

## The Fate of Customary Tenure Systems of Ethnic Minority Groups in Upland Myanmar

*An Analysis of the Land Tenure Reform Process since 2012*

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### ABSTRACT

Myanmar is a multi-ethnic state with 135 officially recognized ethnicities. The uplands are home to ethnic minority groups like the Chin, Kachin, Pa-O, or Naga. These groups attained semi-autonomous status during the colonial era and were largely left untouched by the passing military regime. Recent ceasefire agreements have facilitated the incorporation of these frontier lands for investment purposes.

This strategy is accompanied by a land tenure reform process since 2012. The Farmland Law (2012), the Vacant, Fallow and Virgin (VFV) Lands Management Law (2012), and the recently enacted Law Amending the VFV Lands Management Law (2018) are designed to cause a shift from common to private property regimes. These laws are contrasted by the National Land Use Policy (2016), in short NLUP, which guides decision makers in the development of the country's first ever National Land Law. The NLUP is an important step forward in the recognition of customary tenure systems.

I examine the National legal framework of land governance and provide insights into the land tenure reform process of a country in transition, and the inevitable challenges and opportunities faced by the people concerned. My research questions examine how the reform impacts on, and how the laws should be amended to strengthen customary tenure security.

I propose amendments to existing laws until the National Land Law has been implemented. The government should, *inter alia*, (i) include shifting cultivation as an official farmland category; (ii) exclude lands left fallow by shifting cultivators from the VFV Law; and (iii) align all existing land laws with the NLUP (2016).

In the interest of sustainable peace, customary tenure should be officially recognized as a land tenure regime alongside state and private property. The NLUP (2016) provides the foundation for a land tenure reform process that should now be put into action.

**Keywords:** Myanmar; land redistribution; customary tenure; large-scale land acquisitions

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## LIST OF ABBREVIATIONS

CLR	=	Classic Land Reform
FAB	=	Farmland Administrative Body
MBLR	=	Market-Based Land Reform
LUC	=	Land Use Certificate
NLUP	=	National Land Use Policy
VFV	=	Vacant, Fallow and Virgin

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# INTRODUCTION

## Background Information

Myanmar has an area of 670.000 km<sup>2</sup> with a population of 51.4 million people. Most people depend on land for their livelihoods, as almost 70% of the total population lives in rural areas. Myanmar, bordered by Bangladesh, India, China, Laos, and Thailand, is administratively divided into the Union in Nay Pyi Taw, 15 Regions and States, 74 districts, 330 townships, 3.301 wards, 13.588 village tracts, and 63.798 villages.<sup>1</sup>

Myanmar is a multi-ethnic, multilingual, and multi-religious country with 135 officially recognized ethnicities. The Bamar are the largest ethnic group. Myanmar's uplands are home to many non-Bamar groups, henceforth called ethnic minority groups. These groups account for approximately 40% of the total population. The two figures below<sup>2</sup> show the distribution of some of the main ethnic groups throughout the country.



Figure 1: Myanmar Country Map

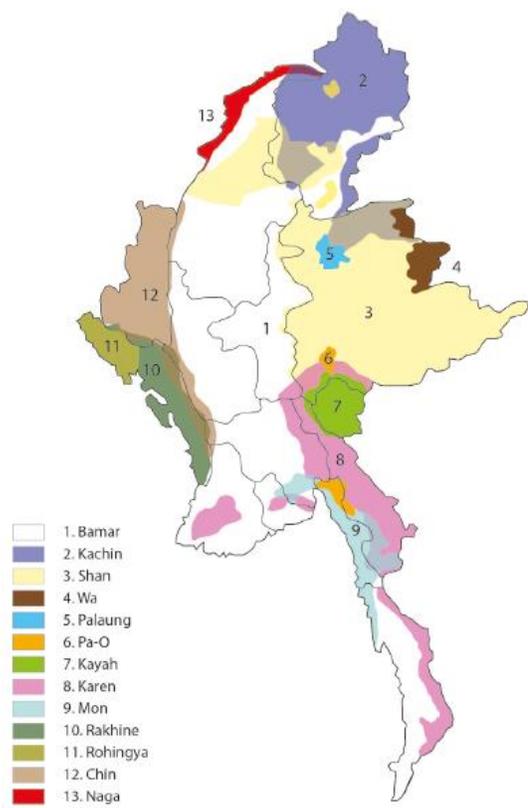


Figure 2: Major Ethnic Groups of Myanmar

<sup>1</sup> Frauke Kraas, Regine Spohner, and Aye Aye Myint, eds., *Socio-Economic Atlas of Myanmar* (Stuttgart: Franz Steiner Verlag, 2017), 30.

<sup>2</sup> Myanmar Information Management Unit (UN), "Agency Maps," GIS Resources and Agency Maps, last revised July 2018, <http://themimu.info/agency-maps>. / Kristian Stokke, Roman Vakulchuk, and Indra Overland, eds., *Myanmar: A Political Economy Analysis* (Oslo: Norwegian Institute of International Affairs, 2018), 3.

## Research Problem

Myanmar is currently undergoing a triple transition: From an authoritarian military regime to democratic governance; from a centrally controlled to a market economy; and from more than sixty years of armed conflict to peace in its border areas.<sup>3</sup> The current land tenure reform process takes place within this transition.

