



Promotion of Indigenous and Nature Together
Mekong Region Land Governance

Thematic Study

Persistence and Change
in Customary Tenure Systems
in Myanmar

Christian Erni

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Thematic Study

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Reviewed by:

Antoine Deligne
Natalie Y. Campbell
Peter Swift
Maxime Boutry

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Abbreviations

CF	Community Forestry
CFC	Community Forestry Certificate
KESAN	Karen Environmental and Social Action Network
KMSS	Karuna Mission Social Solidarity
KNPP	Karenni National Progressive Party
KNU	Karen National Union
LUC	Land Use Certificate
MRLG	Mekong Region Land Governance Project
NLL	National Land Law
NLUP	National Land Use Policy
POINT	Promotion of Indigenous and Nature Together
RRtIP	Resource Rights for the Indigenous Peoples
VFV	Vacant, Fallow and Virgin (Land Management) Law

Glossary

Collective property	Ownership of property by a group of people (e.g. a clan, community, an association, or a cooperative)
Communal property	Ownership of property by a community
<i>Dama-u-gya</i>	First clearing: the inheritable right to a plot of land derived from the act of having cleared it first
Ethnic groups (<i>taingyintha</i> <i>lumyo myar</i>)	A group of people who share a common heritage, culture, and/or language
Ethnic nationalities (<i>taingyintha lumyo myar</i> or <i>taingyintha lumyo suh</i>)	Directly translates to 'national races', the term used in the Constitution (2008) and the National Land Use Policy classifying people in Myanmar into eight major ethnic nationalities (Bamar, Chin, Kachin, Kayin, Kayah, Mon, Rakhine, Shan), among many others.
Indigenous Peoples (<i>htanay taingyintha</i> or <i>taingyintha myo nwehsu</i>)	Under the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organisation (ILO), indigenous peoples are defined as [...] peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations and who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of recent state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
<i>Kaw land</i>	Customary communal land of Karen communities
<i>Lopil</i>	Term used in Northern Chin State for a shifting cultivation block containing several plots used by households
Private property	Ownership of property by individuals
Property	An object or objects that belong to someone
Tenure	Generally, to hold or possess something, such as land, but also a position (e.g. as a university teacher) or an office. In the context of this study it refers to the regulation of the way individuals and groups in a society gain access to land and natural resources

Note on Terminology

Myanmar has extremely diverse communities who practise many different forms of customary tenure. The use of the term 'indigenous peoples' is used in international law, agreements and standards (see definition above). After consideration and discussion with the MRLG CT Alliance in Myanmar, this paper will use the term 'indigenous peoples' and 'indigenous communities' following general UN & ILO usage. The Alliance agrees that customary tenure applies to all people and communities who have customary practices over land and natural resources.

The Constitution (2008) uses the term *taingyintha* which directly translates to 'national races'. It is, however, referred to in English as 'ethnic nationalities' and sometimes the term is used synonymously with 'indigenous peoples'. Given the importance of clarity this report uses the term ethnic groups to be inclusive of Bamar communities, and the term indigenous peoples or indigenous communities to represent the non-Bamar ethnic groups in Myanmar as defined above.

This paper does not attempt to address complexities of contested terminologies and concepts of citizenship in Myanmar around ethnic nationalities, ethnic minorities or indigenous peoples.



Kwaingan village road in Kayah State against the backdrop of limestone cliffs. Limestones are an important, communally owned resource. (Photo: Christian Erni)

Background, purpose and methodology

Following the passing of the National Land Use Policy (NLUP) in 2016, the Myanmar government formed a National Land Use Council and gave it the task of drafting a National Land Law that reflects the principles of the NLUP. Among others, this means that customary tenure rights of ethnic nationalities, which are extensively covered in Part 8 of the NLUP, will have to be recognized and protected in the new National Land Law.

An Alliance for the Recognition of Customary Tenure in Myanmar was formed in 2018 by the Mekong Region Land Governance (MRLG) project to develop a joint strategy to influence policy and law making in order to ensure better recognition and protection of customary tenure. As part of this strategy, the Alliance seeks to develop and discuss policy options for the definition, recognition and protection of customary tenure rights, and to communicate them to relevant policy-makers so that they will be considered in the formulation of the future National Land Law and other related laws and policies.

Myanmar is home to more than 100 ethnic groups, and within each of them communities have their own distinct identities, cultures and livelihoods. Customary tenure systems are equally diverse and a single legal mechanism for their recognition might not address their specificities and needs. In order to encompass a broad range of situations without exclusion, as a first step toward the identification of policy options, the Alliance agreed to conduct a thematic study by systematically reviewing existing knowledge about the various customary tenure systems in Myanmar, compare them and develop a typology.

This report is the result of an in-depth desk review using peer-reviewed academic articles, books and reports, as well as unpublished reports and articles found on the internet. Due

to the limitations on travel that accompanied the COVID 19 pandemic, access to personal, institutional and public libraries was not possible.

Despite these limitations, a large number of publications and unpublished manuscripts were available, and the limited timeframe for writing this report made a selection inevitable. Thus, the literature review for this study prioritized recent publications with a clear focus on customary tenure or closely related issues like land use change, land conflicts, or legal recognition of land rights. In response to recent and ongoing legal and policy reforms in Myanmar, numerous studies have been conducted on customary tenure by academics, local and international non-governmental organizations, bilateral development agencies and organizations of the United Nations.¹ Where considered useful, these were complemented by older historical or anthropological publications and studies on these topics conducted in other countries.

A number of publications on customary tenure have also been produced in Burmese. Several of them have been translated into English and were thus accessible for this report. A list of some of these publications is given in the Annex to this report. The sources in English used for this report are referenced and compiled in the bibliography.

The report is structured into two parts. After a brief introduction, the first part reflects and decides on a working definition of customary tenure for this report. It is followed by a Chapter identifying common features of customary tenure. In the second part, the report identifies criteria for distinguishing customary tenure systems and proposes a typology, with a description of examples and their distinguishing features. The report ends with a short Chapter containing some concluding thoughts.

ⁱ The government recognizes 135 official ethnic groups, though this classification is inherited from the British colonial rule and does not represent the diversity of claims made by communities on their distinct identities and associated practices (notably regarding land tenure regimes).

1 A working definition of customary tenure

Every human society has its own tenure system that regulates the use of land and resources found therein, defining who can use which resources, in what way, when and for how long, and under what conditions. These systems might be part of statutory law (i.e. written law usually passed by parliaments), or they might be part of customary law and beliefs, which are usually shared, and thus also transferred between generations, orally. Often, statutory tenure and customary tenure exist side-by-side, but today, in most countries, the latter is not formally recognized or protected, and statutory tenure has come to prevail over or completely replace customary tenure. As Wily² has pointed out:

The choice is not between customary or statutory tenure. The choice is between whether or not national law gives its support to customary 'law' (the rules about land made by communities) and to the land rights those systems deliver.

In both statutory and customary tenure, rights can be held individually, jointly or collectively. What distinguishes customary tenure from statutory tenure is that customary tenure is community-based tenure, and should be referred to as such because...

...the outstanding characteristic of all customary /indigenous regimes around the world is that the norms and procedures of these systems are determined and sustained by communities, not outside bodies like governments, and that communities are themselves a continuing and living entity. Accordingly, norms practised by customary systems usually include many modern practices, as devised by living communities who make adjustments to meet modern situations. What never changes and is therefore 'traditional' is this fact that jurisdiction always comes from, and is sustained by, the community.³

'Customary' in this context should be understood as going beyond the common understanding of being 'in accordance with a society's

“

We trust and understand each other. People from the village never create disagreements or arguments over land boundaries because we know which space is our own. The land is marked by big trees, rocks or bamboo bushes. Everyone accepts it, because we have thout kyar. Even if someone moves away and works in Thailand, we know which area of land is theirs. It is their grandparents' land, so we always respect that. Because Karen people have thout kyar.

Plong Karen
interview in Kayin State⁶

”

customs and traditions', i.e. what is common practice, corresponding to accepted standards or models of behaviour. 'Customary' in the context of customary tenure is explicitly ethical and moral. Customary tenure systems 'gain their legitimacy from the trust a community places in the people and institutions that govern the system'.⁴

Among the Plong Karen, for example, relationships among community members are guided by the ethics of thout kyar, which requires villagers to 'live simply and honestly, without pride and greed and ... value harmonious relations, over and above individual gain'.⁵



Motorcycles carrying cardamom in Kayin State (Photo: Antoine Deligne)

Customary tenure rules are often enforced not just through social pressure by kin and neighbours, and sanctions imposed and conflict resolution facilitated by customary authorities, but also through belief in supernatural or divine sanctions in case of their violation.

Customary tenure systems reflect a community's relationship to land and resources, and the social values linked to these. Particularly, indigenous communities are known to have a close, multidimensional – i.e. economic, cultural and spiritual - relationship to their land.⁷

Thus, for the purpose of this study, the following working definition of customary tenure will be used:

Customary tenure is a community-based system of rules, regulations and procedures which determine how land and other resources are used and shared, and which have their roots in and reflect a community's social organization, culture and value.

The meaning of 'community'

In the context of customary tenure thus defined, a community is in most cases a traditional village, which is not necessarily identical with an administrative village under the State's local government structure: in these, smaller traditional villages are sometimes put under a single administrative unit. Traditional communities are local groups in which households are often related through kinship, but do not necessarily comprise a single settlement. They can consist of two or more small settlements. While, in most cases, the community members belong to a single ethnic group, there are also many communities of mixed ethnicity, as is the case in Shan State or Kachin State.

In some cases, tenure systems are overlapping in the sense that neighbouring communities might share certain land areas (like forests or pastures) or certain resources (like game, fish,



Khupra villagers in Kayah State (Photo: Christian Erni)

timber, minerals and so on), which are governed by joint tenure rules. In other cases, two or more traditional villages might have a shared territory and a joint customary tenure system governing the use and management of their land and resources, and – in the context of customary tenure – can be considered a 'composite community'. In Kayah State, for example, there are several cases in which two communities requested KMSS-Loikaw, a local NGO, to compose a joint map and customary tenure documentation for them instead of producing separate versions for each. These villages have a common origin and therefore close relationships and a joint territory.

While communities often share close ties and a strong sense of mutual responsibility towards each other and their local resources, they should not be viewed automatically as a single interest group. Within any community there are hierarchies, differentiations that create variations in terms of rights and interests in accessing resources and land, and capacity to manage them.

Whether comprising only one or several villages, the customary tenure systems of these communities share some common features which are discussed in the next paragraphs.

2 Commonalities in customary tenure systems

There are a few characteristics that are typical for most customary tenure systems. These are basic traits that vary in their concrete manifestation according to specific local conditions in the communities who practise them. While in this Chapter the main common characteristics of customary tenure systems are briefly discussed, in the subsequent Chapter some of the key factors determining variations are identified.

Communities hold jurisdiction over their territories

According to the working definition suggested for use here, customary tenure systems are community-based. This also implies that in customary tenure systems, the community and their territory are inseparably linked. As Wily put it, 'These systems cannot exist without social community, or without correspondent geographical space over which the community's norms apply, and which I have referred to [...] as "community land area" or "our land".'⁸

This does not mean that under customary tenure all land is owned communally, or that land and resource rights within communities are equitable,⁹ nor is community jurisdiction contingent on common property. Even when all community land is privatized and there is no more collective or communal land ownership, community jurisdiction 'can vibrantly exist', and, with it, a customary tenure system.¹⁰ A common expression of community jurisdiction is the restriction on the sale of land to people from outside the community. In customary tenure systems, the preference is for land to be sold to close relatives, clan members or other villagers, and many customary village regulations either ban the transfer of land to non-community members outright, or allow it only after relatives or village authorities have assessed the case and granted permission. Examples of such village regulations are those of Kwaingan and in Khupra community in Kayah State documented by KMSS-Loikaw, or the village rule books of Sgaw Karen villages where former shifting cultivation land has been divided up among families to allow them to plant rubber individ-

ually; the village rule explicitly bans the sale of rubber parcels to outsiders.¹²

In precolonial times, the boundaries of villages were not always clear or permanent, particularly in the upland areas: they were rather vague and shifted over time. This was changed following the extension of administrative control by the British colonizers. Among the Northern Chin, for example:

[] the concept of a village – or a realm of multiple villages – with fixed boundaries did not exist as such. Villages and associated territories were often moving due to internecine wars, depletion of resources, alliances, and marriages (giving access to land through bride prices). Nonetheless, the British felt it necessary to delimit precisely and definitively the boundaries of villages – as they did everywhere else in their colonies including Burma – for administration (taxation, legislative matters, and so on) and development (roads) purposes.¹³

Thus, today, village boundaries, even in the uplands, are usually pretty well defined and rather fixed. But whether boundaries are clearly, or in parts only vaguely, defined, what is important is the strong connection communities have to their territories, over which they hold jurisdiction and whose land and resources are governed by their customary tenure system.

As is the case with statutory tenure, in customary tenure rights can be held collectively, jointly or individually, and rights held by individuals or groups might comprise one or several elements of the bundle of rights that comprise customary tenure.

However, it has been suggested that the community territory as a whole, comprising all land, forest, grazing land, water bodies and so on, can be considered the community's common property.¹⁴ Similar to Nation States (among them Myanmar), which consider all land and other resources the property of the State but grant different use or ownership rights to their citizens, communities claim ownership over

their territories, but, through their customary tenure systems, recognize and regulate the various rights of its members to different resources within the territory.

Customary tenure systems contain bundles of rights

As is the case in statutory law, customary tenure systems contain bundles of rights, making customary tenure systems diverse and complex as they contain different, sometimes overlapping rights to various resources that are enjoyed by different individuals or groups in a community. In the literature, these bundles of rights are generally understood to comprise five rights (see Box below).¹⁵

Bundle of rights

1. Access right: The right to enter and be in a specific area, but not to use or take anything.
2. Withdrawal right: The right to obtain a resource or products from it, such as harvesting agricultural crops, hunting animals, catching fish, or withdrawing water.
3. Management right: The right to regulate how a resource is used and how it can be transformed by making improvements (e.g. terracing, tree planting, or constructing irrigation infrastructure).
4. Exclusion right: The right to determine who has the right to access, withdrawal and management, and how those rights can be transferred to others (for example who can, and who cannot inherit land and natural resources).
5. Alienation right: The right to sell or lease management and exclusion rights (and, consequently, access and withdrawal rights).

The first two are rights at the operational level, i.e. they refer to use *rights*. The other three are at the collective-choice level, i.e. they concern *decision-making rights*. Schlager and Ostrom,¹⁶ who first suggested this distinction, stress the importance of so doing:

The distinction between rights at an operational-level and rights at a collective-choice level is crucial. It is the difference between exercising a right and participating in the definition of future rights to be exercised. The authority to devise future operational-level rights is what makes collective-choice rights so powerful.

