land, and the acquisition of land for companies. The new law also addresses resettlement and rehabilitation of people affected by land acquisition. The draft legislation does not explicitly address customary rights to land and resources, and there is virtually no reference to local systems of tenure and land management. Careful examination is required to ensure the proposed law does not contradict or negate key provisions of laws that protect land-use rights, rights of ethnic groups, customary land rights, and communal and common resource rights.



Challenges

Notwithstanding the relevant provisions in the NLUP, Myanmar has had, until now, limited legal protection of customary tenure. The lack of legal recognition and protection of customary land in Myanmar has left communities vulnerable to land confiscation by the state and commercial interests as documented in numerous case studies. In this context, current laws and practices with regard to land may have potential adverse impacts on local livelihoods, food and nutrition security.

Increasing foreign investment has allowed companies to acquire land for agribusiness concessions and other extractive and infrastructure projects. Allocation procedures do not take into account legitimate customary land rights. Overall, this resulted in the displacement of local communities, their loss of access to land and livelihood opportunities (other than occasional labour), and local conflict. Increasingly, land resource confiscation is countered with protests as communities have few legal means of redress.

The issue of trust between the government and citizens is complicated by a lack of capacity in terms of skills, and the prevailing mindset and practices of some stakeholders. There is a lack of understanding of the importance of resource-rights security for local communities to support inclusive economic growth, as well as political and social stability in the country.

The enactment of the Vacant, Fallow and Virgin Land Management Law in 2012 has compounded land tenure insecurity for ethnic peoples, especially for those practicing shifting cultivation for which land certification has not been available. Yet, authorities have collected annual

tax payment from shifting cultivation communities. In the future, these tax receipts could benefit upland farmers to prove their legitimate claims to the land.

In the first half of 2016, the National League for Democracy government created the Land Confiscation Reinvestigation Central Committee as well as corresponding regional and state committees to work on conflict and dispute resolution. However, these committees have so far not been able to deal with the sheer number of land dispute cases submitted, many of which originate from the previous government. Analysis has revealed that the Land Confiscation Reinvestigation Central Committee has not made public a significant number of land confiscation cases, particularly those related to the military and agro-industrial and mining concessions, and has concentrated on urban areas, while avoiding major contentious cases (San Thein et al., 2017). Channels for resolving land disputes and accessing justice could be further improved. Some non-governmental organizations and farmers are taking land seizure cases to the courts, but these efforts are hampered by limited recognition of customary tenure, as current laws do not sufficiently recognize land holdings under customary tenure or those without LUCs.

The promulgation of the NLUP in January 2016, comprises various provisions recognizing customary tenure, including shifting cultivation areas, and represents a key opportunity to strengthen the formal recognition of customary rights by the GoM. The NLUP supports the development of a new Land Law and rules that need to operationalize “recognition” of customary tenure.

In January 2018, a National Land Use Council (NLUC) was created under the chairmanship of the Second Vice President, with the aim of enabling the implementation of the NLUP. The NLUC brings together Union ministers of eight line ministries, the Union Attorney General, and all chief ministers from state and regional governments. The main tasks of the NLUC are to: 1) establish State and/or Regional Land Use Committees; 2) formulate the new Land Law in accordance with the NLUP; 3) create consistency within land records, maps and land registration systems; and 4) oversee national-level actions related to development, environmental conservation and land-use planning. The NLUC will also revise the NLUP at least once every five years. The creation of the NLUC is an important step towards rationalizing and harmonizing land governance throughout the country, states and regions.

The upcoming new Land Law will need to be complemented with procedures to implement the identification and legal recognition of customary tenure rights. Provisions should ideally be harmonized with the new Forest Law, which has already been scheduled for revision, and the principles outlined in the NLUP need to be integrated. The development of legal and procedural tools at the national level needs to allow for broad stakeholder participation, similar to the process of the NLUP.