The government is dedicated to developing a National Land Law incorporating all previous land laws. The development of the National Land Law is guided by the National Land Use Policy or NLUP (2016).<sup>4</sup> The NLUP does recognize customary tenure. In contrast, the Farmland Law (2012), the Vacant, Fallow and Virgin (VFV) Lands Management Law (2012), and the recently enacted Law Amending the VFV Lands Management Law (2018) do not recognize customary tenure.

Bamar-dominated smallholder farmers in the country's lowlands have been familiar with statutory law and the concept of private property since the British colonial regime controlled their lands to secure access to paddy rice and collect tax revenues.<sup>5</sup> In contrast, customary tenure systems regulate peoples' livelihoods for many of Myanmar's hill communities.<sup>6</sup>

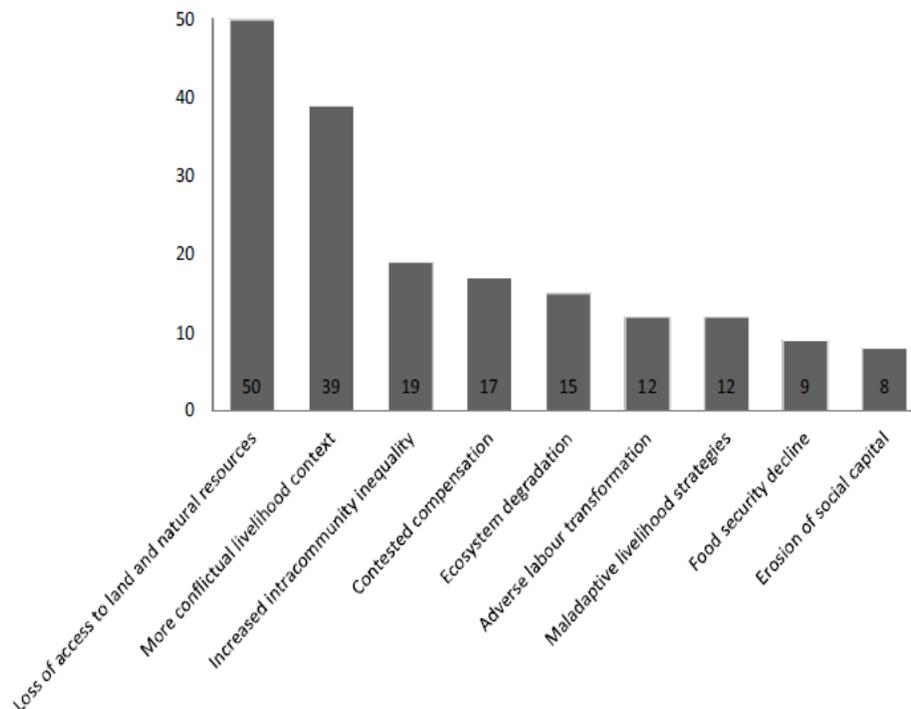


Figure 3: Adverse Livelihood Outcomes of Large-Scale Land Acquisitions

<sup>3</sup> Karen Human Rights Group, "With Only Our Voices What Can We Do?" *Land Confiscation and Local Response in Southeast Myanmar* (June 2015): 18.

<sup>4</sup> Philip Hirsch and Natalia Scurrah, *The Political Economy of Land Governance in the Mekong Region* (Vientiane: Mekong Region Land Governance, 2015). Online available at [http://www.mekonglandforum.org/sites/default/files/Political\\_Economy\\_of\\_Land\\_Governance\\_in\\_Region.pdf](http://www.mekonglandforum.org/sites/default/files/Political_Economy_of_Land_Governance_in_Region.pdf).

<sup>5</sup> Kirsten Ewers Andersen. 2016. "The Recognition of Customary Tenure in Myanmar." In *Annual World Bank Conference on Land and Poverty*, Washington DC., March 14-18, 2016, 1-24. / SiuSue Mark, "Are the Odds of Justice 'Stacked' Against Them? Challenges and Opportunities for Securing Land Claims by Smallholder Farmers in Myanmar," *Critical Asian Studies* 48, no. 3 (July 2016): 447-448, <http://dx.doi.org/10.1080/14672715.2016.1196888>.

<sup>6</sup> SiuSue Mark, "Land and the Peace Process," *Common Space Dialogue Paper Series* (Draft) (March 2015): 1.

Large-scale land acquisitions (LSLA) can tremendously transform the livelihoods in their target region through alteration of use, access, and ownership rights to land.<sup>7</sup> Lands held under common property regimes are vulnerable to involuntary land loss in contexts of weak legal enforcement mechanisms of customary land rights.<sup>8</sup> Figure 3 above<sup>9</sup> shows the most frequently reported adverse (negative) livelihood outcomes of LSLA on a global scale.