Often, ownership is understood as a situation in which an individual or group holds the complete bundle of rights over a particular resource,¹⁷ and thus has complete control over it. However, the rights contained in a particular tenure system 'bundle' often overlap, which could imply restrictions on other rights. For example, in the dry zone of central Myanmar, 'Land and tree ownership rights vary between villages and townships. Toddy palm trees, for example, might be owned by different persons to those that have customary usufruct to the land'.¹⁸ Such tenure rights over individual trees, palms, bamboo, rattan, and so on, are very common in customary tenure systems across the region. The separation of rights over land and individual trees means that while the land on which the tree or palm grows belongs to another person, the owner of the tree has the right of access to the land and the right to withdraw products from his or her tree. The owner of the land might hold withdrawal, management and alienation rights over his or her land, but might not be allowed to do anything on the land that harms the tree, and when selling the land, the tenure right over the tree remains with its original right holder.

Customary tenure and community governance systems are inseparably linked

Customary tenure depends on the existence of community governance institutions and mechanisms for the enforcement of the rules and resolution of conflicts. Well-functioning conflict

resolution mechanisms in particular are critical for the legitimacy of customary tenure systems and thus their long-term sustainability.

The governance system of which customary tenure is part, requires a certain degree of independence from external control if it is to be genuinely community-based. Thus, as will be shown in the following Chapter, more complete customary tenure systems are above all found in upland areas that have not – entirely or only marginally – been brought under State administration.

In the pre-colonial era the State's power in the uplands of what today is Myanmar was minimal. As is the case elsewhere in Southeast Asia, there were two fundamentally different forms of society in pre-colonial Myanmar – State people in the valleys and along the coasts, non-State people (identified in colonial “taxonomies” as “tribals”) in the hills, forests and archipelagic labyrinths: as some scholars argue,¹⁹ these two forms have evolved not simply as a result of the geographical isolation of the latter, but as a result of choice: the two separate spheres existed in spite of the constant flow of people between them throughout history.

During British colonial rule, traditional local governance systems in the remote and hilly frontier areas remained largely intact as a result of the indirect-rule strategy applied in those areas. The British used two different administrative approaches after their conquest of Upper Burma and the abolition of the monarchy:

In lowland areas, the British adopted a more interventionist approach. They appointed headmen over various geographical regions and altered their traditional roles. However, for hill-country areas, the British used indirect control methods. Because little revenue could be raised from these areas, it only justified minimal expenditure on administration.²⁰

This means that much of the uplands, which are inhabited mostly by indigenous peoples, continued to be governed by customary institutions and in accordance with customary law until independence in 1948. To some extent

this remains until today, despite decades of heavy militarization and armed conflicts. This is not to say that customary systems do not exist outside of the uplands. As we will see below, partial customary systems and common land systems exist throughout much of Myanmar.

The principle of first-clearance and inheritance

Another common feature of customary tenure systems is the recognition of special rights to land based on the principle of first-clearance and inheritance. This is known among indigenous communities all over Southeast Asia. For example, among the Lua of Northern Thailand:

Rights to use swidden land freely are inherited by descendants of the village founders, or descendants of families specifically adopted into the village. These households have first choice of the land remaining after village religious officials have chosen their land. After these families have chosen, the descendants of households without a primary claim on the land might choose their swidden sites.²¹

Among Sgaw Karen living in the same area:

In one sense swidden land is a communally held good. As at Pa Pae [the Lua village referred to above], an individual born outside the village has no claim on village land unless he marries or resides with a native-born villager who descended from one of the village founders.²²

The rule that non-native members of a community can usually gain access to land only through marriage and/or residence is also very common in tenure systems among indigenous communities across the region.

In Myanmar, the principle of rights based on first clearance and subsequent inheritance is known not just among indigenous communities, but also in Bamar society, in which it is called *dama-u-gya*. In pre-colonial times, ‘customary rights were acquired through clearing and cultivating any vacant land, after which the cultivator could sell, mortgage, or pass [it] to his descendants’.²³ In villages in Central Myanmar:



Spirit House in Shan State (Photo: Natalie Y. Campbell)

The families usually cleared land and the deriving claim is called *dama-u-gya*, meaning first clearing. When passed down through inheritance it became *bo-bua-paing myay*, that is, 'father's and grandfather's land'.²⁴

The recognition of the priority rights of the descendants of those who have first cleared the land has also been documented among many ethnic groups in the highlands of Myanmar.²⁵

The way these rights are passed on between generations differs considerably between ethnic groups, depending on the prevailing inheritance rules: for example, whether land and other property is given to (some or all) sons or daughters only, or to both.

Ancestral rights have a spiritual dimension

Among communities who still practise their traditional belief, ancestral relationships with the village founders usually carry not only rights but also spiritual obligations. The village founders who first cleared the land are often believed to have created special relationships with the spirits of the land who are responsible for its fertility.²⁶ Their descendants have a duty to maintain a good relationship with the spirits of the land by conducting, or leading, the necessary rituals and

offerings. In recognition of their special status and their responsibilities, these descendants of the village founders (who in many communities would be the village headman or priest) receive some of the first fruits (like chilies, cucumbers and so on) from fellow villagers. These were usually small quantities that were just tokens of recognition.

All community members have access to land

Under customary tenure, the rights of individuals or families in a community are enjoyed because they are members of the community or of another collective (e.g. a clan or, less commonly, an ethnic group) that holds the land in common trust. This does not mean that there are always equal rights to land. As mentioned above, some individuals or families might have priority rights based on the common principle of first-clearance and inheritance. However, these rights are rarely absolute and usually also come with responsibilities and obligations. Often, these relate to the obligation to grant access to those who have no, or too little, land of their own. There are cases in which families or clans with ancestral claims to land ask for a rent from those who want to use some of their land, for example, in some communities in Southern Chin State²⁷ or in Kayah State (see Case Study 4 in the next Chapter). What is important, how-

ever, is that, generally, under customary tenure systems, all community members are given access to land or other opportunities to make a living. As Andersen²⁸ reports...

...landless families are seldom found in villages where customary tenure includes access to communally tenured shifting cultivation land. Many of the villages studied under MRLG's customary tenure documentation initiative with ethnic youth organizations report that there is no landlessness in communally tenured shifting cultivation land and that outsiders who come to stay and live in the village will be given access to shifting cultivation land, but not to land for perennials.

Rights are linked to residence in the village

The right of all the village residents to have access to land in most cases also implies that when people leave their village, they cannot maintain any claim over their land until they return again, as the example of Naga communities in the Somra Tract of Sagaing Region illustrates:

Physical residence in the village is necessary to fully assert household tenure claims. If someone moves out of the village, the right to cultivate their land passes to close relatives, then clan members if no family wants to cultivate it, then to other village residents. If the person moves back to the village, they will again have the right to cultivate their household land. This custom ensures that village residents have access to all available land to cultivate productively.²⁹

Not always will the returning village members be able to reclaim the same land. They might be given other land instead:

Everyone living in the village would have rights to land the villagers in Chin and Shan states say. Persons who leave the community would hand over - without remuneration - their rights in the common property to their relations or to the chief of the village for re-allotment. The same household would be eligible for new land

or the same old land if it returned to live in the village again later.³⁰

Intensively used land is the private property of individuals or households

Land that is extensively used - for shifting cultivation, as pastures or forest, or suchlike - is often, although not always, held as common property of a community, clan or ethnic group. It is, however, very common in customary tenure systems that house lots, and intensively-used land - e.g. irrigated and terraced paddy fields, orchards, tea or coffee gardens - in which a lot of labour has been invested and which are permanently used, are private (individual or household) property.³¹

In most, although not all, cases these private ownership rights are limited in the sense that the right to alienation is subject to community control. As an expression of the community's jurisdiction over the village territory, the sale or lease of land to outsiders is often prohibited since it would break up tenure cohesion and the community would lose control over its land.

Customary tenure systems are constantly evolving

Customary tenure systems might be many generations old and deeply rooted in the culture and traditions of a community, but, in common with the social system of which they are part, they are not static, but constantly evolve in order to remain practically relevant. As Wily³² observed, 'customary tenure is as much a social system as a legal code and from the former obtains its enormous resilience, continuity, and flexibility'.

Thus, while customary tenure systems are known to be particularly strong in communities whose members have lived in their territory for a long time, they are also found in communities that have voluntarily migrated, or have been forced to move elsewhere due to conflicts, disasters or dispossession.

Today, customary tenure systems have come under increasing pressure from a variety of forces that sometimes lead to drastic changes.

For example, increasing labour migration might lead to changes not just to the livelihood and land use in communities, but also to the rules that are part of the customary tenure system. In a study in Southern Shan State, farmers reported an increase of labour migration to Thailand and urban areas of Myanmar, which has affected community structure and land-holding. Likewise, while landlessness might have been less common under customary tenure systems, it is likely to become more prevalent as a result of changes in the livelihood and land use in communities. As Andersen observed:³⁴

Landless insiders found, for instance, in the Sgaw Kayin village referred to above, would find alternative livelihoods such as working as casual labourers. This tends to happen in villages that have experienced a gradual informal privatization of land plots and where village-based internal trade in land is permitted by Internal Rules.

As will be shown in the Case Study on Gheba communities in the next section, even in communities where all land is under individual claim, and where inequality of land ownership has become more pronounced, landlessness is not an inevitable result. The Case Study also shows that the customary tenure system has evolved along with the changes in land use, and even though these changes are rather profound, the communities have retained their jurisdiction over their village territory and resource governance. However, there are cases in which customary tenure systems were not able to adapt, but have broken down.

In the next section, this report takes a look at these and other forces that have been leading to differences in customary tenure systems, and that drive the changes that they are currently undergoing.



Shifting cultivation field in Khupra community, Kayah State on land that is owned by both clans and individuals. (Photo: Christian Erni)

3 How customary tenure systems differ

In Myanmar, customary tenure systems are still found in rural communities of all ethnic groups, but more complete systems are likely to be found among indigenous peoples. In fact, most of the country's land is believed to be 'held through customary or informal tenure arrangements'.³⁵ Ennion³⁶ found that:

Even in areas where there has been a considerable amount of conflict and displacement, there is continued reliance on customary land rights. In surveys conducted by non-governmental agencies along the Myanmar-Thailand border, 71 per cent of respondents claimed that their authority to use agricultural land was derived from the authority of village leaders and/or customary land rights. [] However, CLM [customary land management, C.E.] systems are noted as weaker in areas where swideners are new arrivals in an area.

Long-term settlement in an area, and thus being native to and having developed a close relationship with the land, could explain the strength of customary tenure systems found in indigenous communities, not just in Myanmar but across the world.

In her study on the recognition of customary tenure systems in Myanmar, Andersen³⁷ distinguishes between three basic types: systems with communally tenured shifting cultivation land; systems with 'a mix of communal land (held at the level of the village/community, a clan or larger ethnic group) and private plots claimed by individuals or households (e.g. paddy land and upland areas with individual or household ancestral claims)'; and tenure systems in which 'all land inside the village territory is subject to individual or family claims, but where claims still cannot be alienated to outsiders'.³⁸

Which of these three types is to be found in a particular community depends on a broad range of determining factors, such as the community's specific local environment, livelihood and land use system, demography, culture and

history, as well as the wider socio-economic and political environment. This Chapter attempts to identify the forces at play that determine not just which of these three types is found in a particular case, but also which bring about changes and could ultimately undermine customary tenure systems.

Agreeing with Wily³⁹ that 'land use dictates the norms, and changing land use and its distribution alter those norms', and result in differences in customary tenure systems, land use is discussed here as the first criterion, serving as a point of departure for the identification of other factors that will help to explain variations in customary tenure systems.

It is important to emphasize that the existence of individual land rights within customary systems does not imply that the recognition and protection of such rights can or should be achieved through direct individual recognition and protection by the government. On the contrary, these individual rights exist within community systems which are important for the continuation of those rights.

A. Livelihoods and land use

Customary tenure systems are usually complex, landscape-level resource governance systems that are comprised of multi-layered bundles of rights regulating the relationship between people and the various types of land and resources in their territory. Landscape is understood in this context to be the whole territory of a community or, in some cases, two or more communities with a joint territory.

The prevalent livelihood on which people in a community depend determines which and how resources are used. Farming is by far the most common form of land use in Myanmar's rural areas. Livestock rearing is an integral part of most livelihood and land use systems, but only in a few exceptional cases is it the main pillar on which people's livelihood rests - like goat

ⁱⁱ Mithun (*Bos frontalis*), also called gayal, is a large, domesticated bovine species raised by indigenous peoples in Northwestern Myanmar, (Chin State and the Naga Self-administered Zone) and adjacent areas in India, and the Chittagong Hill Tracts of Bangladesh, in Yunnan province in China and in Bhutan.

rearing in the central dry zone or mithun rearing in some villages in Chin State.⁴⁰

A form of hunting and gathering as the main livelihood is practised by only one ethnic group in Myanmar, the Moken of the Mergui (in Myanmar Myeik) archipelago, where traditionally mobile family groups in boats use marine, coastal and inland resources on islands for subsistence and trade, obtained in a seasonal pattern that is determined by changing weather conditions and the related availability of resources.

All other forms of land use in Myanmar revolve around farming. Non-farming land use activities, for example, husbandry, hunting and gathering, is important for the livelihood of the respective community, but the main pillar of their domestic economy is farming. The particular form of farming prevalent in an area is the result of the interplay of a range of determining factors including agro-ecological conditions, demography, market access, culture, government policies and politics.

As briefly mentioned, there is a common pattern to customary tenure systems that recognizes individual tenure rights over intensively and permanently used land, like paddy fields, orchards or other land on which much labour has been invested to develop and maintain it. Extensively used land, like forest and grazing land, and sometimes also long-fallow shifting cultivation land, is held under some form of collective tenure. This also means that the rights to a particular plot of land usually vary along with changes in land use. For example, there is a trend across Southeast Asia to replace collective tenure rights over shifting cultivation land with individual rights as a result of changes in land use from shifting cultivation to permanent agroforestry systems. Those include orchards, coffee, rubber, and tea gardens (see the Case Study on the Gheba communities below).⁴¹

Common property relating to forest and grazing land are more enduring, and are sometimes still found in communities where customary tenure has been otherwise largely replaced by statutory tenure.



Khupra village land, Kayah State: Settlement, communal shifting cultivation field, grazing land and community forest (Photo: Christian Erni)

Landscape level customary land governance: Long-fallow shifting cultivation systems and collective tenure

Long-fallow shifting cultivation, a form of rotational agroforestry, is still practised in upland communities with low population densities, for example, in the Naga Self-Administered Zone, and in Chin, Kachin, Kayah and Kayin States. It is common for long-fallow systems to have complex customary tenure systems, in which extensively used land, like forests or pastures, but also shifting cultivation land, are often, although not always, held under collective ownership. Where collective ownership exists, there are variations relating to the social group that holds the collective rights. Another common feature is the existence of hereditary individual or clan rights over land, based on the principle of *dama-u-gya* discussed above. Although the particular combinations of individual and group rights over shifting culti-

vation land vary considerably between different ethnic groups, overall management decisions are usually conducted collectively at the community level.



