Analysis of Customary Communal Tenure of Upland Ethnic Groups, Myanmar

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Customary Tenure and Land Alienation in Myanmar

Customary communal tenure is characteristic of many local upland communities in S.E. Asia. These communities have strong ancestral relationships to their land, which has never been held under individual rights, but considered common property of the village. Communal tenure has been the norm and land has never been a commodity. This is an age-old characteristic of many societies globally. Prior to the publication in 1861 of Ancient Law by the English jurist Henry Sumner Maine, the accepted view among Western jurists in the nineteenth century had been that the origin of the concept of property was the occupation of land by a single proprietor and his family. However, Maine insisted that for India, for example, “it is more than likely that joint ownership, and not separate ownership, is the really archaic institution, and that the forms of property that will afford us instruction will be those that are associated with the rights of families and of groups of kindred.”

The international recognition of this had earlier emerged in developed countries such as Australia, New Zealand and Canada and it became manifest in the UN Declaration on the Rights of Indigenous Peoples in 2007. The Declaration specifies individual and collective rights of indigenous peoples, as well as their rights to culture, identity, language, land and natural resources, employment, health, education and other issues. It was voted for in the UN by 144 countries, including Myanmar.

In Myanmar customary tenure arrangements date back centuries. They are linked to the characteristics of the landscape and its resources, to the kinship systems, to population density and to the actual history of the area and settlement. In general the ethnic upland villagers’ identity is clearly linked to the land constituting a dense network of particular places, each having different cultural and material value and containing a mosaic of resources. There is an inner connection between history, identity and land.

Most Asian countries have developed rights-based policies on indigenous peoples/ethnic groups/ethnic minorities, ethnic nationalities or hill tribes. There is also legislation that respects customary law in some countries. Two countries provide communal land registration. The Philippines have a separate legal act catering to the land rights of indigenous peoples (IP) while in Cambodia these rights are embedded in the 2001 Land Law’s Chapter 3 and not a special separate act. In Cambodia the ethnic indigenous communities make up only 1% of the population while they make up more than 10 % in the Philippines and 40% in Myanmar. The Land Law of Cambodia was developed with support from several international NGOs and the Asian Development Bank (ADB) that all were instrumental in the inclusion of a Chapter on ‘communal immovable property’ of monasteries and indigenous communities, respectively, in the 2001 Land Law.

Customary tenure is not protected by law in Myanmar. Customary tenure would most often be a characteristic of shifting cultivation, which includes in the very tenure a major area of fallow land. In the eyes of government such fallow lands look idle and vacant and are at risk being subject to economic land concessions. In the present day situation of Myanmar these customary systems will require, if to be protected, recognition by state law to survive as the market economy grows and land concessions and land grabbing are spreading. If land is turned into capital without recognition

of community rights, the basis for day to day sustenance of farmers, who make up the majority of the rural population, will be lost.

Control of land is the basis of power, influence and corruption, and present day governments in S. E. Asia wish to retain as much land as possible under their control for their own disposition via, e.g. economic land concessions to agribusiness. In comparison, if we go back centuries, it was not land, but labor that the Southeast Asian kingdoms needed to maintain the upkeep of the courts. In these former centuries prisoners of war were transported back and forth between kingdoms, settled and forced to produce for the court.²

More recently during the time of the State Law and Order Restoration Council (SLORC) (1988-1997) in Myanmar and in subsequent years under Than Shwe military junta more than 2 million acres of “idle wasteland” were handed out as concessions by the Ministry of Agriculture and Irrigation (MOAI). The Master Plan for the Agricultural Sector 2000-2030 of the MOAI promises to convert 10 million acres of ‘wastelands’ to commercial agricultural production. By May 2013, based on official statistics, a total of 377 domestic companies have been allocated 2.3 million acres of ‘vacant, fallow, and virgin’ land and 822 companies or individuals have been allocated a total of 0.8 million acres of forest land (outside of Mon State). In addition to these concessions numerous instances of land grabbing by the army has taken place in a large number of villages, as revealed by the media. The army will only reluctantly today in the present reform process release the grabbed land. It holds that it retains authority to designate and use land for its own purposes.³

Myanmar has a population of around 50 million people, where over 20 million belong to non-Bamar speaking ethnic minority groups. The Colonial Rule of the British stressed the distinction between the Burmese-occupied areas and the territory of other ethnic nationalities. Under a dual system of governance the British administered the predominantly Bamar area of “Ministerial Burma” separately from the other ethnic areas called the “Frontier Areas”. For the most, the frontier areas were left under the local authority of traditional headmen and chiefs.