The seizure of communally-held lands in the uplands of Myanmar is currently being facilitated, ironically, through the nationwide ceasefire agreement enabling a shift from decades of civil war to the inflow of capital from domestic and foreign investment.<sup>10</sup>

Without amendments, the current legal framework of land governance increases vulnerability and risks poverty for millions of people.<sup>11</sup> Until the development of the National Land Law, existing laws regulating ownership rights to land and natural resources should be amended to officially recognize customary tenure systems as a reality on the ground and increase the level of protection of communally-held lands against involuntary land loss.<sup>12</sup>

## Research Questions

1. How does Myanmar's land tenure reform process (since 2012) impact on customary tenure security of upland ethnic minority groups?
2. How should Myanmar's land laws be amended to increase customary tenure security for upland ethnic minority groups?

## Research Relevance

One of the objectives of the National Land Use Policy (2016) is further research on customary tenure to better understand and facilitate recognition of customary land rights. This study contributes to a better understanding of customary tenure in Myanmar.

The research is linked to **indicator 1.4.2** of Myanmar's report on the Sustainable Development Goals regarding Goal 1: End poverty in all its forms everywhere, which is measured by the **proportion of the adult population with secure tenure rights and legally recognized documents**.<sup>13</sup>

## Research Approach

I have analyzed the legal framework of land governance (respective laws and secondary sources) to better understand the complexity behind land reform in Myanmar. I have consulted relevant land laws before (1894-1947) and after independence (1947-2012) as well as recent land laws and policies (since 2012). In this paper, I present the reforms since 2012 because of their profound consequences for customary tenure security.

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<sup>7</sup> Christoph Oberlack, Laura Tejada, Peter Messerli, Stephan Rist, and Markus Giger, "Sustainable Livelihoods in the Global Land Rush? Archetypes of Livelihood Vulnerability and Sustainability Potentials," *Global Environmental Change* 41 (October 2016): 153, <http://dx.doi.org/10.1016/j.gloenvcha.2016.10.001>.

<sup>8</sup> Andrew Fuys, Esther Mwangi, and Stephan Dohrn, "Securing Common Property Regimes in a Globalizing World. Synthesis of 41 Case Studies on Common Property Regimes from Asia, Africa, Europe and Latin America," *International Land Coalition Knowledge for Change Series* 3 (March 2008): 33.

<sup>9</sup> Oberlack et al. "Sustainable Livelihoods in the Global Land Rush?," 158.

<sup>10</sup> Hirsch and Scurrah, *The Political Economy of Land Governance in the Mekong Region*.

<sup>11</sup> SiuSue Mark, "'Fragmented Sovereignty' over Property Institutions: Development Impacts on the Chin Hills Communities," *Independent Journal of Burmese Scholarship* 1, no. 1 (August 2016): 137.

<sup>12</sup> Mark, "'Fragmented Sovereignty' over Property Institutions," 158.

<sup>13</sup> UNDP and Central Statistical Organization, *Measuring Myanmar's Starting Point for the Sustainable Development Goals* (August 2017). Online available at [http://www.mm.undp.org/content/myanmar/en/home/library/SDGs/Measuring\\_Myanmar\\_Starting\\_Point\\_for\\_the\\_SDGs.html](http://www.mm.undp.org/content/myanmar/en/home/library/SDGs/Measuring_Myanmar_Starting_Point_for_the_SDGs.html).

# THEORETICAL FRAMEWORK

## Land Tenure Systems and Security

### Land Tenure Security

The term land tenure refers to property rights to land of groups and individuals.<sup>14</sup> Land tenure is characterized through a **'bundle of rights'**. The literature<sup>15</sup> distinguishes five tenure types:

- 1) **Access**: The right to enter a defined physical area and enjoy non-subtractive benefits. The right to subtract the resources pertaining to these lands is not guaranteed;
- 2) **Withdrawal**: The right to obtain resource units or products of a resource system;
- 3) **Management**: The right to regulate internal use patterns and transform the resource by making improvements;
- 4) **Exclusion**: The right to determine who will have access and withdrawal rights, and how those rights may be transferred;
- 5) **Alienation**: The right to sell or lease management and exclusion rights.

As shown in table 1<sup>16</sup>, the level of property rights to land is defined by the rights holder.

Table 1: 'Bundle of Rights' and Associated Operational Position Towards the Resource

	Owner	Proprietor	Claimant	Authorized User	Authorized Entrant
Access	X	X	X	X	X
Withdrawal	X	X	X	X	
Management	X	X	X		
Exclusion	X	X			
Alienation	X				

### Land Tenure Regimes

Land tenure regimes are institutional arrangements that define rules, principles, procedures, and practices through which societies establish and regulate peoples' relationship to land.<sup>17</sup>

Land rights are held under one of the following four globally recognized **land tenure regimes**:<sup>18</sup>

- 1) **State property regime**: Property rights are held by some authority in the public sector, but can partly be transferred to individuals (by leaseholds or concessions);
- 2) **Individual property regime**: Property rights are held by an individual or legal body, but can partly be restricted by the state;
- 3) **Common property regime**: Property rights are held by the community. Members can use the commons within a demarcated territory independently, based on strict rules and procedures. Non-members are excluded;
- 4) **Open access**: Property rights are not assigned, access unregulated. States sometimes claim ownership to lands held under common property regimes on the grounds of open access because they do not recognize the former.