The main street at a village in Naga Self-Administered Zone, Sagaing Region (Photo: Raphael Bick, Flickr)

Case 1. Naga Self-Administered Zone: Land use and customary tenure in Naga communities

A case study conducted by RRtIP⁴² among three Naga communities in Layshi Township documented the complexity of landscape-level land governance through customary tenure systems, which is found among many long-fallow shifting cultivation communities in the highlands of Southeast Asia:

In the Naga customary system, there are different tenure arrangements for different land-use types. Households have the rights to manage and harvest resources that they directly cultivate, including rice terraces, orchards and woodlots. Resources from forests and streams are collected by community members and managed by village institutions. Households harvest and manage their individual *jhum* [shifting cultivation, C.E.] plots, but the village also maintains some management responsibilities over *jhum* land.⁴³

Shifting cultivation land is owned by households based on the principle of first-clearing and inheritance. Descendants of those who have cleared land in virgin forest have permanent rights over that land. Use rights for one cultivation cycle are granted by them to those who do not have enough land. The community as a whole manages the shifting cultivation land jointly, deciding where to clear land in a particular year.⁴⁴

Table 1 below illustrates the complexity of co-existing bundles of rights found in many upland indigenous communities. It is based on field work conducted among the Tangkhul Nagas, who live on both sides of the Myanmar-India border. It contains only a few of the customary tenure rights over resources and is rather generalized; there are considerable variations between villages.

Table 1: Complexities of co-existing bundles of rights of the Tangkhul Naga

Land/resource	Access	Management	Use, withdrawal	Exclusion	Alienation
Rice terraces	Everyone	Household	Household: rice All community members: grazing during dry season, collecting snails and catching fish	Household	Household; Subject to clan and community control
Shifting cultivation land	Everyone	Community	Household: farm products All community members: wild resources and grazing during fallow	Household	Household; Subject to clan and community control
Forest	Everyone	Community or clan	Timber, bamboo: Community or clan NTFP (hunting, gathering): open access	Community or clan	Community or clan (subject to community control)
Grazing land	Everyone	Community or clan	Community or clan	Community or clan	Community or clan (subject to community control)
Water bodies	Everyone	Community or clan	Community	Community	Community
Wasp- and bee hives:	Everyone	Community or clan	Individual: Temporary claim staked by those who detect them	n.a. (temporary claim)	Individual

Beyond the community: Cultural land uses and inter-community collective tenure

There are cases in which large and remote forest areas are used by several communities and are thus considered a kind of joint common property with access for members of those communities. There are forests that are jointly protected by six Kayah communities in Demoso Township in Kayah State⁴⁵ or inter-village arrangements over land, like watershed or grazing areas in Northern Chin State.⁴⁶ Areas of particular cultural significance, such as sacred mountains or sites, may be considered the common property of a whole ethnic group. Care-taker responsibilities may be given to a village inside or near the territory on which the sacred site is located, or to a pan-ethnic civil-society organization. An example is Mount Saramati at the border between Sagaing Region and Nagaland State in India. It is sacred to the Makury Naga tribe. The villages surrounding it, and the Makury Naga Youth Federation, have been given the responsibility of protecting it.⁴⁷ As argued, in most cases, a community would be identical to a village or a local group comprising two or more small settlements, but in cases such as those mentioned here, the concept of community has to be dealt with more flexibly.⁴⁸

We can assume that there are more cases of inter-community or pan-ethnic tenure regimes, both of ancient (like Mount Saramati) or of recent origin (the communities in Kayah of Northern Chin State). There might also be more cases than those mentioned earlier in which two or several communities have a joint territory governed by a common customary tenure system. Clearly, more research is needed on the various forms of inter-community and pan-ethnic customary tenure systems.



Collective rice harvest in Kwaingan community, Kayah State. Paddy land is individually owned; In the background: community owned forest (Photo: Christian Erni)

The Salween Peace Park in Kayin State

A unique initiative towards large-scale joint recognition and protection of customary tenure systems is the Salween Peace Park in Kayin State. The park aims to simultaneously recognize and protect the customary tenure systems of more than 340 villages, while at the same time safeguarding forest and biodiversity, promoting democratic resource governance and bringing about lasting peace in an area of 5,485 square kilometres in one of the most heavily militarized parts of the country. The park contains 139 demarcated *Kaw* lands (customary communal land of Karen communities), 27 community forests, four forest reserves and three wildlife sanctuaries.⁴⁹

The customary lands, called *kaw* in S'gaw Karen, are a mix of forest, farm and village land, and vary substantially in size. Though each has traditionally been governed in idiosyncratic ways decided by the resident community, the integrity of the *kaw* is anchored in Karen animist beliefs. A *kaw's* territory is made inviolable by *loh*, spirit dwelling sites, and custodianship has traditionally been vested in the older males of a leading family who claim a special relationship with these spirits.

The peace park charter prescribes the protection and revitalisation of *kaw*, not only as a means of protecting the Karen people's land rights – and holding the Myanmar government to its own National Land Use Policy, approved in 2016, which envisages the protection of ethnic customary tenure as part of a single national land law – but also drawing on the *kaw* institution's proven record of preserving both the natural environment and the self-sufficiency of Karen communities.⁵⁰

Beyond land: Resource governance in sea-based, mobile hunter-gatherer communities

It is equally important to fill the gaps in understanding customary tenure systems in communities that have land and resource use systems that are very different from the majority – for instance, the 'amphibious' systems of farmer-fisherfolk communities in mangroves and wetlands, and the sea-based hunter-gatherer system of the Moken communities in the Myeik archipelago.

The urgency for research in these communities is linked to the challenge of recognizing and protecting their land and resource rights in a context of complexity, mobility, blurred and shifting boundaries, when the tide turns land to sea, and much of the 'hunting and gathering' happens on 'land' below the water, for instance, on species-rich coral reefs.⁵¹ In Myanmar, many coastal communities might have such livelihood systems that need recognition in their entirety to ensure their economic and cultural survival. Only one example will be briefly discussed here, that of the Moken. The case illustrates how

livelihoods shape what customary tenure is, and specifically answers questions such as what types of resources the tenure systems include.



Salween River in Kayin State (Photo: Harri Suvisalmi_Flickr)

Case 2. People of the islands: Livelihoods and customary tenure among the Moken

The Moken, as they call themselves, are one of the ethnic groups known as ‘sea gypsies’ who live along the coast and on the islands of Southeast Asia from the southern Philippines to the Mergui (Myeik) archipelago. Around 3,000 Moken live in the Myeik archipelago in Myanmar, and about 800 across the Thai border to the South, on the adjacent islands and coastal areas of the Andaman Sea. In Myanmar they are also called Selung or Salone.⁵²

Traditionally, Moken lived in mobile family groups on boats using a broad range of resources from the open sea, coral reefs, coasts and islands for subsistence and trade. Rice has long been their staple food, but they have hardly ever cultivated it themselves.⁵³ They have rather obtained it by trading marine products that have been in high demand, like pearls, sea-shells, turtle shells, edible birds’ nests and dried sea cucumbers.⁵⁴

While the Moken also gathered some marine and littoral produce for exchange, receiving in return cultivated staple foods such as rice, this trade was mainly seasonal and for most of the year Moken bands appear to have been largely self-sufficient. Some groups in addition planted shoreline gardens, to which they returned from time to time to harvest crops. [...] the Moken made extensive use of the resources available in the interior of the larger islands of the archipelago. Here they gathered wild honey, fruit, roots and tubers and hunted wild pigs with the aid of dogs. Some communities also occupied brackish tidal estuaries and mangrove swamps, exploiting these areas [] as one of a number of varied foraging habitats.

Today many of these groups, much like rainforest hunter-gatherers, are faced with environmental loss as mangrove and coastal forests are cleared for farming, charcoal production, plantations and other kinds of coastal development[...].⁵⁵

There is little information in the literature about the Moken’s traditional customary tenure system. Similar to that of other hunter-gatherer groups, its distinguishing feature is collective ownership of territories by kinship-based boating communities comprising a main home island and the surrounding sea and islets.⁵⁶

Up until the 1980s, the Moken considered the 800 islands of the Mergui Archipelago as the ‘natural’ territory of their nomadic livelihood. This archipelagic Eldorado permitted the distribution of gathering areas where Moken collect food on the strand or seashells in the sea between five mother islands [...]. Each island community of the Moken can be divided into flotillas: 7 to 10 boats collect various products (sandworms, yams for meals or for trade, sea slugs and seashells) and hunting (mostly wild boars and turtles) in defined territories during the rainy season.⁵⁷

The life of the Moken has changed drastically over the past decades as a result of many factors. These include the introduction of motorized boats, an increasing commercial fishing industry - and thus the ensuing scarcity of resources on which they depend - the growing number of Bamar settlers and harassment by the State authorities, along with attempts to resettle them. All of these factors must also have an impact on the customary tenure system of the Moken. If the future heralds the possibility of formal recognition and protection of customary land in Myanmar, there is an urgent need now for a better understanding of the present livelihood and customary tenure systems of communities like the Moken to ensure that they are not left out.



Moken village in Mergui Archipelago (Photo: Axel Drainville_Flickr)

B. Culture and socio-political organization

Differences in livelihoods and land use and the corresponding customary tenure systems are shaped by a combination of several factors, not only agro-ecological and demographic conditions, market integration and government policies, but also the social organization and cultural preferences of people. For example, the complex ethnic landscape found in Shan State and neighbouring countries, like Laos or Northern Thailand, is at least partly a result of cultural preferences. Ethnic groups belonging to the Tai-Kadai ethnolinguistic family (e.g. the Shan, Thai, Lao, and Khon Mueang, as well as various smaller ethnic groups like the Black Thai) prefer to live on the plains and valley bottoms, while other ethnic groups prefer to live at different elevations in the hills. The preferred settlement location corresponds to prevailing forms of traditional land use: wet-rice cultivation in the plains, shifting cultivation in the hills. Land use – e.g. which crops are grown with what cultivation method – is only partly determined by factors like agro-ecological conditions or population densities; cultural preferences also play a decisive role. The customary tenure system, found in communities practising a similar form of land use, also varies with ethnicity, as the Case Studies in this Chapter will demonstrate.

Culture and social organization determine customary tenure systems not just by shaping livelihoods and land use, but also in other ways. For example, customary tenure systems differ considerably according to the traditional socio-political organization of the society of which a community is part.

In many traditional upland societies there has typically been no political integration above the village level, which has led some authors to refer to Naga villages, for example, as 'village republics'.⁵⁹ In some ethnic groups – e.g. the Northern Chin⁶⁰ – there are cases in which a headman might have been able to extend his authority – to adjacent villages, but these cases have not been common and were often only temporary. Furthermore, even when these supra-local chiefs among the Northern Chin had extended their influence to nearby villages, these villages to a large extent retained their autonomy.⁶¹

The principle of first-clearing is a key determinant in customary tenure rights, and it is found in many upland communities. But it usually comes along with the ethical principle that recognizes the right of access to land of all community members. In communities with hereditary headmanship, the headman and his clan, as descendants of the village founder, might have priority rights over land. In some



Pa-O lady in Shan State (Photo: Urs Bucher_Flickr)

cases, headmen appear to have such control over the village's land that they might be considered the owners of that land. Nevertheless, the nature of the rights, roles and obligations of traditional village headmen in upland societies is usually more akin to that of a trustee, administering the land on behalf of the community. However, the intervention by the colonial (and post-colonial) State often reshaped customary law and political organization not just in the lowlands, but also in upland societies. This will be briefly discussed in the Chapter on State interference below.

Variance in inheritance rules and gender

The extent to which culture determines customary tenure is also evident in the differences in rules relating to the ownership and inheritance of land, particularly regarding land ownership by women. A study conducted in four villages in four different regions of the country found that 'women farmers' rights to land seem to vary significantly depending on the customary system of the village they live, their birth order in their family, their wealth (relative to other family members) and their marital status'. In the Chin village in Sagaing Region, 85% of the land plots were passed down to sons, while in a village inhabited by both

Karen and Bamar in Tanintharyi Region 66% of the plots were given to daughters. In Bamar village in Sagaing Region and in the Karen village in Kayin State inheritance was relatively gender neutral, with 55% of the land passed on to sons in the former, and 51% to daughters in the latter. Culture was found to be a key factor explaining differences in the degree of gender equity in land inheritance, as noted by a village administrator who explained to the researchers: 'Buddhist Bamar tend to divide the inheritance equally among children, whereas Chin culture favours passing land on to sons.'⁶⁴

So far little information is available in the literature about gender roles in different customary tenure systems or how vulnerable groups (widows, displaced people, people from another ethnic group, and so on) can access land and natural resources within specific customary tenure systems. Late settlers, or those of lower social status, for example, might acquire access to land of lower quality or remote plots. While not necessarily egalitarian, customary tenure systems can be more flexible than statutory tenure and provide access to land to all residents as long as land is available and not fully privatized. It can be assumed that with the high diversity of ethnic and local communities in Myanmar, and with the diversity of customary tenure systems, there is correspondingly a high degree of diversity in terms of gender roles, rights and access to land.

Variations in customary tenure practices between ethnic groups with long-fallow systems of shifting cultivation

The first Case Study in this report briefly describes an example of customary tenure in a land use system based on long-fallow shifting cultivation, as practised by Naga communities. It shows that among Naga communities in Layshi Township, shifting cultivation land is owned by households based on the principle of first-clearing and inheritance, but that use rights for one cultivation cycle are granted by land owners to those who do not have enough land. Communities that also practise long-fallow shifting cultivation but belong to other ethnic groups, however, might have different rules, as the following two Case Studies illustrate.

Case 3. Northern Chin State: Ancestral claims and common pool resources in Chin communities

There are many similarities between the long-fallow shifting cultivation systems of the Nagas and those of the Chin communities in Northern Chin State. There are also many similarities with respect to tenure rights over certain types of land, such as pastures and forests, but there are considerable differences, particularly with regard to ownership of shifting cultivation land. While among the Naga communities in Layshi Township all shifting cultivation land is individually owned, in Northern Chin communities, individual and collective ownership of shifting cultivation land exist side-by-side. Thus, in communities with very similar forms of land use there are differences in customary tenure systems. These variations might have historical reasons - that are difficult to trace - but cultural differences are a more probable explanation.

As is the case in the Naga areas, in the rugged mountains of Northern Chin State⁶⁶ only parts of a community's territory can be used for shifting cultivation or other forms of farming. Every village has several blocks of shifting cultivation land, called *lopil*, and communities decide collectively which *lopil* to use in the coming year, after which it is left fallow for ten years or longer. Some families hold ancestral claims over plots, called *lo hmun*, within one or several, but not necessarily in all, *lopil*. In Chuncung village,⁶⁷ for example, about one third of the total land area in all *lopil* is covered by individual ancestral tenure rights. All other shifting cultivation land is the community's common property.