For the last two decades there are numerous documents that provide evidence of land grabbing in Myanmar. The Land Core Group under the Food Security Working Group (FSWG) has prepared three documents: Briefing Paper on Land Tenure: A foundation for food security in Myanmar’s uplands, FSWG 2011; Upland Land Tenure Security in Myanmar: an Overview, FSWG Feb 2011 and 13 Case Studies of Land Confiscations in Three Townships of Central Myanmar. These were prepared by the Land Core Group of the Food Security Working Group in September 2012. In addition there are several academic papers analyzing the land situation in Myanmar such as The Impact of the confiscation of Land, Labor, Capital Assets and forced relocation in Burma by the military regime, by Dr Nancy Hudson-Rodd and Dr Myo Nyunt, Saw Thain Tun, and Sein Htay; Arbitrary Confiscation of Farmers’ Land by the State Peace and Development Council (SPDC) Military Regime in Burma Hudson-Rodd, N. and Sein Htay 2008, Testimony of Marco Simons in Front of the Tom Lantos Human Rights Commission: Business and Human Rights in Burma (Myanmar), Tom Lantos Human Rights Commission, February 28, 2013; TNI’s report on Financing Dispossession in Kachin, 2012, and Losing Ground, Land Conflicts and Collective Action in eastern Myanmar, Karen Human Rights Group, 2013. There are numerous other reports.

³With reference to the Cantonment Municipalities Law, No. 32/2010, the armed forces can establish bodies for the management of land designated as being part of cantonment towns. Under the Facilities and Operations for National Defense Law the armed forces can issue designations concerning land under or adjacent to their facilities. See http://www.humanrights.asia/news/ahrc-news/AHRC-STM-243-2013
Those threatened with displacement have only what are effectively use-rights, not registered land titles. Kachin and Northern Shan State have seen the highest growth rate of land grabbing, e.g. by the Chinese with the blessing of the Myanmar army and companies establishing rubber plantations for alleged opium eradication purposes. In addition to rubber, two Burmese companies with rumored Chinese financial backing – Yuzana and Jadeland – received concessions of approximately 200,000 hectares in total to grow cassava and other crops in Hukawng Valley Tiger Reserve. Land grabbing for gold mining is going on in the Shan State causing land loss and heavy pollution. The main drivers of land grabbing are businesses and profit-oriented activities ranging from cultivation of commercial crops, such as rubber and oil palm, over extractive industries such as gold and jade mining, and oil- and gas pipeline construction and the establishment of special economic zones (SEZ). Most of Myanmar’s ethnic nationalities live in areas rich in natural resources, including timber and minerals, and next to rivers for hydropower development. They are therefore subject to an influx of state-sanctioned companies seeking to establish agro-industrial plantations or mines or hydropower.

Most land in Myanmar, in particular in the uplands, is not titled. Only 15 percent of farmers have land use certificates. Besides, around 30% - 50% of rural families - dependent on region - are landless and work as casual labor in agriculture. With the start of the reform process in 2011-12 new laws were promulgated among them the Farmland Law. This law is an innovation in the sense that individual farmers or organizations now can get their land registered by Settlement and Land Records Department of the MOAI and receive land use certificates including rights to sell the land. Along with the Farmland Law also the Vacant, Fallow and Virgin Land (VFV) Law was passed. This law has since 2012 been seen as a great risk to upland communities practicing shifting cultivation as all their fallow land would be considered vacant and fallow and suitable for land concessions by the MOAI.