<sup>14</sup> Frithjof Kuhnen, *Man and Land: An Introduction into the Problems of Agrarian Structure and Agrarian Reform* (Saarbrücken: Deutsche Welthungerhilfe, 1982). Online available at <https://searchworks.stanford.edu/view/11896169>.

<sup>15</sup> Gershon Feder and David Feeney, "Land Tenure and Property Rights: Theory and Implications for Development Policy," *The World Bank Economic Review* 5, no. 1 (1991): 136-137. / Elinor Ostrom and Charlotte Hess, "Private and Common Property Regimes" (Research Paper, Indiana University, 2007), 11.

<sup>16</sup> Ostrom and Hess, "Private and Common Property Regimes", 116.

<sup>17</sup> Food and Agriculture Organization (UN), "Land Tenure and Rural Development," *Land Tenure Studies* 3 (2002): 4-5.

<sup>18</sup> Benjamin Davy, "The Poor and the Land: Poverty, Property, Planning," *Town Planning Review* 80, no. 3 (2009): 10, <https://doi.org/10.3828/tpr.80.3.2>. / Gesellschaft für Technische Zusammenarbeit, *Land Tenure in Development Cooperation: Guiding Principles* (Bonn: GTZ, 1998), 31-37.

Although these four major tenure categories can be distinguished in theory, they often overlap and change over time.<sup>19</sup> For example, a forest area may officially be classified as state land but considered common property on the local level with villagers holding rights to practice shifting cultivation and collect firewood.<sup>20</sup>

## Customary Tenure

Though usually not recognized in formal statutory law, customary rights and associated rules and institutions are legitimate in the eyes of local communities: They are well known, accepted and enforced by communities, and in most cases by neighbouring communities as well.<sup>21</sup>

Customary law does not have to be old to be legitimate. It is not a static concept, but adaptive to local and global changes. Furthermore, customary law refers not only to communally held lands, but also to clan-based, household, and individual ownership rights within village boundaries.<sup>22</sup>

It is estimated that indigenous peoples and local communities either own, control, or could claim 65% of the global land mass.<sup>23</sup> At present, 18% of all global lands are legally recognized customary land (10% ownership; 8% designation without ownership rights). In comparison, Myanmar has recognized less than 1% (0.07%) of its land mass to indigenous peoples and local communities.<sup>24</sup>

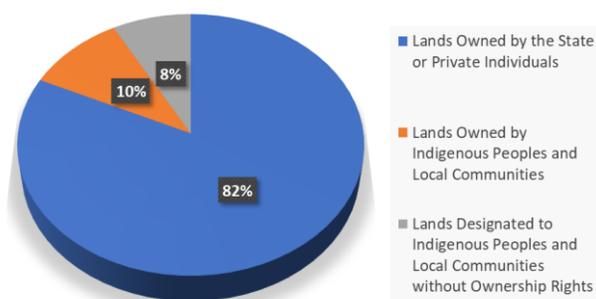


Figure 4: Customary Tenure Recognition Worldwide

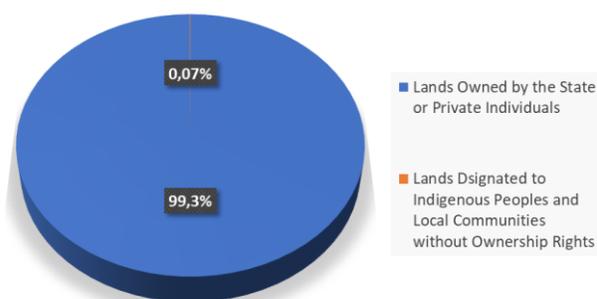


Figure 5: Customary Tenure Recognition in Myanmar

## Land Redistribution Definition

Throughout history, governments have attempted to change land governance institutions to overcome obstacles to social and economic development because of shortcomings in the agrarian structure.<sup>25</sup>

Land redistribution or land tenure reform is herein defined as **legislation intended and likely to directly redistribute ownership of, claims on, or rights to current farmland, and thus to benefit the poor by raising their absolute and relative status, power, and/or income, compared with likely situations without the legislation.**<sup>26</sup>

<sup>19</sup> Mekong Region Land Governance, *Documenting Customary Tenure in Myanmar. A Guidebook* (First Edition) (Vientiane: Mekong Region Land Governance, 2017), 28.

<sup>20</sup> Mekong Region Land Governance, *Documenting Customary Tenure in Myanmar*, 28.

<sup>21</sup> Mekong Region Land Governance, *Ibid.*, 30.

<sup>22</sup> Mekong Region Land Governance, *Ibid.*, 30.

<sup>23</sup> Original figure; based on Rights and Resources Initiative, *Who Owns the World's Land?*, 1.

<sup>24</sup> Original figure; based on Rights and Resources Initiative, *Ibid.*, 6, 10, and 17.

<sup>25</sup> Kuhnen, *Man and Land*.

<sup>26</sup> Michael Lipton, *Land Reform in Developing Countries: Property Rights and Property Wrongs* (New York: Routledge, 2009), 328.