Families with ancestral claims have priority rights to choose their inherited plots for cultivation. All other plots are allocated to families with no ancestral claims. In some villages this is done through a lottery system,ⁱⁱⁱ in others, by letting households choose a plot after a *lopil* has been cleared, after which the allocation is validated in an assembly.⁶⁸ Using the lottery method instead of direct choice for distributing plots in a *lopil* has been linked to 'the greater demographic pressure on land, as well as a greater variety in the quality of the plots within the *lopil*', and to differences in soil quality.⁶⁹

While some families have privileged access to plots due to their hereditary rights, they cannot claim more land in a given year than they can work:

If the family has ancestral plots in a *lopil* over and above what it can use in a given year, these plots become part of the common pool resources and subject to allocation by lottery among the remaining households that have no ancestral claims in that particular *lopil*. Being residents of the village, the others have rights to access land that year out of the common pool of land. The families using the ancestral plots of others do not need to pay for the use of the land. The common pool is shared freely.⁷⁰

Households not living in the village cannot claim any plots, but all households in the village are given access to a plot, which means that 'any newly settled household can claim access to a plot'.⁷¹

Parts of the common property land inside *lopils* can become private property when a person or a household decides to convert it to permanent use, for example by constructing terraces. Permission has to be obtained from the village authorities. The request for the

ⁱⁱⁱ The lottery system for allocating plots of shifting cultivation land to households has also been documented for other ethnic groups, like the Ta'ang communities in Northern Shan State (Andersen 2016, p. 6).

right to construct terraces can also be made for a plot over which other people have an ancestral claim, which will be granted if those people do not intend to build terraces themselves.⁷²

The system described here has not changed over generations, even though, during the era of traditional chiefdoms, most of the land was nominally in the hands of a few aristocratic families. The chiefs' rights over the land were, however, more administrative in nature and rents paid were more symbolic.⁷³ In marked contrast to Northern Chin villages, a study in Southern Chin State showed that blocks of shifting cultivation land are traditionally 'subject to a full range of private claims that are enforced, and those without land claims have to pay for access to a plot of land'.⁷⁴

Yet another form of land tenure in a long-fallow shifting cultivation system has been documented among the Kayan Hlahui of Kayah State, which is the subject of the next case study.



Traditional house in Chin State (Photo: Antoine Deligne)

Case 4. Kayah State: Overlapping clan and community rights in Kayan Hlahui communities

The Kayan Hlahui are one of the indigenous peoples of Kayah State. In the Kayan Hlahui community of Khupra,⁷⁵ located in Demoso Township, a long-fallow shifting cultivation is practised with a cycle of 12 to 14 years. The decision about where to start cutting new fields is made early in the year by the leaders of the three clans in the village.

In the Khupra community, the collective tenure rights of clans relating to the long-fallow shifting cultivation systems discussed in this report are more prominent than they are in the other two Case Studies. As is the case in most upland communities, paddy land as well as permanent agroforestry and garden land are under individual ownership. Around half of the shifting cultivation land is also owned by individuals, but the rest is owned by clans. Furthermore, all grazing land and most of the forests are owned by clans. Only a small area of 'use forest' along with sacred forests and cemetery forests are communal property; none is under individual ownership.⁷⁶

Even though most forests are owned by clans, all village members have the right to access and use forest resources, and all community members and even people from neighbouring communities have the right to let their cattle and buffaloes graze on pastures owned by clans.⁷⁷

Clan ownership of shifting cultivation land means that clan members have use rights over these lands. Clans and individuals who own shifting cultivation land also have alienation rights, but the community has management rights over all shifting cultivation land. Individuals or clans who own shifting cultivation land have the ownership rights, but also the obligation to lease land for temporary use to others who do not have enough land for cultivation every year.⁷⁸

Land owners can freely sell their land within the community, but they are not allowed to sell any land to people from outside, with the exception of land at the village boundary, which can be sold to people from the adjacent community.⁷⁹

C. Population growth, migration and land use change

Demography is one of the main drivers of land use changes. A response to population growth and increasing land scarcity is intensification of land use, from long-fallow shifting cultivation to a short-fallow system and, where conditions permit, to permanent land use. Such changes will inevitably also lead to changes in the respective customary tenure system, i.e. a shift from collective (where they exist) to individual claims over land.

Responding to resource scarcity: Short-fallow shifting cultivation and permanent farming systems

In many upland communities across the country, land scarcity, as a result of population growth, and other factors has forced farmers to shorten the fallow period of their shifting cultivation cycle and, where fertile land was available, use the land permanently through crop rotation. Wherever possible, farmers would also construct terraces for paddy fields. All intensively used land is held under private ownership.^{iv} However, collective tenure rights are usually maintained at least over forests and grazing land, and similar to long-fallow land use systems, customary tenure remains a landscape-level resource governance system that contains rules regulating all aspects of the relationship between people and other resources on which they depend for their livelihood.

Case 5. Southern Shan State: Short-fallow shifting cultivation and land tenure in Pa-O communities

The Shan States are remarkably diverse both ecologically and ethnically, and so are the land use and customary tenure systems. Permanent farming of irrigated and rain-fed paddy and other crops is common on the plateau and in the valleys, while shifting cultivation is still the dominant form of land use in the hills, usually in combination with terraced paddy cultivation and other forms of agroforestry, like tea and coffee gardens or orchards.^{iv}

With 6,500 acres (2,630.5 ha) of land and a population of 2,000 people, the Pa-O community of Nan Pan in Southern Shan State has a population density of 76 persons per square kilometre. This is fairly high for a shifting cultivation community, even if most of its territory (5,000 acres or 2,023.4 ha) is used for shifting cultivation. With a fallow period of three to four years, the shifting cultivation cycle is quite short.

Around 500 acres (202 ha) are under tea gardens and fruit tree orchards. Only 150 acres (61 ha) are irrigated rice terraces and 100 acres (40 ha) are permanent upland fields. The rest is community forest, watershed forest, grazing land, firewood hedges and sacred land. All shifting cultivation land is communal land, and each household has the right to cultivate a plot each year. The plots are distributed through consensus at a village meeting in January, before the clearing of fields start.

As communally owned land, shifting cultivation land cannot be sold. Permanently used land, however, is under private ownership and can be sold within the community or to people from neighbouring Pa-O villages. The selling of land is said to be rare. This is partly because a village fund has been set up which is used not just to finance social events but also to lend money to households in need. The community accepts and holds rights over privately owned land as collateral. None of the villagers has yet applied for land use certificates.

As the study on which this short description is based concludes:

The community does not wish for private land registration even on terraces because villagers believe that if someone gets private ownership for a terrace or tea garden, then other people may also ask for it and the whole community may lose all the other lands which are not put under private ownership (i.e. shifting cultivation land). The villagers wish to keep all the land under communal ownership, as even owners of private terraces feel their rights are secure within the community and do not need SLRD [Settlement and Land Records Department, C.E.] land titles for this.

^{iv} Most rice terraces typically need access to irrigation, and the irrigation system will require some form of collaboration between users for its construction and management that might be established under another set of customary rules.

^v Agroforestry is understood here as it is defined by the FAO - 'agroforestry is a collective name for land-use systems and technologies where woody perennials (trees, shrubs, palms, bamboos, etc.) are deliberately used on the same land-management units as agricultural crops and/or animals, in some form of spatial arrangement or temporal sequence'. Shifting cultivation is a form of agroforestry that integrates agricultural crops, animals and woody perennials in temporal sequence: agricultural crops are planted during the cultivation phase along with some tree crops or bamboo etc., and natural tree regrowth occurs during the fallow period when animals are also allowed to graze on the former fields.

^{vi} Now called the Department of Agriculture Land Management and Statistics under the Ministry of Agriculture, Livestock and Irrigation.



Khupra villagers (Photo: Christian Erni)

Case 6. Kayah State: Permanent *taungya* and land tenure in Kwaingan community

Kwaingan community is also located in Demoso Township of Kayah State, but the agro-ecological conditions are very different from those of Khupra community described above. Its territory covering a little less than 11 square kilometre is only about half of the size of Khupra's village land, while its population is almost as large (at 500, while Khupra has about 600 people). They belong to the Kayan Kangan ethnic group. A little over half of its land is also rugged forest land that cannot be cultivated. But of the remaining land, a large part (32%) is flat or gently rolling land with fertile red soils suitable for permanent upland farming (permanent *taungya*), and 4% is irrigated paddy land. Shifting cultivation with a short fallow of four to five years is practised on only 2% of the land, thus it is not contributing much to the livelihood of the community as a whole.

The customary tenure system of Kwaingan community recognizes three types of land ownership – individual, clan and communal – and has several rules regulating access to and the use of other resources. Most of the agricultural land is owned by individuals, some of it jointly by members of a family until the parents decide to split the property up among their sons. Small areas of forestland (13.8ha, about 1.3% of the village land) are owned by clans, all of the remaining forest is communally owned.

A total of 47 of the 86 households have a land use certificate (Form 7 and Form 105). However, these just confirm rights already recognized under customary tenure, and the customary tenure system remains the framework governing land and resources in the community. For example, land owners have the right to sell their land, but their intention has to be made known first to the head of the clan, the family and other relatives. Only when brothers and sisters cannot afford to buy the land can it be sold to others within the community, or to people from neighbouring villages if they are also members of an indigenous people of Kayah State. Also, only members of the community are allowed to extract natural resources such as water, wood or limestone from the communally owned land, and this has to be carried out in accordance with the specific customary rules for the respective resource.

The case of Kwaingan community fully illustrates that a strong customary tenure system does not depend on the presence of communal tenure of all land, but on the assertion of jurisdiction of the community over its entire village territory as a common property. Like in the Pa-O community of Nan Pan, the collective identity of Kwaingan community is strong and they want to keep their village under customary tenure.

Migration

Out-migration of a part of a population in search of land or other livelihood opportunities is another response to resource scarcity. While out-migration eases pressure on land in the communities from where they originate, these settlers, searching for land and livelihoods elsewhere, will inevitably bring about changes in the areas to which they are moving. First, in-migration of settlers can either displace local populations (often indigenous communities) and the forms of land use they have practised (often shifting cultivation). Second, they might live among the native communities and introduce new forms of land and resource use, or, third, the increase of population and pressure on land in the migration area can trigger changes of land use.

Settler migration

In Myanmar, spontaneous internal migration of poor and landless farmers to less densely populated areas in search of land does not currently seem to be happening on any significant scale. Present-day migration destinations are mainly urban areas within Myanmar and abroad.⁸⁰ However, the development of agro-industrial plantations, such as those of bananas in Kachin State, has led not only to dispossession of local farmers, many of whom have been displaced by armed conflicts, but also to the immigration of large numbers of plantation labourers from other parts of Myanmar and from China.⁸¹ While the impact of these plantations on the livelihood and wellbeing of local communities has been amply documented, we know little about how this has affected customary tenure.

State-sponsored settler migration on a significant scale took place in Myanmar only during the British colonial era when the Ayeyarwady Delta was drained for rice cultivation and farmers from Upper Burma were encouraged to move there. Of course, such large-scale settler migration also leads to profound changes among the people who leave their communities on their own initiative, or are resettled by the State, and these changes also affect land tenure systems. A comparative study on land tenure in the Ayeyarwady Delta and in the central dry zone found that British colonial rule had exerted a markedly

different impact on land tenure in the migrant settler communities, compared with the situation in the old villages in the central dry zone.

For people coming from different parts of the country, most likely having different cultures and different customary tenure systems, establishing cohesive communities and recreating community-based tenure systems could be challenging.

Since the beginning of the opening of the Delta for settlement, access was mainly covered by State laws that regulated access, use and ownership of land. Most land is held under private tenure, and many land owners have in recent years applied for, and received, a Land Use Certificate (LUC, commonly known as 'Form 7'). In the survey conducted for the study quoted above, 71% of landowners have obtained an LUC. In these villages there is no longer any communal land. Former communal grazing land has been absorbed by village expansion:⁸²

Even riverbanks and their resources such as Nipa palm (commonly used for making roofs) and other trees fall under the ownership of the adjacent paddy lands or housing compounds. If it is not the case, those riverbanks fall under forestlands.⁸³

All forestlands in the Delta, which consist mostly of mangrove forests, are State land under the management of the Forest Department. However, they are important for the livelihood of many communities and, as described in more detail below, some communities are now looking for some form of protection for their rights to these forests through Community Forestry.

Labour migration

In present-day Myanmar, labour migration, which involves the younger generation leaving their villages to seek employment elsewhere, is the most significant form of migration. Young people migrate to cities inside Myanmar, or in neighbouring countries, above all Thailand. According to a study in Magway and Ayeyarwady regions conducted in 2014 and 2015, migration rates are high, with one in five house-

holds in Magway and one in four households in Ayeyarwady reporting that at least one of their members had migrated. The main destinations are urban areas, above all Yangon and Mandalay, where employment is found mainly in the informal labour market in construction, restaurants and tea shops. To a lesser extent, some migrants find jobs in garment factories where employment is available on a more formal basis.⁸⁴

Out-migration leads to considerable changes in the community structure and can also have an impact on land use and customary tenure. A study conducted in Southern Shan State among Shan, Danu and Pa-O communities⁸⁶ found that out-migration of young people had affected community structure and landholding:

These changes are affecting demographics, as it is predominantly young couples that are migrating to Thailand, leaving their elderly parents and children back in the village. As a result, older farmers whose younger family members have left the village often hire laborers to farm their lands.

The influx of outsiders into the communities, mostly for seasonal work, had affected customary tenure systems, as new forms of tenure, such as 'rental or temporary use of land that had been vacated', have become increasingly common.⁸⁶ At the same time, communities had been experiencing increasing landlessness as a result of population growth, market integration and economic pressure from agribusiness. Nonetheless, the study found⁸⁷ that:

Despite migration and land pressure placing strains on community cohesion, community ties appear strong. This appears to be the case given that many farmers still strongly valued their link to their land and its traditional symbolism as a conduit of their heritage. Land is also viewed as important to preserving community structure. This relevance of tradition is evident in the fact that farmers, even after receiving offers to sell, largely rejected the idea of selling their land.

D. Market integration

Not just demographic dynamics but also shifting global and regional demand for commodities have long triggered changes in land use. New forms of land use practices are readily adopted by farmers when they promise a higher income.⁸⁸ Myanmar was one of the first countries in Southeast Asia where rubber was cultivated. Introduced by the British colonizers in the early 20th century, it was first planted by smallholders in Mon State, and in the 1990s, rising rubber prices led to an expansion of smallholder production in Mon State, Kayin State, and Tanintharyi Region.⁸⁹

The cultivation of cash crops, such as opium poppy, coffee, tea or rubber, have initially often been adopted to complement subsistence production.⁹⁰ However, what can currently be observed throughout Southeast Asia is that other forms of land use are often not just complementary but are rapidly replacing shifting cultivation, as the Case Study below illustrates.

From shifting cultivation to commercial agroforestry systems

In common with upland farmers in the hills and forests elsewhere in Southeast Asia,⁹¹ shifting cultivators in Myanmar are adopting new forms of land use, which are complementing or replacing shifting cultivation, and might lead to changes in customary tenure systems.