Over the course of 2013 the Asian Human Rights Commission and various media reported a large number of conflicts over land grabs, where farmers’ old grievances have not yet been attended to. This led the Pyidaungsu Hluttaw (Lower House of Parliament) to establish a Land Use and Land Allocation Scrutiny Committee (LULASC) chaired by Win Tun Min of Ministry of Environmental Conservation and Forestry (MOECAF) to investigate. The committee is to listen to grievances and provide information to Parliament on the social and environmental impacts. It seems unable to meet the large number of grievances that are coming up and it is unable to tackle the fact that the army refuses to hand the land back. Recent news mid 2014 indicates that the Myanmar army plans to

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9 Salween watch, see http://www.salweenwatch.org/
10 Bridging the Housing, Land and Property Gap by Displacement Solutions 2013
Burma/Myanmar in Transition: Connectivity, Changes and Challenges. 24-26th July 2015. Center for ASEAN Studies (CAS), Chiang Mai University, the Regional Center for Social Science and Sustainable Development (RCSD): Myanmar Center, the Faculty of Humanities at Chiang Mai University and the International Institute for Asian Studies (IIAS) in Leiden, the Netherlands

return only a quarter of seized land nationwide. This means the Myanmar army will return less than 120,000 acres of farmland to its original owners, making up less than a quarter of land seized across the country during decades of military rule. On February 20, 2014 the LULASC submitted a report to the parliament about 745 legal cases of land seizure, which involved a total of more than 500,000 acres of grabbed land. These 500,000 acres can be vetted against the almost 2 million acres in concessions handed out by the MOAI out of which perhaps only one-third have been put under cultivation.

Parliamentarians are now questioning the army whether the 120,000 acres of land the army plans to return will be returned to the original owners, given that they have, in the past, rented it out to private companies or charged original landowners a “tax” to use the land. Parliament also questioned how to make sure that land was not handed over to false owners who have connections with officials? As recent as June 2014 it was confirmed that “Battalions and Military Units under the Ministry of Defense did transfer the land to the General Administrative Department and the Department of Settlement and Land Records. However, the Battalions, the Military Units, and the Settlement and Land Records Department in the Ayeyarwaddy Region have conspired to sell the land to businessmen, rather than ensure its return to the rightful owners.” Land grab tensions could trigger uprisings MPs now warn.

Villagers in eastern Myanmar are particularly concerned for the property rights of the internally displaced persons, whose lands are at risk of land grabbing, because owners are absent. Absence has resulted in confiscation of land belonging to refugees and internally displaced persons. A large number of ethnic activist groups have been calling on the government, ethnic militias and the international community to address a surge in land grabbing in cease-fire areas. Companies are seen to move into Burma’s ethnic regions e.g. Kayin State following recent ceasefire agreements.

The Development of the National Land Use Policy

The government of Myanmar is presently preparing a new National Land Use Policy. The work is chaired by the Ministry of Environmental Conservation and Forestry. Many civil society groups and donor funded consultants lobby and support the drafting of the policy in its consecutive versions. The result is that the new 2015 version that is the 6th draft of the National Land Use Policy has several sections that in writing aim to protect and recognize customary tenure. As the policy is meant to feed into the preparation of the new Land Resource Law it is an important stepping stone for the recognition of customary communal tenure and development of legal procedures for the protection.

It is noted that the policy so far uses the term ‘customary’ and not ‘customary communal’ tenure. In general it is assumed that the customary tenure is communal, but in fact, customary tenure in Myanmar come in many forms and the collective decision making arrangements may pertain to different kinds and ways of land use and management. In most villages of ethnic upland nationalities the customary tenure is communal, e.g. in Hakha township in Northern Chin State, where the management of the shifting cultivation areas ensures that plots inside a block of land that is opened in a given year are allocated by lottery to the village’s families and every family residing in

15 http://www.irrawaddy.org/archives/34167
the village is guaranteed land without payment to anyone. In contrast customary tenure in Southern Chin State around Mindat means certain clans in the village can claim historical (informal) ownership of the different named land blocks of swiddens and other clans and families must pay rent for the plots they use in a given year. It may therefore be warranted in the development of the legislation that the word “communal” is added to the term ‘customary rights’ in order to prevent – in the case of cadastral customary land registration - a possible elite capture in villages, where the customary tenure is characterized by inequity.