## Classic Land Reform

In classic land reform (CLR), households owning more land than a specified *ceiling* are to surrender this excess to the state.<sup>27</sup> The CLR attempts to reduce inequality by transferring land rights from large landholders to smallholder farmers raising the latter's absolute and relative status, while monetarily compensating previous landholders for their 'loss' of land.<sup>28</sup>

People with direct or indirect interests in the amount and terms of land transfer try to influence government officials and their agencies. They often succeed in resisting land tenure reform until the rural poor become a large and increasingly mobilized interest group that can no longer remain unattended.<sup>29</sup> After all, "[i]t would be naïve to assume that those who monopolize power and land will simply step aside and divest themselves of their wealth and social position [...]".<sup>30</sup>

Despite the redistributive character of CLR, customary law is often not well understood. Consequently, proponents of the CLR sometimes treat communally-held lands as open access or public lands.<sup>31</sup>

## Market-Based Land Reform

The focus of Market-Based Land Reform (MBLR) is predominantly technical, administrative, and economic with the intention to capitalize on the remaining commons.<sup>32</sup> According to MBLR proponents, poverty can be addressed by transforming lands with unclear ownership rights – often communally held lands – from 'sleeping capital' into privately owned and financially interchangeable rights that can be turned into assets.<sup>33</sup> Turning this 'extra-legal' property into individual titles provide incentives for banks to hand out credits to people, which encourages the latter to invest in their now legally protected lands.<sup>34</sup> This model is intended to ensure that the state give up its regulatory functions over land and establish a land rental market.<sup>35</sup>

## Criticism on the Market-Based Land Reform

The idea of 'capitalization by formalization' (p. 837) offers a simple solution to a complex problem.<sup>36</sup> However, land tenure is too complex to be tackled by a 'one-size-fits-all' approach legalizing 'extra-legal' property.<sup>37</sup> Property rights are not intangible, they describe social relationships, which are not adequately considered through MBLR. Since the MBLR has been implemented worldwide over the past decades, land tenure reform has largely shifted from its classic character of 'redistribution' to 'efficiency' without considering inequality.<sup>38</sup>

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<sup>27</sup> Lipton, *Land Reform in Developing Countries*, 127.

<sup>28</sup> Lipton, *Ibid.*, 127.

<sup>29</sup> Lipton, *Ibid.*, 11.

<sup>30</sup> Saturnino M. Borras Jr., "The Underlying Assumptions, Theory and Practice of Neoliberal Land Reform," in *Promised Land: Competing Visions of Agrarian Reform*, ed. Peter Rosset, Raj Patel, and Michael Courville, 99-128 (Oakland, California: Food First Books, 2006), 115.

<sup>31</sup> Lipton, *Land Reform in Developing Countries*, 175.

<sup>32</sup> Saturnino M. Borras Jr. and Jennifer C. Franco, "Contemporary Discourses and Contestations around Pro-Poor Land Policies and Land Governance," *Journal of Agrarian Change* 10, no. 1 (2010): 4.

<sup>33</sup> Borras and Franco, "Contemporary Discourses and Contestations around Pro-Poor Land Policies and Land Governance," 7.

<sup>34</sup> Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

<sup>35</sup> Borras and Franco, "Contemporary Discourses and Contestations around Pro-Poor Land Policies and Land Governance," 8.

<sup>36</sup> Dirk Löhr, "Capitalization by Formalization? Challenging the Current Paradigm of Land Reforms," *Land Use Policy* 29, no. 4 (January 2012): 837.

<sup>37</sup> Klaus Deininger and Hans Binswanger, "The Evolution of the World Bank's Land Policy: Principles, Experience and Future Challenges," *The World Bank Research Observer* 14, no. 2 (August 1999): 260-261.

<sup>38</sup> Borras, "The Underlying Assumptions, Theory and Practice of Neoliberal Land Reform," 111.

## Legal Pluralism

In contrast to an exclusive focus on private property regimes, legal pluralism refers to the **co-existence of at least two different property regimes** in a multi-ethnic society like Myanmar.<sup>39</sup> The legal entry point to recognize customary alongside individual land rights requires modifications in legal provisions that regulate the use and exploitation of land and resources.<sup>40</sup>

## LEGAL FRAMEWORK OF LAND GOVERNANCE

The **Farmland Law** (2012), the **Vacant, Fallow and Virgin (VFV) Lands Management Law** (2012), the **Law Amending the VFV Lands Management Law** (2018), and the **National Land Use Policy** (2016) represent important documents regarding customary tenure.

### Farmland Law (2012)

The Farmland Law (2012) establishes a land registration and title system for agricultural use that formally recognizes private use rights through the issuance of Land Use Certificates (LUC) granting its holder permission to cultivate agricultural land (Articles 4-8).<sup>41</sup> The widescale distribution of LUC is meant to attract investors through the creation of a land rental market since the certificate provides its holder with the right to sell, exchange, access credit, inherit, and lease his or her now legally secured farmland (Articles 9 and 12).<sup>42</sup> The Farmland Law (2012) does recognize hillside cultivation as farmland category; however, only as long as it is under current use, and not during the fallow period.