The Karen, who live in the Myanmar-Thailand border area as well as in the Bago Yoma are well known for their sophisticated form of rotational shifting cultivation and natural resource management.⁹² Less known are the land use systems they have developed in response to external forces, including increasing land scarcity and market integration in Thailand,⁹³ or, as discussed in the Case Study below, market integration that has led to the development of commercial agroforestry as the main form of land use.

The transition from shifting cultivation to agroforestry generally leads to a consolidation of existing individual customary use or ownership rights, or the replacement of collective by

individual rights. Changes in customary tenure systems as a response to land use changes have occurred throughout history, testifying to the flexibility of customary tenure systems. However, in some cases the changes brought about by

new forms of land use and tenure have profoundly altered social relations within the community, as the case of the Gheba communities in Leiktho sub-Township in Kayin State shows.

Case 7. Kayin State: The shift to commercial agroforestry in Gheba communities

The Gheba are an ethnic group belonging to the Karen ethno-linguistic family. Over the past four decades, the livelihood system of the Gheba communities changed from subsistence farming based on shifting cultivation and a few paddy fields to commercial agroforestry, with very little food production. As a result of the switch from shifting cultivation to commercial plantations of coffee and black cardamom, the land that was formerly communally owned was privatized.⁹⁴ Food self-sufficiency steadily declined as farmers preferred to grow cash crops and buy food at the market. Along with commercialization of farming came commodification of land, and distress land sales by families faced with food shortage led to the emergence of large land owners.

The customary tenure system changed to accommodate changes of land use, but communities were not able to foresee its consequences and take the measures needed to prevent social inequalities. What has been observed⁹⁵ is a...

...gap between individual and collective-level adaptation in the context of the commercial cardamom boom. At the individual level, and because of their favourable position, some farmers adapted quickly to the new commercial opportunities by expanding commercial cropping systems. At a regional level, the sudden boom of commercial opportunities overwhelmed the communities. They were not able to adapt natural resource management rules (e.g. regulation of land sales, conserving communal spaces), leading to a total deregulation of local land markets and rapid social stratification.

In the communities included in the study, only about 10% of all households are small subsistence farmers who continue practising shifting cultivation, along with some agroforestry to generate cash. About 60% are small farmers (with an average of 16 acres/6.5 ha of land) growing commercial crops, 15% are medium sized farmers with paddy land and agroforestry areas and 5% of households are large farmers, with 50 to 100 acres (20 – 40 ha) of land, most of it commercial agroforests.⁹⁶ However, while there is considerable disparity in the size of land holdings, there are no landless households in the communities.⁹⁷

In many indigenous communities elsewhere in the region, commercialization of farming has not just led to privatization of agricultural land but has also given rise to commodification of land, an internal land market and the concentration of land in the hands of a few households who were better positioned to economically benefit from cash-crop booms and invest the capital generated in buying land.⁹⁸ The terms 'enclosure from below'⁹⁹ or 'dispossession from below' have been used to characterize such processes of the privatization of land formerly held under collective tenure, and the subsequent land accumulation and dispossession in the wake of a shift from subsistence to commercial farming.¹⁰⁰ It is important to keep in mind the fact that land transfers and the ultimate land concentration in the Gheba communities of Leiktho took place within the framework of the communities' customary tenure system.

In Leiktho, attempts to have their landholdings registered under statutory law might eventually happen, but, so far, options have been limited, particularly because much of the land is classified as forest land.¹⁰¹ Whether communities maintain de facto jurisdiction over their land and whether land transfers will be allowed to people from outside the community, will be critical in the future. So far, disparities might be deepening, but land remains in the hand of community members and there are as yet no landless households. Once there is an active land market for individually owned parcels, and communities are not able to maintain control over land sales to outsiders, the integrity of their customary tenure systems will be at stake.

As Andersen¹⁰² pointed out, there is an increased possibility that this happens when LUCs are issued. Where informal private land claims inside customary tenure systems are registered to obtain a Land Use Certificate (Form 7) issued by the state, customary tenure opens up to outsiders and it can lead to a breakdown of the system. This is particularly prevalent in most peri-urban areas with the development of a land market driven by investment – and speculation – by urban investors.



Cheba woman in her cardamom agroforest, Kayin State (Photo: Christian Erni)

E. State interference

There are two main forms of State interference that have a profound impact on customary tenure systems in Myanmar. First, the State does not recognize customary tenure and is establishing administrative control over much of the land held by communities, including agricultural land as well as common property resources such as forests and pastures. It is doing this through restrictive legislation such as the Forest Law and the Vacant, Fallow and Virgin (VFV) Land Management Law. As a result, communities might end up being classified as illegally occupying their communal resources. Second, the implementation of formal/statutory land registration instruments such as land use certificates (LUC) can put communities at risk for elite capture of collective lands, increased private sector invest-

ment and commercialisation of agriculture, and loss of agricultural diversity and resilience, all of which can potentially undermine customary tenure systems.

The Forestry Law and the Vacant, Fallow and Virgin (VFV) Land Management Law classify these lands, as well as other parts of community land, such as community forests or pastures, either as State-owned forest land or as 'vacant'. They are consequently open for land concession applications, and are legally removed from community control.

Even though the State is attempting to establish administrative control over the entire country, the introduction of statutory tenure instruments and the enforcement of other laws, such as the Forest Law, have been limited in remote communities - and particularly in those areas under the control of Ethnic Armed Groups - and have affected lowland communities more prominently.

Direct interference by the State is one of the main drivers of change, resulting in the weakening or even demise of customary tenure systems. It goes back to pre-colonial times when the land of Bamar peasant communities were 'organized on a communal basis' and when access to such lands was 'subject to close headman supervision'.¹⁰³ These now became subject to administrative reforms and were progressively privatized, leading to the rise of a new landowning class.¹⁰⁴

In lowland Bamar society, land tenure underwent further profound changes with the commercialization of agriculture during British colonial rule, with the result that, by the end of the colonial era, a high percentage of land was in the hands of absentee landowners, many of whom were foreigners, for instance, Indian moneylenders.¹⁰⁵

In highland societies too, British colonial rule led to changes that had an impact on customary tenure systems. British indirect rule of the frontier regions of its colonial empire considerably strengthened the power of headmen or chiefs,^{vii} or, for administrative convenience, headmen were created among the more egalitarian societies that did not have any, or where the cooperation of traditional headmen was not easily obtained.¹⁰⁶ Emboldened by State recognition and backing, and as commercialization of agriculture and commodification of land engulfed ever remoter areas, some village chiefs might now claim to be the owners, and not just the caretakers, of much or all of the village land. Alternatively, they could use their wealth and connections to the State administration to have parts or all of the common property land registered as their private property, giving rise to inequality, polarization and conflict.¹⁰⁷

In contrast to areas across the border in North-east India, where traditional chiefs and village councils are still important in local governance, in Myanmar these institutions have disappeared in many, if not most, communities. This has been the result of the social change brought about by religious conversion and the expansion of State administration into the hills.¹⁰⁸ Now, it is official village chiefs that are in some cases using their positions to push for land privatization that serves their own interests. An example are some Pa-O leaders in Southern Shan State using their position in their local ethnic organization to broker land sales with urban dwellers or companies and 'who become direct agents of land privatization in their communities against the will of the villagers', which is 'pushed by peri-urban land speculation around Taunggyi'.¹⁰⁹ Another example is the granting of a Vacant, Fallow and Virgin (VFV) permit over customary land to a former village administrator who had applied

for it on behalf of a group of 54 'farmers', whose names were identified by community members as either not from the village, or who were not financially dependent on the land or on farming.¹¹⁰

Large-scale land acquisition under the Vacant, Fallow and Virgin (VFV) Land Management Law

Dispossession through laws like the VFV law, and the allocation of land to private companies is a significant cause of land loss among farmers in the country. Land dispossession by the State for agricultural development has a long history in Myanmar:

During the colonial period, the British introduced the problematic notion of waste land, arguing that it should be a prime target for agricultural investment. The post-independence nationalization of land and the establishment of State farms (and State-owned enterprises) were promoted until the military coup in 1988. At that time the military used the State lands to promote large-scale agricultural development in various ways, leading to the expropriation / displacement of existing users and smallholder farmers. The new Vacant, Fallow and Virgin Land Law, approved by the quasi-civilian government in 2012, offered the possibility of granting VFV land (waste land) to domestic and foreign investors. As such, this action should be seen in a longer historical trend of dispossession of smallholder farmers.¹¹¹

According to the report quoted here, 'from 1991 to October 2016, a total of 5,156,819 acres (2,091,543 ha) of land was allocated by the government to agro-business companies [...] and individual entrepreneurs'.¹¹²

Forced displacement for infrastructure projects

Dispossession and forced displacement have also taken place in connection with large-scale infrastructure development, particularly the construction of hydroelectric dams.

^{vii} Generally, a headman is understood here as the customary leader of a village, a chief/leader who has extended his authority over more than one village. However, 'chief' is also often used as designation for a village headman, referred to as 'village chief', as is the case in, for example, Northeast India.

Hydroelectric projects are a major driver of forced displacement in Myanmar. The reservoirs create large flood areas, and each dam has the potential to displace thousands of people. Myanmar's mountainous regions are suitable for hydroelectric power, and Chinese and Thai companies have financed dams in these areas for decades to supply their energy needs. As Myanmar's economy grows stronger and energy needs for factories and individuals increase, the government plans to continue building dams. Burma Rivers Network reported that as of March 2015, 43 more dams were planned for construction, which would displace more than 100,000 people.¹¹³ According to a recent review of hydropower in Myanmar, a total of 92 hydropower projects are planned to be implemented in the future. Many of these will involve dam construction and further displacement of people.^{viii}

The impact of forced displacement is also felt by the communities on whose lands displaced people are rehabilitated. For example, communities in the vicinity of the Upper Paunglaung dam in Pinlaung Township, Shan State, have lost access to land, used customarily for shifting cultivation and other purposes, because part of their land was given to displaced villagers, 'the consequence being land scarcity that lead to change of agriculture practices, shortening rotation cycles, further deforestation and the collapse of customary practices'.¹¹⁴

Forest rights under the Forest Law and Forest Policies

The post-colonial State of Myanmar continued the forestry policy introduced by the British, by nationalising all forest land and putting it under the jurisdiction of the State Forest Department. State forest management of the 'Permanent Forest Estate' (consisting of both Reserved Forest and Protected Public Forests) focused primarily on commercial timber extraction. Forests have long underpinned the development of various sectors and economic profits, which led to large-scale investment in forestlands and extremely high deforestation rates. The Forest Law 2018 attempted to curb the widespread deforestation by introducing

measures and provisions for better management of the Permanent Forest Estate.

The customary land of communities however, was not considered or acknowledged when the various forest areas were being gazetted, resulting in increased conflict and the loss of rights and access to land held under customary tenure.¹¹⁵ The Forest Law (2018) does allow private sector investment for concessions and extractive industries to invest in the forest areas, adding yet another risk for local communities who depend on the forests for their livelihoods.

As previous stated, the Forest Law (2018) does not adequately address customary tenure rights and additionally it is not aligned with the National Land Use Policy, which has specific provisions to recognise customary tenure. The Law does recognise Community Forestry (CF) - a co-management scheme that grants communities access, use and management rights over forests to be jointly managed together by communities and the Forest Department. CF programmes in some respects have the potential to be a means for securing minimal or partial tenure rights, although they do not specifically address customary tenure (see 'Mangroves and Community Forestry' section below).

While there are not many on-going Community Forestry programmes in Myanmar, recent studies have shown that the process of creating a CF have not always taken pre-existing community organisation, customary tenure or land use into account. For this reason, the customary practices that are central to customary tenure systems, such as shifting cultivation, are often excluded.¹¹⁶ Some communities oppose Community Forestry in Myanmar as it does not provide long-term tenure security (it is valid for only 30 years), the scheme separates forests from other land uses that are all part of customary tenure systems, and it allows for elite capture because a 'group' (forest user group) in the village can be awarded the rights as opposed to the whole community. Lastly, the oversight powers of CF are held by the Forest Department who might have vested interests in the way the forests are managed or used.

^{viii} The plans include 34 hydropower projects on the Ayeyarwady River, eight on the Chindwin River, 11 on the Sittaung River, 21 on the Thanlwin River, four on the Mekong River, and 14 on other rivers. (May Myat Moe Saw and Li Ji-Qing 2019, p. 118).



Ayeyarwady delta (Photo: Antoine Deligne)

Mangroves and Community Forestry

In the Ayeyarwady Delta, all forestlands, which mostly consist of mangrove forests, are considered State land and are under the management of the Forest Department. However, mangrove forests provide major contributions to local livelihoods, including fuelwood, timber, crabs and other aquatic resources. Although communities in the Delta have used mangrove forests for decades, they are, like many communities across the country, legally considered to be encroachers on State forestland.¹¹⁷ After the passing of the Community Forestry Instructions in 1995, communities in the Delta have also applied for Certificates of Community Forestry, which provide them with a 30-year, renewable use right over a designated community forest area. These community forests are governed by rules and regulations formulated by the Community Forest User Groups themselves. Thus, these rules and regulations differ between user groups. In a study conducted in villages in the lower Delta, where communities depend to a large extent on mangrove forests, the Community Forestry model applied by the communities was found to differ from the regulations and other elements of Community Forestry elsewhere in the country:

The members of the CFUGs [Community Forest User Groups, C.E.] had decided at the beginning that they wanted to have individual rather than collective 'ownership' for the specific plantation plots. The model includes 'individual ownership' and 'collective management'. People prefer this because they have no other possibility to own private land as individuals. All land is in a demarcated reserved forest area under the Forest Department.

The fact that these communities are interested in Community Forestry indicates that they are dependent on mangrove forests and other common resources. Their relationship to these resources could be considered to be a form of customary tenure, although we cannot be sure without further investigation. There is very little knowledge - and thus a need for more research - about existing forms of resource governance among communities in the Delta, and their preferred forms of tenure over non-agricultural land and resources. These communities might be keen to have protection that goes beyond a community forest.

Lowland peasant systems under strong State control

A close relationship and sentimental attachment to land is not an exclusive characteristic of indigenous communities but has also been reported from long-settled Bamar communities in the dry zone.¹¹⁹ The fact that customary tenure systems among Bamar communities today are reportedly weaker than they are among indigenous communities has less to do with culture (and thus ethnicity) and is more linked to historical, and more recent, State interference.