The 2012 Regulatory Context for the Research on Customary Communal Tenure
After the passing the Farmland Law and the Vacant, Fallow and Virgin Land Law (VFV) in 2012 the urgency of finding a way to protect the land of upland shifting cultivation communities against land concessions and alienation under the VFV was evident. On this background, in 2013, the Land Core Group in Myanmar decided to support research and study of the customary communal tenure in Chin and Shan States with support from its partners GRET in Chin State and CARE in Shan State. The objectives were to develop evidence-based recommendations for the recognition of customary communal tenure and to define procedures for codifying this tenure system under statutory law. The Land Core Group, which has undertaken several studies of land alienation and land grabbing, wanted to identify the ways protection of the customary rights of upland communities could be institutionalized through communal land registration.

The research argued for using Article 3 (j) of the Farmland Law as it includes a ‘farmers’ organization’ as a right-holder to land title. The latter is defined as a body “that is formed in accord with any law issued to support the development of the rural economy”. In combination with Article 6 this may pave the way for communal land registration. Article 6 of the Farmland Law specifies the entities that “have right to farming” and this includes in Article 6 (b) an ‘organization’, a government department, a government organization, an NGO or a company. In Article 7 (b) it stipulates that the organization/association must be “desirous to carry out agriculture in the farmland”. This could be done if the community was seen as an ‘organization’ or ‘association’, which Article 6 (b) of the Law puts among the right-holders. In order to become an association the village community would apply to General Administration Department to incorporate legally. The foundation for the village association would be Statutes that were developed initially with the help of the researchers. If legally incorporated, the community could apply to SLRD for registration of its common property parcels with reference to Farmland Law, Article 6 (b). The land parcels making up the common property would be registered under one community ownership.

The research therefore suggested using Article 6 (b) to recommend that the village community incorporates legally as an association under the Association Law and Rules in order to become a right-holder according to Article 6 (b). Any land titling carried out later by the Settlement and Land Records Department would be a communal land registration of all the parcels making up the common property in line with the practice in Cambodia. In 2013 the concern was also to make the government recognize shifting cultivation as an agricultural system where fallows were an indispensable part and not see agricultural land defined as land which is never idle. The development since then in the 6th version of the draft National Land Use Policy seems to indicate the government’s recognition of shifting cultivation as a customary land use and of its recognition of customary tenure arrangements which would include communal tenure.

The procedures that were developed in the research as an evidence-base therefore refer to the Farmland Law Article 6, - but call for amendments of the Rules under the Law as the Rules call for abolition of shifting cultivation. However, with the new draft Land Use Policy of 2015 the Farmland Law and Rules of 2012 may be changed. A political hitch (yet to emerge) may be that the Farmland
Law and the Vacant, Fallow and Virgin Land Laws are under the MOAI, which is also the ministry awarding land concessions, while the development of the National Land Use Policy is headed by the more progressive MOECAF and the two ministries may not always see eye to eye.

The Conceptual Framework for the Research on Customary Communal Tenure

Communal tenure refers to a situation where a group holds secure and exclusive collective rights to own, manage and/or use land and natural resources, referred to as common pool resources. This may comprise either agricultural lands, grazing lands, forests, trees, fisheries, wetlands or irrigation waters. In common property or common pool resources theory, communal tenure can be defined as self-governing forms of collective action by a group of people, most often a village.