The Farmland Administrative Body (FAB) oversees the land registration process and issues the LUC (Articles 4-8 and 16). In addition, the FAB has the authority to confiscate farmland, if this is in public interest (Article 26).<sup>43</sup> The Farmland Law (2012) does provide for dispute resolution mechanisms (Articles 9 and 17). However, if unresolved, disputes over farmland can only be passed on to another FAB at the next highest level (from Township to State) without external accountability. In other words, the FAB is both administrator and judge of farmland allocations.<sup>44</sup>

### Vacant, Fallow and Virgin (VFV) Lands Management Law (2012)

The Vacant, Fallow and Virgin (VFV) Lands Management Law (2012) regulates use, allocation, and use permissions for lands declared 'virgin' (lands in which cultivation has never been done before) and 'vacant and fallow' (lands cultivated and then abandoned) under the management of the VFV Central Committee (Article 2). However, decisions about allocations of lands falling under this category are not always based on up-to-date and accurate information.<sup>45</sup> Fallow lands used for shifting cultivation under customary law are often regarded 'vacant', which can lead to misclassifications and incorrect allocations, and, subsequently, involuntary land loss and conflicts over property rights to land.<sup>46</sup>

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<sup>39</sup> Franz von Benda-Beckmann, "Legal Pluralism and Social Justice in Economic and Political Development," *IdS Bulletin* 32, no. 1 (2001): 48. / Henri Dekker, *In Pursuit of Land Tenure Security: Essays on Land Reform and Land Tenure* (Amsterdam: Pallas Publications, 2005), 81.

<sup>40</sup> Fernanda Almeida, *Collective Land Tenure and Community Conservation* (ICCA Consortium, September 2015).

<sup>41</sup> USAID, *Analysis of Burma's Farmland Law* (2012).

<sup>42</sup> Mark, "Land and the Peace Process," 1.

<sup>43</sup> Mark, "Are the Odds of Justice 'Stacked' Against Them?," 449.

<sup>44</sup> As cited in Mark, "Land and the Peace Process," 10.

<sup>45</sup> World Bank, *Towards a Sustainable Land Administration and Management System in Myanmar. Land Sector Needs Assessment; Thematic Policy Notes* (Draft) (January 2018), 16.

<sup>46</sup> Earth Rights International, *Comments on the Amendments to Burma's Vacant, Fallow and Virgin Lands Management Rules* (2012). / USAID, *Analysis of Burma's Vacant, Fallow and Virgin Lands Management Rules* (2012).

Furthermore, the amount of use permissions that investors and businessmen can obtain are disproportionately higher than those of smallholder farmers. While local communities can apply for agricultural use of 'vacant' lands one time only for no more than 50 acres (Article 10 (a) (iv)), investors can apply ten times for 5000 acres each time, totaling 50.000 acres (Article 10 (a) (iii)).<sup>47</sup>

### **Law Amending the VFV Lands Management Law (2018)**

On September 2018 11<sup>th</sup>, 2018 the Law Amending the VFV Lands Management Law (2018) was passed. Some of the amendments introduced through this law have important implications for customary tenure security of indigenous peoples and local communities. Under the Law Amending the VFV Law (2018), smallholder farmers – often unaware about the existence of the law or the (potential) allocation of lands used for their livelihoods to private companies – have to apply for a permit to utilize these lands **within six months** from the day when the law was enacted (Article 22). They become subject to criminal prosecution, if they continue to use lands that fall under this category without prior permission. The inflicted punishment is disproportionate and consists of high fines (MMK 500.000 or USD 375) and imprisonment of up to two years (Article 27 (a)).<sup>48</sup>

Nevertheless, the Law Amending the VFV Law (2018) references customary tenure (albeit in a limited way). It acknowledges that (i) lands for which shifting cultivation have been given; (ii) lands defined in accordance with cultural and traditional systems of local ethnic groups; and (iii) lands used for religious, social, educational, health, and communication purposes of local ethnic groups are exempted from the law (Article 30 (a)).

### **National Land Use Policy (2016)**

In 2016, the newly elected National League for Democracy under the leadership of Aung San Suu Kyi launched the National Land Use Policy (NLUP) as a guide to develop a National Land Law with the intention to combine all previous land laws under one umbrella.<sup>49</sup> The NLUP (2016) represents the beginning of a convergence between international standards on longstanding land issues and the national legal framework.<sup>50</sup>

The NLUP (2016) is very different in character from the Farmland Law (2012), the VFV Law (2012) and its amendments (20128). The NLUP (2016) does recognize the importance of customary tenure systems and shifting cultivation practices of Myanmar's rural population in several chapters. The objectives of the NLUP (2016) regarding customary tenure include: (i) legal recognition and protection of customary lands; (ii) preparation of customary land use maps; (iii) re-classification of customary lands; (iv) registration of customary use rights, including shifting cultivation; (v) monitoring recognition and protection of customary lands; and (vi) facilitation of research about customary tenure towards formal recognition of customary lands.<sup>51</sup> The NLUP further offers smallholder farmers more freedom of crop choice, and to voluntarily transfer or sell their lands without undergoing complicated processes, when they desire to change land use.<sup>52</sup>

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<sup>47</sup> USAID, *Analysis of Burma's Vacant, Fallow and Virgin Lands Management Rules*.

<sup>48</sup> Earth Rights International, *Ibid*.