Since, for centuries, the relationship to the land of lowland Bamar peasant communities has been governed by State laws, individual private property has become the dominant form of land tenure and, as mentioned in the previous Chapter, communal jurisdiction over land has been lost in the wake of various State administrative reforms since pre-colonial times. Over time, land in these communities has been largely administered by the State. Myanmar's current legal framework has its roots in colonial law, and over the decades since then, 'new laws, executive orders, and policies have been stacked upon existing ones, creating a high degree of disjointedness in the legal framework'.¹²⁰

However, villagers have always also found ways to circumvent the law. Since the 1963 Tenancy Act, through which 'peasants became State-tenants with delegated land-use rights',¹²¹ until 'after the reorientation of the State in 1989, small-scale tenancies, rentals, sales, and mortgages occurred outside of the law. The legal land tenure system became a means for local officials to increase their wealth by, for instance, demanding fees for changing names on paper while it also allowed to keep ownership local'.¹²²

Even though in some places, land – such as grazing land – remains under communal management, 'cultivators use the State-administrated private property model of managing nearly all the farmland'.¹²³ After the passing of the 2012 Land Law, LUCs were issued mainly in lowland areas. This has been found to be relatively efficient and unproblematic since it has been more of a 'rubber stamping [exercise] over land whose ownership status was not really contested because [it] had already been recognised and legitimised (albeit "illegally") by local authorities'.¹²⁴ Thus, as the study conducted in the dry zone referred to above concludes, little has de facto changed for farmers by the issuing of LUCs. This might, however, be different in the uplands, where there has so far been almost no formal recognition of farmers' land rights.

Case 8. Central dry zone: Customary tenure in Bamar communities

In the Bamar community of Gawgyi in central Myanmar, the issuing of LUCs after the passing of the 2012 Land Law 'opened a Pandora's Box, as some long-standing disputes came to the forefront. But eventually, it was more a matter of recognizing who has authority over which parcels and updating the cadastre at cheap costs'.¹²⁵

Despite the pervasiveness of statutory law in lowland Bamar society, elements of the ancient customary tenure systems have been retained and still play a role above all with regard to inheritance. In Gawgyi village...

...beyond the formal land tenure system, and aside from patron-client politics, we saw that what organizes land relations are the dynamics of kinship (alliance, descent, and the succession of generations), the moral and social obligations between family members and a conception of ownership as property stewardship.¹²⁶

There are also other aspects of the bundle of rights characteristic of customary tenure that have been retained and are complementary to those governed through the State system. This includes land held communally on an informal basis. In Bamar villages of the dry zone, Kahan¹²⁷ reports that '(c)ommunal use of grazing land is customary: everybody has the

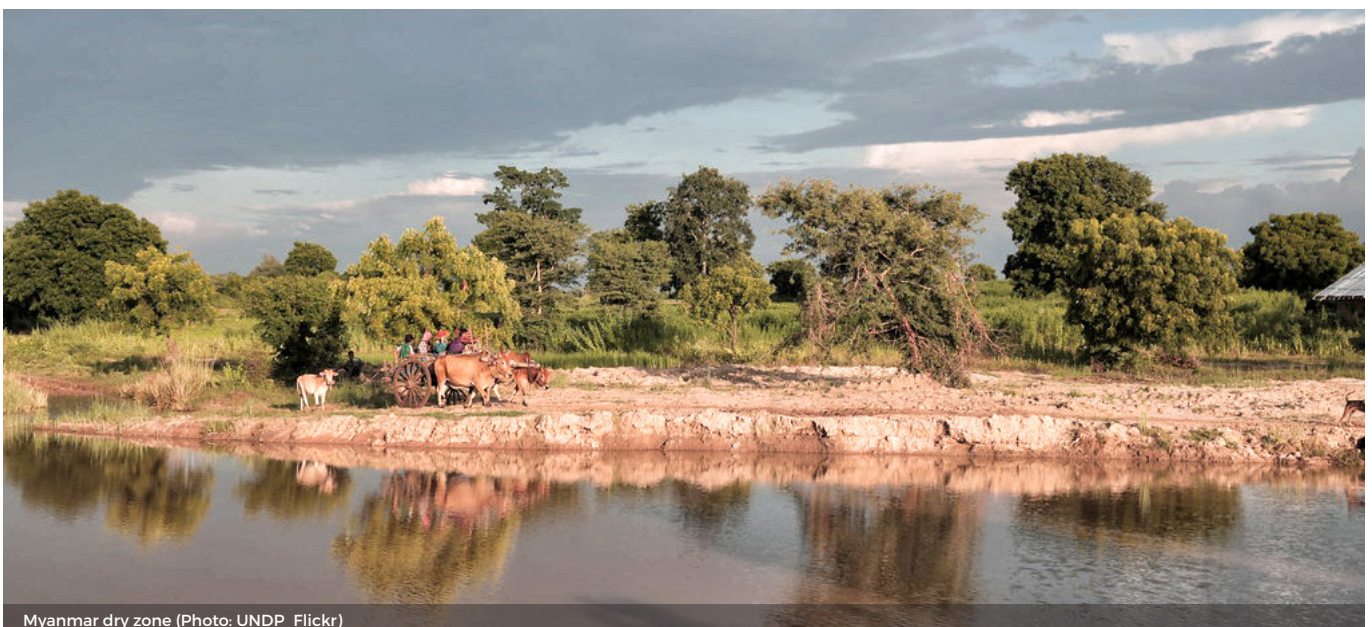
right to allow any number of animals to graze on the fallows, degraded areas and stubble'. However, the fact that overgrazing has led to serious degradation of these common resources¹²⁸ is an indicator that, in this case, the customary tenure system is not functioning well, i.e. that the management rule of open access for all community members has not been changed to a more regulated access. A possible reason for this could be the fact that grazing land has, since British colonial times and until now, been considered State land (today under the jurisdiction of the General Administration Department). It can be expected that, as a result, the sense of 'ownership' and thus communal management is very low.¹²⁹ Thus, it is likely that management could be improved through recognition and protection of customary tenure over these lands.

It seems that these communities have not been able to retain control over community forests and that the State (the Forest Department) appears to have firmly established jurisdiction over the forests in the area.

The use of forestry land for community forestry interventions and/or agroforestry needs to be negotiated with the forest department where user rights are provided. However, the process of officially gaining access to this land is often unclear to community members and ambiguous even amongst government officials.¹³⁰

Customary tenure also regulates use and access rights to specific resources, such as toddy palms. Toddy palms are the property of individuals, who might not be the same as the owners of the land on which the palms grow.¹³¹ It can be expected that there are other aspects of customary tenure systems and the bundles of rights within these systems might still be applied in Bamar communities in the dry zone. However, very little can be found in the available literature. Most studies on customary tenure have been conducted among upland communities, where the State is less present and land and resources are *de facto* still largely governed by customary tenure systems.

Further investigations could be useful to assess what form of common resource management exists in lowland communities, for example, in respect of irrigation water management, fisheries, pastureland, forests, mangroves, and so on, and how these should be recognized and supported.



Myanmar dry zone (Photo: UNDP_Flickr)

Land Use Certificates and conflicts in upland communities

While the issuing of LUCs in lowland peasant communities seems to be unproblematic - as it is mainly the 'rubber stamping' of individual land holdings in the context of already weak or defunct customary tenure systems - there are fears that the introduction of LUCs in the uplands might undermine still well-functioning customary tenure systems.¹³²

So far, LUCs have not been widely applied for in the uplands. Generally, LUCs might be welcomed in places where there is a formal or informal land market and a threat of land grabbing, and where customary authorities are not able to control land transactions. In many upland areas, this is not - or not yet - the case. Thus, farmers might not be interested in obtaining LUCs.

Communities in remote upland areas are often not even aware of the possibility to obtain LUCs, and many of those who know about it lack the knowledge about how to apply. Additionally, they do not have easy access to the relevant government offices, which are located only in major towns. The presence of ethnic armed groups might also make it less likely that communities apply for LUCs, because government officials do not enter these areas or because communities prefer to seek recognition of their land rights by the respective authorities within these parallel governments.

A study¹³³ among Karen communities in a Karen National Union (KNU) controlled area in northern Mon State showed that very few farmers had Land Use Certificates. Most farmers hold their land under customary recognition, 'making these parcels vulnerable to land grabs by other actors'.¹³⁴ Only six out of 47 respondents had a LUC (Form 7).¹³⁵ The authors of the study concluded that '(t)he reluctance to engage with the formal system is a result of lack of awareness, language barriers, fear of authority and prohibitive costs'.¹³⁶ Language is certainly an issue since land documentation and registration have to be produced in the Burmese language, yet only 57% of the respondents said they could read and write in

Burmese.¹³⁷ However, another reason for this low rate could simply be that people did not feel it was necessary to have an LUC since they had confidence in their customary tenure. None of them had any title issued by the KNU either.

LUCs (Form 7) have so far been issued only for land under permanent cultivation such as paddy fields, orchards or plantations. Until the amendment of the Farmland Law in 2020, shifting cultivation land, in particular fallow land, was not eligible. Moreover, this amendment does not yet make it clear how shifting cultivation will be recognized in practice.

Applying for use rights for agricultural land (LUCs), or a temporary use right for forest land (Community Forestry Certificate - CFC) is seen by some community members as a way to retain some rights over at least some parts of their land. However, this is rejected by others who consider the acceptance of such certificates - whether LUCs or CFCs - a recognition of the State's claim to ownership of their customary land, through which they would lose control over their land and undermine their customary tenure system. Some communities in the Naga Self-administered Zone of Sagaing Region, in Kayah and Shan State have explicitly rejected the option of obtaining LUCs.¹³⁸

In many cases, people might have acquired LUCs because they were the only option at the time, or local elites might have acquired them at the expense of the rest of the community and the community's customary tenure system.¹³⁹ As is the case elsewhere in the world, the government's offer of LUCs (maybe less so CFCs) potentially pitches individual interests against the collective interest of the community. As Wily observed:¹⁴⁰

Nonetheless, the existence of LUCs in a community does not necessarily preclude the possibility of recognition of customary tenure systems and their co-existence, either because they would apply to different types of lands or because individual tenure continues to be regulated somewhat by the customary rules, for example in terms of inheritance, conflict resolution, and so on. A study in Northern Chin communities¹⁴¹

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The more worldly-wise in a community may rationally calculate that abandonment of customary norms in favour of those offered by statutory norms is the safer means to protect individually possessed lands against wilful denial of possession or access by governments, the courts, entrepreneurs, or as against acquisitive individuals and families within their own ranks. While this may save possession for individuals, albeit in altered form, it does not save community jurisdiction or community tenure.

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shows that the existence of statutory tenure rights for plots of agricultural land can be fully integrated into the wider customary tenure system.

F. Armed conflicts

The ultimate form of State interference is the use of force, a reality that communities in Myanmar’s ethnic nationality areas have had to endure for decades. And for many there is still no end in sight despite local and national ceasefire agreements. Armed conflicts have a devastating impact on all aspects of life of communities, including customary tenure systems. These are affected mainly in two ways. First, since communities have been forcefully relocated by the State security forces, or had to evacuate their villages to escape violence and forced labour, they have been alienated from their ancestral lands over which they held customary tenure. In the resettlement areas, they often lack strong tenure security, and they might be competing over land and resources with communities who are native to the area and have customary tenure over that land. Many have remained landless, making a living as daily labourers. For the displaced communities, restoring customary tenure systems under these conditions is difficult, if not impossible. Returning to their ancestral territories might be prevented by the security forces, or it might, for other reasons, be difficult. In communities,

which were relocated long ago, many who are now adults were born in the resettlement site and do not have any relationship to their ancestral land, and are unwilling to go there with their parents.¹⁴²

Second, the existence of parallel governments of the Myanmar State and those established by ethnic armed groups, and their competing claims for legal jurisdiction and policies regarding land and resources, are causing a lot of insecurity among communities. Some ethnic armed groups, such as the Karen National Union (KNU) and the Karenni National Progressive Party (KNPP), have drawn up their own land policies, recognizing to some extent customary land and customary tenure systems. The KNU land policy was published in 2015.¹⁴³ The KNPP land policy has recently been finalized,¹⁴⁴ but has not yet been published. A Kachin and a Mon land policy are allegedly in the process of being written.¹⁴⁵

The KNU land policy is implemented in the seven districts under full or partial KNU control. By May 2017, 133 collective customary land claims and 68,530 family plots, and other types of land (community forests, wildlife sanctuaries, reserved forests and use rights) had been registered.¹⁴⁶ The issuing of land use certificates was greatly appreciated, but some villagers ‘stressed that these certificates would be less legitimate before the Myanmar national law than a land use certificate issued by the Myanmar government’,¹⁴⁷ and thus they found themselves to be ‘caught in the dilemma of which land use policies to adhere to—those of the KNU or those of the Myanmar central government’.¹⁴⁸

While some land users in the mixed-control area might prefer to adhere to the KNU’s policy, others might prefer to follow the Myanmar government’s legislation (source: personal communication, respondent anonymised). Adhering to both sides’ legislations is rather challenging due to their different nature. This conflictual overlapping of different institutions adds another level of complexity to land governance.¹⁴⁹

The complexity faced by Karen villagers in an area of overlapping administration and land

governance has also been documented by another recent study,¹⁵⁰ which found that:

Karen households are caught in-between two land administration systems which overall creates a greater feeling of insecurity. In many instances, Karen households expressed the little trust they had in any of the titles issued (whether Form 7 or KNU certificates), although, they tend to apply for both by default. In addition, private projects (mining, rubber plantations, logging, road construction) are implemented around several studied villages, both with formal or informal agreement from the central

government or the KNU and [this] generates confusion and concerns for Karen villagers.

Forcefully relocated communities

As of December 2019, 457,000 people had been displaced by conflict and violence in Myanmar.¹⁵¹ Some had left their villages to seek security elsewhere, in other cases whole communities had been forcefully resettled by the State. The following case study tries to document the impact forced relocation has had on communities in respect of both their livelihoods and the customary tenure system.

Case 9. Bago Region: Displaced Karen communities¹⁵²

Thar Byu village is a community of the Sgaw Karen (who call themselves Pgaz k'nyau, meaning 'human being'), who have lived in the Bago Yoma for hundreds of years. It used to be located in the interior of Bago Yoma. In their old village, people were shifting cultivators, growing all the food they needed, selling only a few products to make some money for buying whatever they could not produce themselves. They used to govern land and natural resources according to their customary tenure system. This included the ban on hunting certain animals and strict protection of forests that were considered sacred.

In 1975, the army forcibly relocated all settlements in Bago Yoma to the lowlands as part of its 'Four Cuts Policy' aiming to undermine ethnic armed groups by cutting off their access to food, funds, information and recruits. The people of Thar Byu were relocated together with people from Bamanlite, Nya Wa Kwi and Theme villages to a place near the Burman village of Thar Pin Gone. There was little food and water and more than 40 people died. The army forced them to be porters and to work on the army's paddy fields.

In 1981, the Forest Department launched a teak reforestation project in the nearby concession areas. For 20 years, until the year 2000 when the reforestation project ended, people had to work for the Forest Department, living in temporary huts, farming their fields and planting teak during the planting season. When the reforestation project closed, people had work as daily labourers, some started to take up shifting cultivation and developed the land that was suitable for permanent rain-fed farming. But only 39 of the 63 Karen families in Thar Pin Gone resettlement site now have some land and might be able to survive by farming in the future. For the others it is very difficult to find the time to develop land, and they are competing for the remaining arable land with the Bamar villagers who live in the same area.