The research on identifying the characteristics of the customary communal tenure in Chin and Shan States and on ways of codifying customary communal tenure used a framework that requires the preparation of two set of rules like in Cambodia. This comprises first developing village statutes for governance of decision making in meetings and relationship to the outside world and secondly the Internal Rules of land management and sharing. The Statutes set up the governance of the village ‘organization’ with an elected Land Caretaker Committee to deal with ongoing issues in relation to decisions on annual land allocation and relationship to the outside world. It features a General Assembly of all villagers as the final decision making body being the body that can change the Statutes and the Internal Rules of sharing of the land. The Statutes do not deal with the details of customary land management in any detail, only the Internal Rules do. The Statutes only inform on the objectives and the governance structure used to set up the village as a legal entity that will apply to the General Administration Department (GAD) of the Home Affairs Ministry for recognition as an association under the Association Law and Rules and thus qualify as a right-holder under Article 6(b) of the Farmland Law.

While the Statutes may be similar among the different upland communities, the Internal Rules differ a lot as they reflect the customary arrangements developed through time in response to the ecology, the size of village territory, the population density, and the kinship system. The Internal Rules are the day to day working rules and these are common knowledge sustained by the community itself. The Internal Rules differ from village to village, dependent on many factors, including, but not limited to, ethnic group identity, clan identity, population density, size of total land areas of the village and the resource endowment, women’s status, private land claims within the common property, inheritance, bride prices, and transactions to borrow/lend land between village members. No external authority plays a role in day to day application of Internal Rules. One internal rule that is common, though, to both Chin and Shan is occupancy in the village as criterion for access to land. Besides this common rule the internal rules in Chin are clearly reflective of their large landscapes and annual allocation of plots to households by lottery, while the rules in Shan reflect their more permanent land use.

In interviews in the villages in Chin and Shan states the characteristics of the pilot villages’ specific communal tenure arrangements were recorded as their Internal Rules using a questionnaire based on Elinor Ostrom’s eight principles below:16

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- Clearly defined boundaries (effective exclusion of external un-entitled parties);
- Rules regarding the appropriation and provision of common resources that are adapted to local conditions (who can take what, where, why and how);
- Collective-choice arrangements that allow most resource appropriators to participate in the decision-making process;
- Effective monitoring by monitors who are part of the appropriators;
- A scale of graduated sanctions for resource appropriators who violate community rules;
- Mechanisms of conflict resolution that are cheap and of easy access;
- Self-determination of the community recognized by higher-level authorities; and
- In the case of larger common-pool resources, organization in the form of multiple layers of nested enterprises, with small local CPRs at the base level.

The research understands ‘property’ as social and economic relations among people with respect to rights in something. Tenure in land is a bundle of rights that are enforceable by statutory law and/or customary law. A right is an enforceable claim recognized by a social system. Tenure can be understood as a system of many different bundles of rights that are enforceable at different levels. These can operate simultaneously and overlap on the same piece of land, thereby constituting a nested hierarchy or configuration of rights. In communal tenure the right-holder is defined as an exclusive group, where everyone is aware of the criteria for membership. Internally, group members – usually organized in households – can hold individual permanent or temporary rights to particular resource niches within the common property, whether a standing crop or a seasonal non-timber forest product, a piece of land based on an ancestral claim, part of a lake or fish harvested by a specific technology, or trees in the forest that produce resin, but these rights cannot be bestowed to an outsider.

By analyzing the kinds of rights that appear in the bundle it is seen that some rights are more important than others, but basically there are five kinds of important rights, namely access, withdrawal or appropriation, management, exclusion and alienation. Access pertains to the right to enter a defined physical area and enjoy non-subtractive benefits (e.g. walk through a field or rest in an area). Withdrawal or appropriation is the right to harvest resource units or products of a resource system (for example, crops grown in a swidden, cut trees, collect resin, catch fish, or divert irrigation water). Management is the right to regulate internal use patterns and also to transform the resource by making improvements, e.g. terracing the land, planting an orchard or releasing fingerlings in a body of water. Exclusion refers to the right to determine who has access and withdrawal rights, and how these rights may be transferred. Finally, alienation concerns the right to sell or lease management and exclusion rights if warranted.