<sup>49</sup> Natalia Scurrah, Kevin Woods, and Philip Hirsch, *The Political Economy of Land Governance in Myanmar* (Vientiane: Mekong Region Land Governance, 2015). Online available at [http://www.mekonglandforum.org/sites/default/files/Political\\_Economy\\_of\\_Land\\_Governance\\_in\\_Myanmar\\_1.pdf](http://www.mekonglandforum.org/sites/default/files/Political_Economy_of_Land_Governance_in_Myanmar_1.pdf).

<sup>50</sup> Scott Leckie and José Arraiza, *Restitution in Myanmar. Building Lasting Peace, National Reconciliation and Economic Prosperity Through a Comprehensive Housing, Land and Property Restitution Programme* (Displacement Solutions and Norwegian Refugee Council, March 2017), 31.

<sup>51</sup> Andersen, "The Recognition of Customary Tenure in Myanmar," 15.

<sup>52</sup> USAID, *Analysis of Burma's Farmland Law*.

## DISCUSSION

### Research Findings

*Research Question 1: How does Myanmar's land tenure reform process (since 2012) impact on customary tenure security of upland ethnic minority groups?*

The Farmland Law (2012), the Vacant, Fallow and Virgin (VFV) Lands Management Law (2012) and the Law Amending the VFV Lands Management Law (2018) can have significant adverse impacts on the lives of indigenous peoples and local communities in Myanmar. The Farmland Law (2012) does strengthen individual tenure security through the issuance of Land Use Certificates (LUC). However, since it neither recognizes customary tenure nor lands used for shifting cultivation during the fallow period as a farmland category, local people cannot obtain certificates for the lands under shifting cultivation land use.<sup>53</sup> On the one hand, the Farmland Law (2012) restricts Large-Scale Land Acquisitions (LSLA) of individually-held lands through the issuance of individual Land Use Certificates (LUC). On the other hand, it facilitates LSLA of communally-held lands.<sup>54</sup>

The VFV Law (2012) facilitates LSLA. Lands that fall under this category are often mis-classified as 'vacant' without consistently cross-checking the actual land use on the ground. The VFV Law (2012) increases inequality through the enormous differences in the amount of 'vacant' lands for which investors can apply compared with those of smallholder farmers. The VFV Law (2012) does not recognize shifting cultivation practices. In consequence, lands left fallow for several years, but intended to be used for cultivation at the end of the fallow period, are categorized as 'vacant'.<sup>55</sup>

The Law Amending the VFV Law (2018) has raised concerns because of its retributive character (Article 27 (a)). It gives the people concerned limited time (six months from the day of enactment) to apply for a permit to use lands categorized as 'vacant' (Article 22). However, it does exempt lands under customary tenure (Article 30 (a)).

Compared to these laws, the National Land Use Policy or NLUP (2016) restricts LSLA by officially recognizing customary tenure, thus placing an obstacle to land confiscations of the commons. The NLUP (2016) is a milestone and a guiding framework towards inclusive future land governance. Nevertheless, despite important progress for customary tenure security in comparison to previous land laws, little attention is paid to the fundamental link between land use and administration and nationwide peace, and the protection of customary rights is not yet not on the same level as its protection under international law.<sup>56</sup>

### Policy Recommendations

*Research Question 2: How should Myanmar's land laws be amended to increase customary tenure security for upland ethnic minority groups?*

The second research question addresses amendments that the government should take to legally strengthen customary tenure and protect the livelihoods of upland ethnic minority groups.

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<sup>53</sup> Boutry and Allaverdian, *Land Tenure in Rural Lowland Myanmar*.

<sup>54</sup> USAID, *Analysis of Burma's Farmland Law*.

<sup>55</sup> Earth Rights International, *Comments on the Amendments to Burma's Vacant, Fallow and Virgin Lands Management Rules*. / Oxfam, *Comments on the Amendments to Burma's Vacant, Fallow and Virgin Lands Management Rules* (2012).

<sup>56</sup> Burgess, *Land Governance*. / Namati, *Streamlining Institutions to Restore Land and Justice to Farmers in Myanmar*. Policy Brief (Namati, 2016).

### **Policy Recommendations for the Farmland Law (2012)**

The Farmland Law (2012) should be amended to provide smallholder farmers with the opportunity to apply for communally-held Land Use Certificates (LUC).<sup>57</sup> Legal barriers should be removed to facilitate the registration process. No further LUC should be handed out without cross-checking the land use on the ground using up-to-date technology and maps to avoid land conflicts.<sup>58</sup>

Furthermore, the Farmland Law (2012) should include shifting cultivation fallow lands as a legitimate land use category. The law should provide smallholder farmers with more freedom to choose and change the crops that they desire since crop restrictions exert pressure on smallholder farmers to shift from traditional rotational to sedentary forms of agriculture.<sup>59</sup> Finally, the lack of oversight of the Farmland Administrative Body (FAB) needs to be addressed to establish checks and balanced through an independent review body of land confiscations.<sup>60</sup>

### **Policy Recommendations for the VFV Law and Its Amendments (2012)**

The Vacant, Fallow and Virgin Lands (VFV) Lands Management Law (2012) should re-classify those lands that have already been classified with cross-checks on the ground using the latest technology.<sup>61</sup> It is equally important to recognize fallow lands and terminate mis-classifications.<sup>62</sup>

The VFV Law (2012) should define a proportionate punishment for smallholder farmers protesting eviction and allow for independent dispute resolution mechanisms.<sup>63</sup> Evictions should be applied as a last resort and international best practices of Free, Prior and Informed Consent as well as Social and Environmental Impact Assessments should be followed. If inevitable, the law should provide compensations to a standard of living at least as high as before the eviction and make return a possible option.<sup>64</sup> Finally, the VFV Law (2012) should provide equal or at least approximate opportunities in terms of land size area that investors and businessmen on the one hand and local communities on the other hand can apply for.