When the people from Thar Byu were resettled in Thar Pin Gone, they had to use the surrounding forests to meet their needs for building materials and fuelwood. As other resettled communities and the local Burman villages depended on the same forests, these soon became depleted of timber, non-timber forest resources, game and fish. What happened was the result of a typical open-access, first-come-first-served situation over which there is no control. Whatever customary management might have existed in local Bamar villages,

there was little chance that this would be upheld when the government took control of the land and brought in the resettled communities. And the resettled Karen were concerned only with their bare survival, a situation in which the development of a sense of collective responsibility, restraint in resource use and long-term management planning was unlikely to develop.

There was an attempt to have an area designated as community forest, for which they intended to eventually obtain a Community Forestry Certificate. However, it was impossible to enforce any rules. As the villagers in Thar Pin Gone resettlement site explained, people cannot monitor each other. Thus, their attempt to recreate at least one aspect of their customary tenure system failed.

The Karen of Thar Pin Gone have to go to their old village territories, many hours' walk away, to obtain timber and other forest products. Several checkpoints have been set up by the Forest Department and, on the way back, the villagers have to pay bribes to the officers. The forests of their old village territory are also already badly degraded as illegal loggers have penetrated deep into the interior of Bago Yoma. Communities who could try to protect their forests as they used to do in the past when they held jurisdiction over their land under customary law, are no longer living there.

Many of the older generation would like to return to their old village territories and re-establish their communities, land use and customary tenure system, since they still know the land and the customary law they used in governing it. In fact, a few did return to try this. However, the younger generation - those born in the resettlement site - have lost connection to their ancestral territories, and, along with it, the rich traditional knowledge about the forests, and the plants and animals that live there. They also have little knowledge about how land and resources are managed according to customary law. None of the younger ones want to leave, despite the hard life they have in a place with few opportunities to make a decent living. For them, the old village is too far away, there is no road, no school, no clinic and no shop. Many would rather try to go to the cities in search of jobs.

The customary tenure system of Thar Byu community is no longer functional. The case study is included here because the knowledge and the ethical principles underlying it are still there, in the memory of the older generation. Given the opportunity to regain control over their ancestral land, or, less likely, to obtain sufficient land and resources in the resettlement site or elsewhere, there is still a possibility that these memories might be revived.



Karen elders. Many of the older generation would like to return to their old village land (Photo: Prawit Nikornuaychai)

4 Addressing customary tenure systems on a spectrum

The most important factor that determines the fate of customary tenure systems is the extent to which statutory tenure and State administration interfere or overlap with customary tenure arrangements and the related community governance institutions. Today, in one way or another, State laws have had an impact on all customary tenure systems, even in the most remote communities. This impact might be minimal, or it might result in an overlapping of customary and statutory tenure systems, and ultimately the replacement of the former by the latter. A threshold is reached when a community ceases to hold jurisdiction over its territory, governed through customary tenure.

Thus, a basic distinction is proposed between partial and complete systems, reflecting the extent of community jurisdiction in customary tenure systems. In Figure 1 below, the customary tenure systems explored by the Case Studies in this report are arranged in a continuum from complete to partial systems and then on to the absence of customary tenure. This distinction certainly cannot do justice to the diversity of customary tenure systems encountered in reality. Given the dynamic nature of customary tenure systems and the multitude of causes and agents of change, identifying a system as either partial or complete might sometimes be difficult. However, this distinction might help in exploring mechanisms for the protection of customary tenure systems.

Partial customary tenure systems

Partial customary tenure systems can theoretically occur anywhere the State has established administrative control - e.g. through Reserved Forest, Protected Public Forest and Protected Areas - and introduced formal land registration instruments. These include the issuance of VJV land concessions, or instances where a land market has emerged formally or informally. In an attempt to protect their rights against such

changes, all over the country farmers are now applying for Land Use Certificates or Community Forestry Certificates. They might be used in addition to customary tenure arrangements, thus overlaying but not necessarily replacing them.

The issuing of LUCs has so far been inconsistent in the uplands, in particular in remote areas, as has been their impact - or that of any earlier tenurial instrument - on customary tenure systems. In the lowlands, however, the situation is very different. In some instances, for instance in the Bamar peasant communities of the dry zone discussed in this report, community jurisdiction has been largely replaced by State jurisdiction; the community territory is not held as common property and only some elements (like tenure rules for grazing land) of the original customary tenure system have been retained. Thus, such systems cannot be considered full but, at best, partial systems of customary tenure.

The ultimate form of State imposition on communities is their forced relocation in the wake of armed conflict, for large infrastructure projects like dams or for land concessions. As the case study of the forcefully resettled Karen communities in Bago Region shows, the customary tenure in these communities is no longer functional, simply because they have been removed from their ancestral territory. It can at present not even be considered a 'partial' system because none of the former elements of their customary tenure system can be retained and applied in a situation of resource scarcity, poverty and social breakdown. However, in contrast to the case of lowland peasant farmers where the customary system had long been replaced, there is still the possibility for customary tenure to be revived in these communities, as a complete system, if they are allowed to return to and regain control over their ancestral land, or if they acquire rights to land and resources somewhere else.



In Thar Pin Cone resettlement site in Bago Region (Photo: Prawit Nikornuaychai)

Complete customary tenure systems

A customary tenure system can be called complete when the community territory is considered common property over which the community holds jurisdiction through customary law. A key indicator of community jurisdiction is not the presence of collective (communal) tenure rights, but the effective enforcement of customary tenure by the community governance institution (be it the formal village administration or the traditional self-government institution). Above all, it involves the assertion of control by the community over the transfer of land, including restrictions on, or regulation of, sale to outsiders.

In the diagram below, the case studies discussed in this report are placed in a dual-axis matrix, arranged along the horizontal axis according to the degree of State vs. community jurisdiction and along the vertical axis according to the degree of progression from communal to private tenure.

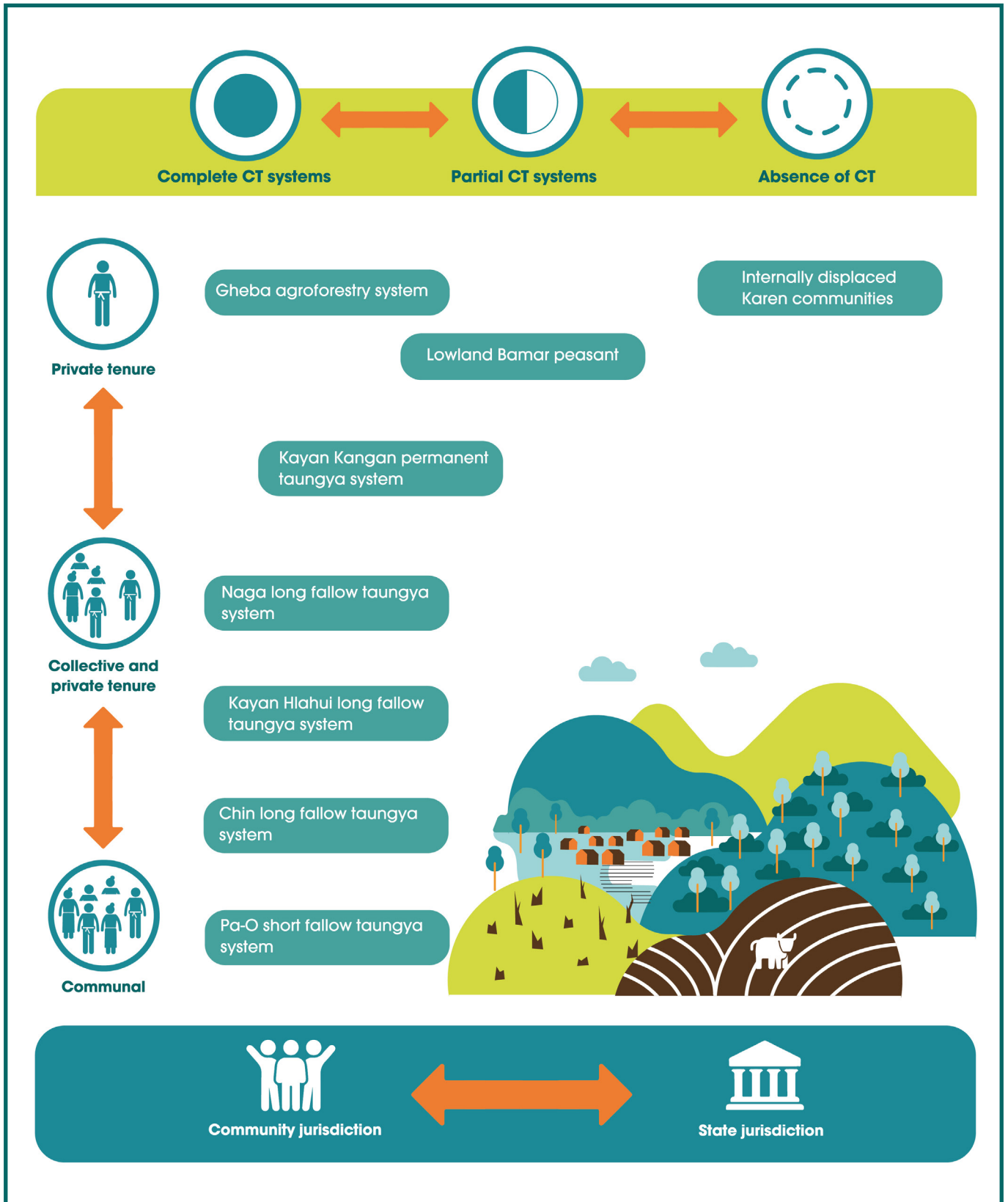
For complete systems, communities could be given a large degree of autonomy in governing their land and resources. In some cases, instead of issuing formal communal land titles, recognition and protection of customary tenure could be realized through the creation of zones

comprising several villages or an entire ethnic group, where customary tenure applies as part of local self-governance. For partial systems, a different form of recognition might be needed, perhaps covering only whatever collectively held land and resources have been excluded from the jurisdiction of statutory law, and when these communities are determined to hold on to them to prevent the complete breakdown of customary tenure.

A similar approach would be needed for communities such as the descendants of migrants in the Delta. They might wish to establish community-based governance systems for critical common resources – such as mangrove forests – that go beyond the limited use rights, as exemplified by the present CFC. However, this has so far not been allowed.

Finally, particular attention needs to be paid to communities whose customary tenure systems have become defunct as a result of forced displacement, but who want to revitalize these, once the conditions for this to happen are met. This might be either when they are able to return to their ancestral territories, or when restitution is completed in other ways and they are able to re-establish community jurisdiction over their village land. Mechanisms to enable the revitalisation of customary tenure should be considered in the future.

Figure 1: Customary tenure system continuum



5 Conclusion: The need to protect community jurisdiction

This report began by identifying commonalities of customary tenure systems, and the first common characteristic mentioned is community jurisdiction over its territory. The examples of the different types of customary tenure systems discussed in the subsequent Chapters confirm that no matter how much the system has changed over time - i.e. to what extent there are collective or individual rights - the community's determination and ability to maintain its jurisdiction over its territory, and to be governed by its own internal rules and regulations, is crucial for the sustainability of customary tenure systems.

Pressures on customary tenure systems are manifold. The example of the Gheba communities in Kayin State shows that commercialization of agriculture, individualization of land ownership and the emergence of a land market can lead to what has been called 'dispossession from below', the loss of land by households in distress and the concentration of land in the hands of a few of the wealthier community members. All the changes of tenure rules and land transactions have taken place within the framework of the customary tenure system. And, so far, there are no landless households in these communities. However, all this could change once land becomes freely transferable to outsiders, which is more likely once it is registered under, and subject to, statutory tenure interventions.

According to the Farm Land Law of 2012, for example, LUCs can be freely transferred, and thus also sold to any Myanmar citizen. This contradicts the widespread practice in customary tenure systems to ban land sales to people from outside the community, making enforcement of such rules more difficult and thus potentially undermining customary tenure systems.

A study conducted among Shan, Danu and Pa-O communities in Southern Shan State, which has already been referred to in the dis-

cussion on labour migration, found that even though all land (except small community forests) is privatized, most villagers use customary land tenure management and dispute resolution practices, rather than official, government-sponsored mechanisms. The study also found that 'farmers express a strong emotional connection to the land and little desire to sell it'.¹⁵³ However, there is an increase in landlessness as a result of population growth and market integration, including economic pressure from agribusiness. Despite the expressed desire to 'retain the community structure, each of the farmer organization leaders discussed a definitive increase in land sales' and it is expected that '(t)hese changes will certainly impact the character of communities as local bonds weaken and there are more outsiders in the villages'.¹⁵⁴

Numerous NGO leaders and farmer organization leaders expressed serious concern about the rise of land speculation and its effect on community structure and land tenure practices. Concerns included farmers being priced out of buying new lands by the arrival of wealthy outsiders, farmers selling their lands for a relatively small amount of money upfront and then ending up landless and with few options once the money is spent, and the arrival of middlemen profiting from land speculation and potentially creating pressure for forced sales. Of course, it should be noted that many farmers expressed a commitment to keep their lands and continue their traditional practice of transferring tenure through inheritance, so these concerns may eventually prove to be overstated.¹⁵⁵

While the commitment by farmers might be there, the question is whether the community as a whole is able to withstand the pressures on its customary governance institution and maintain jurisdiction over its territory. They stand a better chance to do that if there is official legal recognition and protection of customary tenure systems.

As recently as 1999, the World Bank came to the conclusion:¹⁵⁶

It is now recognized that formal title, under conditions of low population density, is not necessarily the most cost-effective and desirable way to ensure secure tenure and facilitate land transfers. One alternative is to award property rights to communities, which then decide on the most suitable tenure arrangements.

A key lesson learned from this analysis is that the effectiveness of customary tenure systems, and thus the security it provides for community

members, does not depend on conditions of low population densities, the presence of collective rights, or a particular kind of livelihood system or type of land, but on the assertion of community jurisdiction. As Wiley recommends, 'Preferably therefore, it is the community-based regime of tenure itself that needs protection, and irrespective of the lands to which it applies.'¹⁵⁷ Even if a customary tenure system is 'partial', the community's jurisdiction over land and resources in its territory needs to be recognized, regardless of the actual forms of tenure for the different land types within the community's territory.