There is growing recognition of the role that customary tenure systems can play in promoting sustainable, equitable, and prosperous rural communities in Myanmar. While some stakeholders consider the recognition of customary land and resources



as an essential step in securing peace and prosperity in Myanmar, others may perceive it as detrimental to economic interests. Broad dissemination of the VGGT and multi-stakeholder discussions could assist in creating additional awareness and possibly consensus on finding a balance in these issues.

The legal, social, institutional and technical aspects of registration of customary tenure must be addressed. The land in question needs to be surveyed and rights-holders legally recognized. Surveying and registration can take many forms and must be debated and adapted to the constellation of rights found in customary tenure systems locally. Providing specific legal mechanisms to secure customary rights of communities may be the single most important intervention to secure certain levels of food and nutrition security, livelihoods, inclusive economic development, peace and stability at the local level.

In recent years, several initiatives have been undertaken by non-governmental organizations and local communities to document customary tenure systems in Myanmar and to prepare specific case studies. Many of these include relatively detailed mapping of what villagers consider their customary land across several states. While the United States Agency for International Development has developed a participatory mapping tool for community resource documentation (USAID, 2017a), a guidebook for documenting customary land tenure has been prepared by the Mekong Region Land Governance project in collaboration with ethnic organizations (Allaverdian et al., 2017).

Community forestry can, in some circumstances, be a good interim measure to establish some customary land tenure security, but fails as a long-term and more comprehensive measure for recognizing customary tenure systems more broadly. Some people currently consider the establishment of community forest rights as the only practical and legal tool to secure

some customary rights. Community forestry is a collective tenure arrangement for a group or association in a village who apply for a certificate. It is a form of delegated management for a time-bound period only, and not a permanent right. Many community forestry areas include individual household plots, such as rattan plots, and communal areas, such as water sources and firewood collection areas (Mark, 2017).

Within the current legal framework, community forestry activities on unclassified forestland need to be promoted in order to stop uncontrolled conversion into agriculture. MoNREC has indicated that it would like to assist upland farmers with bringing their rotating fallow farming fields and their village forests under a registered community forestry certificate, and to use the land for “agroforestry”.

Assessments of land concessions have found that many concessionaires do not make full use of allocated land (Woods, 2015; San Thein et al., 2017). There is an opportunity for undertaking a revision of concession contracts and their implementation. A detailed and systematic audit could, in the future, lead to re-dimensioning or even cancellation of concessions. Any of these measures could lead to restitution of customary lands to local villages. More broadly, there is also opportunity to examine the economic question of the role of small-scale producers in development. Issues such as productivity, regulation or taxation make a strong case for small-scale production and could highlight problems with the concession model. The Land Confiscation Reinvestigation Central Committee provides some opening in this regard.

Recommendations and ways forward

1. The drafting of the new Land Law and revision of the Forest Law and their implementation guidelines needs to ensure broad stakeholder participation and follow an inclusive multi-stakeholder consultative process at national and local levels. The legal drafting of these important documents needs to be harmonized and coordinated in a timely manner. Current amendments to the Vacant, Fallow and Virgin Land Management Law, Farmland Law, and Land Acquisition Law will have to equally adapt to other legal drafting and revision processes underway and need to be consistent with the upcoming Land Law. In all of these new legal documents, the recognition of customary tenure, according to the NLUP, needs to be fully operationalized.

- Countrywide research on customary tenure needs to be continued and intensified because it can feed into the new Land Law, revised Forest Law, and the Vacant, Fallow and Virgin Land Management Law, provided the materials produced are packaged in an appropriate way. It needs to be ensured that these studies sufficiently incorporate legal, institutional and governance aspects.
- These documenting activities could increasingly be combined with aspects of awareness creation, legal education and capacity building of local government authorities and rural communities. Ensuring that communities can readily explain what their rights and customary rules are would make any future formalization exercise much more efficient.
- The new Land Law and its implementation guidelines will need to specify the various existing land tenure systems in the country, institutional responsibilities, adjudication process, surveying, registration procedures as well as adequate compensation (e.g., when customary land is expropriated for public interest purposes).