In most countries the land on which customary communal tenure is practiced would nowadays formally make up state land due to the state’s eminent domain. In former times the state in S.E. would have interest only in taxation of forest projects wanted by various parties, be it the Burmese, Siamese or Laotian kings. In 2015 the situation is different, as the upland areas inhabited by indigenous communities are also the areas where, as mentioned earlier, the most valuable natural extractive resources are found or land upon which to establish rubber plantations, and the upland communities are therefore, as seen earlier, vulnerable to land grabbing and expulsion. Such land grabbing has been observed with highly detrimental consequences for local communities in Cambodia and the Lao PDR.
The Internal Rules for Customary Communal Tenure in Chin and Shan States

The research carried out in Northern and Southern Chin State as well as Shan State in 2013-14 shows the differences and similarities. Both are upland communities but the landscape is very different as well as the size of territory that the villages command. The Chin state is high elevation (2000 m) and steep slopes, while the Shan state is much lower, the landscape much lower many places and the population density and ethnic mix higher than Chin State.

The recording of these already existing Internal Rules represents a clear articulation of the village’s customary tenure. They are the basis for equity and access to land for all resident villagers. Internal Rules may contain specific bundles of rights to different resource niches and land areas in the common property dating back to when the village was first founded. Resources are shared among the village’s households according to the village’s own Internal Rules. The fallow land makes up an indispensable part of the agricultural system of rotating fallow *taungya*. Customary communal tenure of all products and resource niches in a village territory is linked to bundles of rights and complex rules for sharing resources, which date back to when the village was first established maybe a hundred years or more.

Writing down, as part of the advocacy research, the Internal Rules, which were never written down before, but known to every villager through oral communication, makes it possible for the village to keep a copy as a reference if and when one day the village obtains a cadastral registration of a communal land title. Writing down the Internal Rules is done to protect against potential future conflict, if market forces come to lure individual villagers. Thus, a written record of customary Internal Rules can safeguard a villager’s rights if something unexpected happens in the future. The recording of the Internal Rights also helps everyone in the village to avoid the infiltration of outsiders, e.g. commercial corporations and businesspersons that may approach an individual villager to “borrow” land. Including Internal Rules as the basis for land management under a future communal land registration also avoids a tendency to “cultivate new forms of authority and power” shaping them into “NGO-state subjects that contrast with their customary practices” as Kevin Woods writes.

In Chin State the farmers practice shifting cultivation, while in Shan state the farmers practice a more permanent agriculture. In Chin state most of the crops are subsistence crops such as millet, sulphur beans and rice in valleys, while the Shan also cultivate corn for the market. The Chin agricultural landscape for a village consists of, say, 18 large mountain sides, 9 in cold elevations and 9 in lower warmer elevations. Such mountain sides within a village territory may make up 25,000 acres in total. These mountain sides surrounded by ridges are called *lopil* in Chin language and each of them has a name. One or two *lopil* are opened up in a given year for the whole village to use. Each *lopil* has a large number of plots of around 3 acres. The customary internal rules in the village prescribe that these plots are to be shared by all families in the village will share these in the year, when the *lopil* is opened up. The sharing of the plots is done by lottery which emphasizes that the ‘ownership’ of agricultural land is communal. The historical nature of this communal land management system is confirmed by a monograph by the British Officer H.N.C Stevenson who was...

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17 In Cambodia cases of conflicts have occurred in villages where a family “sold” its land to a businessman who had persuaded and lured the family how attractive it would be to buy a motorcycle.

stationed in Falam in Chin State in the 1930s. He wrote *The Economics of the Central Chin Tribes*, published by The Times of India Press as well as articles for the Royal Anthropological Institute.  

Stevenson was a person who understood Chin language and could render land tenure concepts in Chin. He observed that the *klang ram* - although ‘communal’ - contained many internal ancestral claims of individuals to different plots in different *llopils* and that the *bil ram* - although ‘private’ - is subject to many rights of the community as a whole, so it is not exclusively privately owned. This is in correspondence with what was observed in 2013-13 where different Northern Chin villages had clans with special ancestral rights in certain of the plots inside a *llopil*. However, while the family had the right to get an ancestral plot, it would not be able to take all the ancestral plots if it did not have the labour to cultivate the plots. These plots would form part of the common pool which was subject to lottery and given to other families. So privately claimed land plots are not fully private. And some communal areas may be converted by the village’s Internal Rules to privately claim land if a family indicated a wish to turn the land into a terrace or orchard investing labour in the conversion. According to the villages’ internal rules such family could request any land, also land under ancestral claims, to convert the plot into a terrace. This would happen without any payment to the claimant.