Cardamom agroforest in Kayin State (Photo: Christian Erni)

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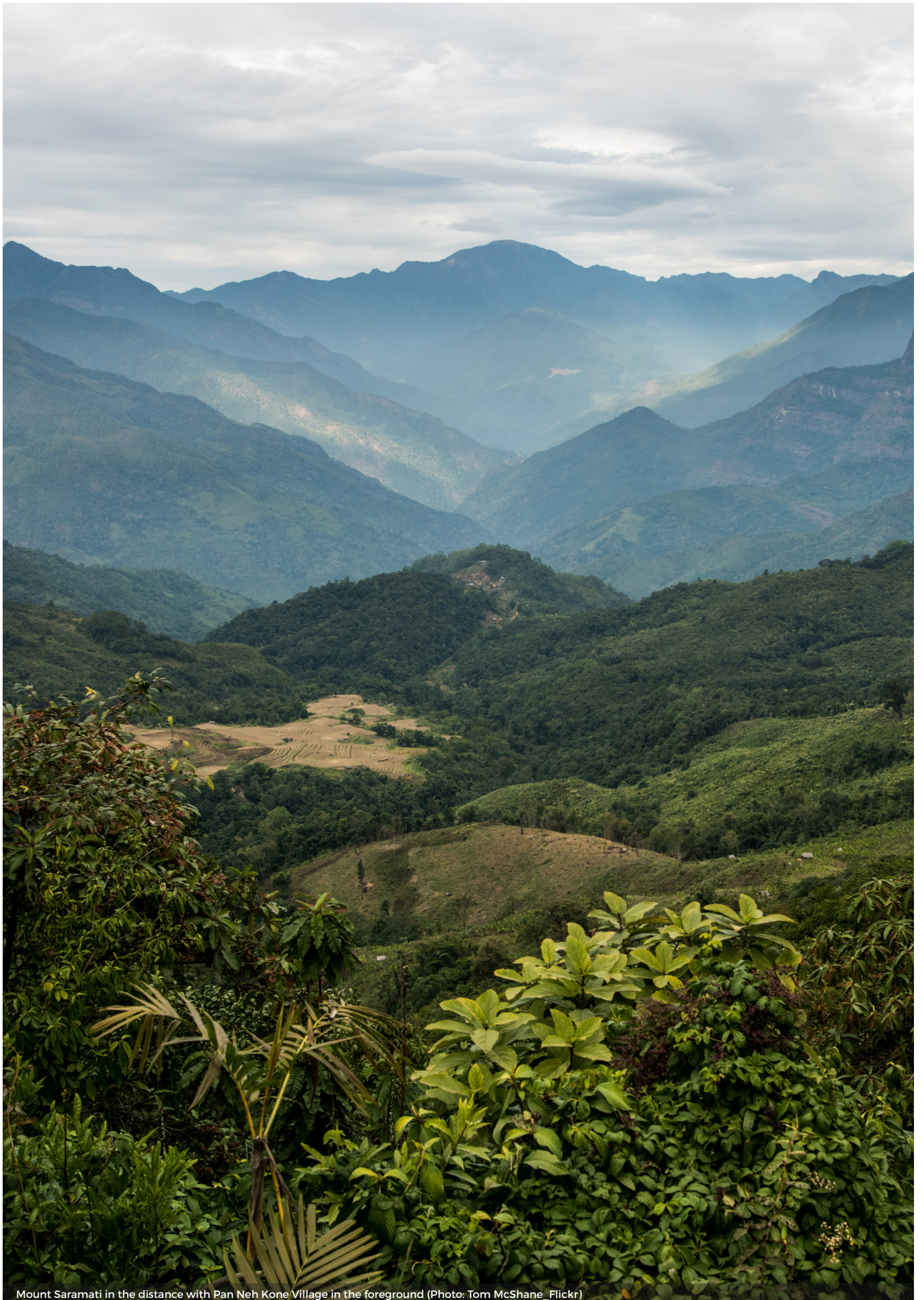
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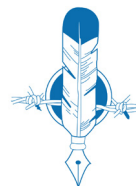
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- 2 Wily 2012a, p.2.
- 3 Ibid.
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- 5 Chambers 2018, p. 91, quoted in Moore 2019, p. 60.
- 6 Butta and Chambers 2018, p. 29, quoted in Moore 2019, p. 59.
- 7 See report by United Nations Special Rapporteur Erica-Irene Daes of 2001.
- 8 Wily 2016, p.461.
- 9 Wily 2012a, p.2.
- 10 Wily 2016, p.462.
- 11 KMSS-Loikaw 2017a, 2017b.
- 12 Andersen 2016, p. 4.
- 13 Boutry et.al 2018, p. 26.
- 14 See e.g. Andersen 2015, p. 10.
- 15 See e.g. Schlager and Ostrom 1992, p. 251, Ewers 2015, p. 30, Allaverdian et al. 2017, p. 26. The term 'bundle of rights' is not only applied to customary tenure but also to statutory law.
- 16 Schlager and Ostrom 1992, p. 251.
- 17 Barry and Meinzen-Dick 2010, p. 9.
- 18 Kahan 2001, p.6.
- 19 See e.g. Scott 2008 and 2009.
- 20 Ennion 2015, p. 34.
- 21 Kunstadter 1978, p. 126.
- 22 Ibid., p. 128.
- 23 Boutry et.al. 2017, p. 52.
- 24 Huard 2020, p. 88.
- 25 See e.g. Ewers 2015 on the Chin, RRtIP 2018 on the Makury and Tangkhul Nagas.
- 26 See e.g. Ewers 2016 p. 7, referring to Lehman 2003.
- 27 See Andersen 2015, p. 44.
- 28 Andersen 2016b, p. 1.
- 29 RRtIP 2018, p. 43.
- 30 Andersen 2015, p. 10.
- 31 See e.g. Kunstadter 1978, p. 126, KMSS-Loikaw 2017 a and b.
- 32 Wily 2012 b, p. 1.
- 33 Baver et al. 2013, p. 59.
- 34 Andersen 2016b, p. 8.
- 35 Scurrah et al. 2015, p. 15.
- 36 Ennion 2015, p. 30.
- 37 Andersen 2016b, p. Iv and p. 5.
- 38 Ibid., p. iv.
- 39 Wily 2016, p. 462.
- 40 Antoine Deligne personal communication. On goat rearing in the dry zone see Boutry et al. 2017, GRET 2019.
- 41 Other examples are privatization as a result of the adoption of rubber by Karen communities (Andersen 2016, p. 4), or permanent gardens in Northern Chin communities (Boutry et al. 2018). See also Nongkynrih 2005 on privatization of communal shifting cultivation land in Meghalaya in Northeast India or Ironside 2012 and 2015 on Ratanakiri province in Cambodia.
- 42 RRtIP 2018.
- 43 Ibid., p. 25.
- 44 Ibid., p. 31.
- 45 Erni 2018, p. 65.
- 46 Boutry et al. 2018.
- 47 RRtIP 2018, p. 36.
- 48 Experiences in Cambodia for example have shown that narrowing the meaning of 'community-based' and thus the application of the concept of customary tenure to a single village or local group might go against the will of the communities concerned and the actual customary tenure systems. A more flexible approach is used in the Philippines, where the Indigenous Peoples' Rights Act provides for the titling of Ancestral Domains, which can comprise several villages or a whole indigenous ethnic group. This could be applied in Myanmar for example in former conflict areas now recognized as being a 'Self-Administered Zone' (Naga, Danu, Pa'O, Pa Laung, Kokang Self-Administered Zones) or a Self-Administered Division (Wa).
- 49 KESAN 2019.
- 50 Frontier Myanmar 2019a.
- 51 In the Philippines, a precedent was created by the recognition of the ancestral domain of the Tagbanwa of Coron island, which comprises both ancestral land, inland lakes, reefs and ancestral waters (De Vera and Zingapan 2017).
- 52 Boutry and Ivanoff 2017, p. 125, Ivanoff and Boutry 2017, p. 8.
- 53 Ivanoff and Boutry 2017, p. 4.
- 54 Arunotai et al. 2007, p. 17.
- 55 Sather 2006, p. 266.
- 56 See Anderson 1890, Sather 2006, Boutry and Ivanoff 2017, http://factsanddetails.com/southeast-asia/Myanmar/sub5_5d/entry-3934.html.
- 57 Ivanoff 2018.
- 58 Human Rights Watch 2015, p. 5, Ivanoff and Boutry 2017, p. 7.
- 59 Wouters 2017.
- 60 Boutry et al. 2018, p. 21.
- 61 Ibid., p.21.
- 62 Faxon and Knapman 2019, p. 14.
- 63 Ibid., p. 14.
- 64 Ibid., p. 15.
- 65 Source: Boutry et.al. 2018; Ewers 2015, p. 34.
- 66 This paragraph is based on Andersen 2015, p. 34, and Boutry et al. 2018, p. 47.
- 67 Andersen 2015, p. 40.
- 68 Boutry et al. 2018, p. 47.
- 69 Ibid.
- 70 Andersen 2015, p. 40.
- 71 Boutry et al. 2018, p. 47.
- 72 Andersen 2015, p. 40.
- 73 Boutry et al. 2018, p. 49.
- 74 Andersen 2015, p. 45.
- 75 This case study is based on the report by Karuna Mission Social Solidarity (KMSS) Loikaw 2017b.
- 76 Ibid., p. 43.
- 77 Ibid., p. 44.
- 78 Ibid.
- 79 Ibid., p. 45.
- 80 See e.g. World Bank 2016 and Griffiths and Ito 2016.
- 81 BNI online 2019, Frontier Myanmar 2018 and 2019b.
- 82 Ibid., p. 86.
- 83 Ibid., p. 87.
- 84 World Bank 2016, p. 7.
- 85 Baver et al. 2013.

- 86 Ibid., p. 56.
- 87 Ibid.
- 88 See e.g. recent studies in northern and central Lao PDR (Vongvisouk et al. 2014) and in Sarawak, Malaysia (Mertz et al. 2013).
- 89 Kenney-Lazar and Wong 2016, p. 1.
- 90 In Indonesia, for example, small farmers have seized the opportunity offered by global demand for rubber and successfully combined rubber and shifting cultivation in a dual economy that provides a high level of long-term economic security (see Dove 1990 and 2011).
- 91 See e.g. Van Noordwijk et al. 1995, Burgers and Boutin 2001, Dove 1990 and 2011, Cramb 2009 on Indonesia, Vongvisouk et al. 2014 on Laos, Mertz et al. 2013 on Malaysia.
- 92 Critically discussed by Walker (2001).
- 93 See e.g. Erni and Nikornuaychai 2015.
- 94 GRET 2019, p.39.
- 95 Ibid., p. 40.
- 96 Ibid., p. 47.
- 97 Ibid., p. 41. While the study did not find any landlessness in the villages, it acknowledges the possibility that people who have become landless might have left the village.
- 98 This has been documented, for example, in the highlands of Sulawesi island in Indonesia. Li 2010.
- 99 Li 2010, 2014.
- 100 Similar developments are happening in indigenous communities getting engaged in cash-cropping of corn in northern Thailand, where social disparities are widening and a class of entrepreneurs is emerging in the communities. See e.g. Erni and Nikornuaychai 2015.
- 101 POINT 2019, p. 36.
- 102 Andersen 2016, p. iv.
- 103 Boutry et al. 2017, p. 63.
- 104 Ibid.
- 105 Ibid., p. 64.
- 106 In Northeast India, for example, British administrators appointed villagers as *gaonbura* (village elders or leaders) who served the District Commissioner in governing tribal villages and, among others, collecting house-taxes. Today, *gaonburas* continue to be part of the local governance system. Among the Angami Naga, who traditionally have not had any chiefs, this undermined village governance by elders and created a 'cult of chiefship, which was unknown to Angami society' (Nakhro 2009, p. 11). The British used the same approach for the frontier areas in Myanmar. In the Kachin Tracts, for example, the Kachin Chiefs (*Duwas*) were left in charge of internal administration based on customary law. However, the colonial government also appointed officials called *taung-oks* who were in charge of tax collection and supposed to assist the *Duwas* (Nyunt 2016, p. 2).
- 107 See e.g. on elite capture in the context of land titling in the Philippines: Gatmaytan 2007 and 2013.
- 108 See e.g. on changes in leadership among the Chin: Myochit 2016, GRET 2018.
- 109 Antoine Deligne, personal communication. Similar developments have been documented by Boutry (2018) for the peri-urban area of Hakha town in Chin State.
- 110 Fogerite 2020.
- 111 San Thein et al. 2018, p. iv.
- 112 Ibid., p. 35.
- 113 Brown 2015, p. 10.
- 114 Antoine Deligne, personal communication.
- 115 Forgerite 2019.
- 116 Springgate-Baginski, 2013.
- 117 Feurer et al. 2018, p. 6.
- 118 Ibid.
- 119 Boutry et al. 2017, p. 62, 149.
- 120 Mark 2016, p. 446.
- 121 Huard 2020, p. 95.
- 122 Ibid.
- 123 Mark 2016, footnote 13 on p. 445.
- 124 Scurrah et al. 2015., p. 16.
- 125 Huard 2020, p. 96.
- 126 Ibid., p. 97.
- 127 Kahan 2001, p. 32.
- 128 Ibid., p. 33.
- 129 Maxine Boutry, personal communication.
- 130 Ibid., p. 6.
- 131 Ibid.
- 132 Andersen 2016, p. iv.
- 133 Norwegian Refugee Council 2019.
- 134 Ibid., p. 9.
- 135 Ibid. p. 37.
- 136 Ibid. p. 9.
- 137 Ibid.
- 138 Personal communication with Ke Jung Kimsing, Director of Indigenous Peoples' Partners (IPP).
- 139 Peter Swift, personal communication.
- 140 Wily 2016, p. 462.
- 141 Boutry et al. 2018.
- 142 See e.g. case study of the forcefully relocated Karen communities in Bago region in: Erni 2018, p. 40.
- 143 https://www.tni.org/files/article-downloads/knu_land_policy_eng.pdf.
- 144 Mi Kamoon, personal communication.
- 145 Khu Khu Ju 2018.
- 146 KESAN 2018.
- 147 Lundgaard-Hansen et al. 2018, p. 15.
- 148 Ibid., p. 15.
- 149 Ibid., p. 21.
- 150 Boutry and Allaverdian 2018.
- 151 Internal displacement monitoring center (iDMC) web-site, <https://www.internal-displacement.org/countries/myanmar>.
- 152 Based on a field study conducted by Prawit Nikornuaychai, partly published in Erni 2018.
- 153 Baver et al. 2013, p. 56.
- 154 Ibid., p. 59 and 60.
- 155 Ibid., p. 76.
- 156 Deininger and Binswanger 1999, p. 269, quoted in Wiley 2016, p. 467.
- 157 Wiley 2016, p. 463.



Mount Saramati in the distance with Pan Neh Kone Village in the foreground (Photo: Tom McShane_Flickr)

This Thematic Study has been elaborated in collaboration with the members of the MRLG Alliance for the Recognition of Customary Tenure in Myanmar:



The Mekong Region Land Governance Project (MRLG) aims to improve the land tenure security of smallholder farmers in the Mekong Region and has been operating in Cambodia, Laos, Myanmar and Vietnam since April 2014.

MRLG is a project of the Government of Switzerland, through the Swiss Agency for Development and Cooperation (SDC), with co-financing from the Government of Germany and the Government of Luxembourg.

For more information on MRLG, please visit

www.mrlg.org

Mekong Region Land Governance

Unit 11, House No. 262, Ban Saphanthong Kang,
Sisattanak District, Vientiane Capital, Lao PDR
PO Box 2973, Vientiane, Lao PDR 01000
Phone: +856 21 454 807
Email: info@mrlg.org

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