Regarding the Law Amending the VFV Law (2018), the severe punishment that may be inflicted for (often unwittingly) committed offences should be reconsidered (Article 27 (a)). User groups of lands categorized under the law should be given a time frame longer than six months from the day the law as enacted (September 11<sup>th</sup>, 2018) to apply for a permit (Article 22). The new law should be widely communicated, and instructions given how to apply for a permit. It should also be specified how to exempt lands governed under customary tenure systems (Article 30 (a)).

### **Policy Recommendations for the National Land Use Policy (2016)**

The National Land Use Policy (NLUP) represents a significant step forward in the protection of customary land rights of indigenous peoples and local communities in Myanmar.<sup>65</sup> Some recommendations can still be made. Policy makers should reconsider the often-underestimated contribution of smallholder farmers to economic development.<sup>66</sup> The NLUP (2016) needs to establish a clear link between sustainable land use and administration and nationwide peace and protect customary tenure in accordance with international law.<sup>67</sup> Finally, all land laws should be aligned with the NLUP (2016) on its road to the National Land Law.

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<sup>57</sup> USAID, *Analysis of Burma's Farmland Law*.

<sup>58</sup> Boutry and Allaverdian, *Land Tenure in Rural Lowland Myanmar*.

<sup>59</sup> USAID, *Analysis of Burma's Farmland Law*.

<sup>60</sup> USAID, *Ibid*.

<sup>61</sup> USAID, *Analysis of Burma's Vacant, Fallow and Virgin Lands Management Rules*.

<sup>62</sup> USAID, *Analysis of Burma's Vacant, Fallow and Virgin Lands Management Rules*.

<sup>63</sup> Boutry and Allaverdian, *Land Tenure in Rural Lowland Myanmar*.

<sup>64</sup> Leckie and Arraiza, *Restitution in Myanmar*.

<sup>65</sup> Namati, *Streamlining Institutions to Restore Land and Justice to Farmers in Myanmar*.

<sup>66</sup> *On The Land We Live*, directed by Land Core Group (Myanmar: Land Core Group). MP4. Online available at [https://www.youtube.com/watch?v=xztU\\_f6QsrU](https://www.youtube.com/watch?v=xztU_f6QsrU).

<sup>67</sup> Mark, "Land and the Peace Process," 11.

# CONCLUSION

## **Idea Behind the Research**

Through this research, I have addressed the problem of insecurity of common property regimes in upland Myanmar, home to many of the country's 135 officially recognized ethnic minority groups. Customary tenure systems have recently become under investment pressure. Coercing a shift from common to individual property regimes ignores the complexities of rural livelihoods and can increase inequality. I have analyzed the land governance framework of Myanmar (since 2012) to better understand and tackle the land question. I have drawn upon two research questions to address the problem, regarding how land redistribution impacts on customary tenure security, and how respective laws should be amended to increase security of tenure.

## **Main Findings and Policy Recommendations**

The National Land Use Policy (NLUP) represents a promising development for smallholder farmers' land rights, as it acknowledges the existence of their customary forms of governance and traditional land use practices like shifting cultivation. However, the NLUP (2016) only provides a guiding framework. It is still a long way to go towards an all-encompassing National Land Law.

The government should, *inter alia*, re-classify farmland categories to include shifting cultivation (Farmland Law), and exclude lands left fallow by shifting cultivators from the category 'vacant' lands (VFV Law and its amendments).

In the interest of long-lasting peace, customary tenure systems should be better protected. The NLUP (2016) provides the foundation for reform that should now be put into action. Only when the land rights of all societal groups are protected will Myanmar's triple transition – from an authoritarian military regime to democratic governance; from a centrally controlled to a market economy; and from more than sixty years of armed conflict to peace in its border areas – be successful.

## **Research Limitations and Further Studies**

The research topic at hand is very complex, but its scope limited; the paper can thus only scratch the surface of Myanmar's land issues. Further studies should conduct a comprehensive analysis of the ongoing land tenure reform process incorporating all relevant laws regulating peoples' relationship to land and natural resources. In addition to an analysis of the national legal framework, this may require analyzing the international legal framework of indigenous peoples' rights to land to contrast national law with international standards.

While this research has proposed legal amendments that the government can take, it has not analyzed how international donors, international Non-Governmental Organisations and local Civil Society Organisations can support the government in their efforts to reform its land laws (e.g., through advocacy or legal awareness trainings). Future research could fill this gap.

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