Rights in land are by village Internal Rules linked to residence in the village. This has been a clear rule in most of S. E. Asia. An interview with a woman in Hakha town disclosed that she had left the village to work in Hakha town for a while. She still has rights to land in her village, when and if she returns. Right now, not being there, she does not have rights in land. She told that in the past, the village chief was not paid by government, but held priority access to good fertile land, and may still get preferential treatment today. The lottery for sharing the land is fair, and if she returned to the village she might win a large plot that is fertile and would be able to share some of her asset with other families that year against some labor being provided to her. If a big family draws lots of smaller *lo* they can request to get more land. She emphasized that in the village there are no landless people, all have rights to land.

There is land she calls her father’s ancestral land, but at present that land has been ‘sold’ by the village to support the local teacher meaning the communal characteristic features strongly in the ‘privately’ claimed. This ‘selling’ means the act of transferring rights for one year to a particular person in the village against remuneration that accrues communally to the village, not to her. After its use, the land is transferred back to the common property. If she goes back she will get land as part of the village’s lottery system or the ancestral land. She informed that some plots, like her own an ancestral one can be ‘sold’ or ‘rented out’ to neighbouring villages. Here ‘sold’ actually means ‘rented’ to a neighboring village for short term, the payment for which goes into the village fund for entertainment of guests to the village or the school teacher. She informed the researchers that if newcomers arrive to settle in the village they are also given rights to land and are often given the fertile land to make them more willing to stay. In the Shan state, the untitled claims to land plots are more private, although many blocks of 50-60 acres would be owned by larger kinship groups. The agricultural land of the village may total 1,500 acres compared to the 15,000-25,000 acres by a Chin village. The communal characteristic of the land in the studied Shan village was that despite private claims, all land was considered the village’s land. No one could sell land, not even an irrigated paddy field. An internal rule further stipulated

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20 In Tinam village researchers were told that the village put 80% for lottery but kept 20% out in order to reallocate if some large households won only small plots of land.
that if a family that owned an irrigated paddy field left the village, the family could not sell the field. It belonged to the village and either relatives or newcomers would get this land. But if the family returned to the village, it would be given land again.

The customary communal tenure similarities between Chin and Shan villages are that residence in the village is a criterion for access to land, that the land is considered the village’s land, that no one leaving the village can ‘take the land with him or her’ by selling it, and that newcomers to the village that come to stay will be given land out of the common pool. The first criterion is the most important one: access to the agricultural land including the fallows of the village, also for a newcomer, is dependent on physical residence in the village. In village theology those living in the village would represent the purported descendants of the first founder of the village or domain, who had special relations to the territorial spirits of the land that guarantee the fertility of the agricultural land for those physically living in the land of the village.²¹ Living in the village ensures spiritual incorporation in the group that collectively depends on good harvests and the blessing by the spirits of land.

Steps towards Cadastral Land Registration of Communal Tenure of Agricultural Land
Any future cadastral registration of shifting cultivation land requires mapping of the land parcels that make up the common property. A first attempt at mapping of shifting cultivation land in Chin State in Myanmar was supported by the LCG as part of the research. It has shown the problems in accomplishing precision of boundary demarcation of eligible land, when dealing with large areas of shifting cultivation land. The shifting cultivation landscape is managed with reference to the lopil and each year maybe two lopils are opened up. But the ‘problem’ is that the community does not use all the land in a lopil and the land use for the same lopil may differ between the years, so there are no permanent boundaries. Therefore, the question emerges of which precise land area to survey and prepare cadastral index maps for? Only land under actual cultivation/actually cultivable land including the fallows? and for how many acres? Secondly, mapping land parcels for land registration in 10 year old forest-clad fallows is similarly difficult and would require a constant guidance of the surveyor by villagers to find out where the boundaries are. Thirdly, a given lopil may have less area under cultivation when a new round starts, if in that year half the young men went to Mizoram for work. The yellow lines on the map show the boundaries of lopil and Google Earth shows the parcels under shifting cultivation inside the lopil. The cultivated areas may make up one-fourth of the lopil only. Image showing one of 18 named lopil inside the yellow lines. Agricultural land use inside the lopil is shown by satellite imagery (Google Earth) below.