- In drafting the new laws, the need for flexibility to provide solutions for a wide range of customary tenure situations will be important. The laws should provide villagers with various options of combining communal and individual tenure with various levels of rights associated to the different land or natural resource categories. In practice, this can range from communal land titles for shifting cultivation and fallow areas, cultural and spiritual sites, ponds to community-managed forests under the community forestry initiative. These communal village areas could be interspersed with permanently used or occupied agricultural or residential plots that are legally recognized as individual land with a “restricted” or even a full LUC (as per the Farmland Law). Alternatively, lands under communal jurisdiction could be used either collectively or individually, as determined by the community. This would, in fact, open the way for a true “decentralization” of land management responsibilities to the community level.
- Any legal recognition of individual and communal claims to customary land must include: 1) specific measures for better securing the women’s rights over land; 2) the systematic registration of the woman’s name on any conjugal titles; 3) clear identification of land under the property of a woman alone; and 4) the identification of women’s rights to communal areas (e.g., in the management rules).
- Due to Myanmar’s recent history, the new Land Law should specifically address issues of resettlement and reintegration of IDPs and refugees in terms of their land rights and participation in customary tenure systems.

2. Current efforts to conduct documentation and mapping of customary tenure practices should be expanded and harmonized.

- Any such exercises need to be conducted as community participatory mapping. This process can be greatly supported by the

use of high resolution and georeferenced remote sensing imagery. The resulting maps will be “provisional maps” with “fuzzy” indicative boundaries, yet agreed by various stakeholders in the community. These maps should not be confused with either cadastral maps or survey maps.

- The provisional maps should include all collectively used and managed community resource areas, including fallow land, but also make reference to areas used individually by specific community groups or members.
- Standard procedures for the preparation and the contents of provisional maps should be agreed upon in a short guidebook.
- Provisional maps will eventually serve as basic sources of information during the actual land registration process and eventual participatory land-use planning processes.

3. Establishment of interim protective measures.

- There is a need for interim protective measures to recognize and protect customary land rights before the new Land Law and other legislation are able to deal with this. One such measure could include declaring a temporary ban on any land transactions (especially concessions, but also sales to outsiders) in customary tenure areas identified by the communities themselves. Copies of the provisional map need to be submitted to MoNREC and MoALI to implement a moratorium on issuing new rights over these lands (under the Farmland Law, Forest Law, or Vacant, Fallow and Virgin Land Management Law). This ban would be lifted after the official recognition and registration of communal and individual customary lands. Another option would be the declaration of a national moratorium on all land concessions as long as customary rights are not recognized.
- Procedures could be put in place to restrict or limit allocation of VFV lands in areas

where legitimate customary land resource tenure claims are being made; also, participatory negotiations with local communities could be promoted and the Free, Informed and Prior Consent could be used.

- Many of the vast number of land dispute cases brought to the attention of the Confiscation Reinvestigation Central Committee and its corresponding regional and state committees concern customary tenure areas. In preparation of future land registration, the work of these committees needs to be strengthened and/or complemented by mechanisms of alternative dispute resolution. Alternatively, GoM could promote the establishment of special land courts. Communities marked by land conflicts should be priority areas for provisional mapping and interim protection.

4. Develop and test pilot procedures for the recognition and potential registration of customary tenure.

- The design and implementation of pilot procedures for the recognition and registration of customary tenure need to be linked to the numerous mapping and documentation initiatives taking place in Myanmar, such as the online, open-access spatial data platform developed by the OneMap Myanmar initiative. Institutional responsibilities need to be clarified.
- Registration of customary right-holders during the process of registration of customary land is essential. Developing formal statutes could be the basis for formalizing rules of governance and decision-making. Statutes would also regulate how new families can join the community, and how others can leave it. In addition, internal (management) rules would record existing customary tenure arrangements of the village. Based on these statutes, communities could request legal incorporation as an association under the 2014 Association Law, although developing statutes for each village could be a long and expensive process.

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