The satellite image shows that the boundaries of the *lopil* cannot be the boundary for a cadastral index map of one of the parcels of the village's agricultural swidden land. In a village with several *lopil* some of the land would be used for shifting cultivation of millet, corn, sulphur beans and rice while some land would be turned into terraces or orchards but most would lie fallow. In a cadastral registration all the actual shifting cultivation land including the fallows would need a survey to make a correct registration of all land claims and the totality of land use over a ten year period. The hitch is that, in fact, such survey would cover land use 'as is' in a given year, which may be more or less than when the same *lopil* was used previously due to yearly oscillation of labor in the households and it would include high uncertainty of boundaries of fallows.

In Cambodia the cadastral land registration of indigenous communities’ land comprise village territories that are a good deal smaller than the Chin state villages and still in Cambodia the cadastral index map of a village may show up to 50 different parcels that were surveyed to make up the total of the common property.

**Conclusion**

The research carried out in short periods during 2013 and 2014 has analyzed the existing customary communal tenure of shifting cultivation land in pilot villages and outlined procedures towards an actual cadastral registration of communal tenure. The procedures included turning the community into a legal entity based on statutes and approach the SLRD for communal title to all agricultural land parcels including fallows as an organization. This would be in line with the Farmland Law 2012, where article 6 can be construed to be in support of this. Arguments to the government are that community-based land management can be conducive to sustainable land management, also under new technologies, as it underpins the livelihoods of all community members. It is a land management based on the social capital in each village, which - in most ethnic villages - ensures no one is without access to land, e.g. newcomers, if they become residents, are allotted land and newly married couples are given land out of the common property. Customary communal tenure secures livelihoods, preserves cultural identity, protects against landlessness for village residents, offers high levels of protection against land grabbing by outsiders, and puts in place institutional mechanisms for future sustainable land use planning and climate change mitigation.
International research has shown that farmers practicing shifting cultivation in *taungya* conserve more forests on their land than any other farmers, and make it productive at the same time. The institutional mechanisms ingrained in traditional rotating fallow *taungya* systems can ensure access to productive resources for every member of the community that resides in the community permanently. Techniques in the systems of shifting cultivation are appropriate for their agro-ecological contexts although not ‘modern’ and cultivators often have comprehensive knowledge about complex resources, land use, and the surrounding environment. In comparison to permanent sedentary cultivation shifting cultivation has often lower impact if population density appropriate. Forest regrowth provides diverse habitats and virtually no toxic external inputs such as pesticides, herbicides, and synthetic fertilizers are used damaging to the soil and water systems.\(^{22}\)

Additional research is required to help prepare guidance on procedures that can lead up to a cadastral communal land registration. We know that the recording of Internal Rules is a must as this recording will establish up front the characteristics of the village-specific customary system as well as the ecological characteristics of the land in question.

It is promising that the draft version 6 of the National Land Use Policy in article 77 (j) calls for determining “appropriate procedures for the formal recognition and protection of customary tenure rights that have not been recorded, and best methods for appropriately utilizing customary law” and in the final article 79 purports that “Research findings and results shall be incorporated when reviewing, revising and approving new or existing National Land Use Policy, National Land Law, and other related polices, laws, regulations and procedures.”

\(^{22}\) Springate-Baginski, Oliver *Rethinking SwiddenCultivation in Myanmar: Policies for sustainable upland livelihoods and food security* Pyoe Pin, Yangon 2013
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