

POLICY BRIEF

Supporting Myanmar's land governance reforms

Approaches for legally recognizing customary land tenure as a driver for development for upland communities practising shifting cultivation

KEY ISSUES

As upland farming systems in Myanmar such as shifting cultivation – functioning under customary land tenurial arrangements – remain outside the statutory definition of farmlands, they are legally perceived as wastelands subject to appropriation under various land-related legislations, such as the award of agricultural or mining concessions under the VFV Land Act (2012). This alienates customary land rights holders from their ancestral rights and lands, rendering them illegal occupants in their own land.

Land grabbing, confiscation, and appropriation have intensified since the enactment of the VFV Land Act, and an increasing number of land concessions for commercial agriculture, mining, and other activities are being awarded to foreign companies, rendering the shifting cultivators landless and deprived of their land use rights.

Introduction

This policy brief examines the challenges and opportunities in recognizing customary land tenure as a key driver for the inclusive development of upland communities in Myanmar. The brief also suggests approaches for harmonizing customary land tenure with the statutory provisions recommended by the National Land Use Policy¹ (NLUP), particularly those that could be included in the proposed National Land Law that is to follow from the NLUP.

The Union Government of Myanmar released the NLUP in 2016 following a participatory, inclusive, country-wide consultative process for greater ownership of the document. Presented as the 'official notification of objectives and plans' for land reforms, the document outlines the government's intent and approach to redress the vexed issues of land alienation, confiscations, and expropriation consequent to several land governance legislations in the past and aggravated recently by the Vacant, Fallow and Virgin Land Act (VFV Land Act) of 2012, which paved the way for the award of agricultural and mining concessions on fallow lands to individuals, government entities, and foreign companies. The NLUP unambiguously lays out provisions that explicitly recognize and express the intent to protect customary land tenurial practices functioning in the uplands and ethnic nationality areas, particularly in the context of shifting cultivation and rotational agricultural systems, and register these as customary land. This intent is also reinforced by the Agricultural Development Strategy and Investment Plan (ADSIP) released recently in 2018 by the Ministry of Agriculture, Livestock and Irrigation, wherein

¹Republic of Union of Myanmar National Land Use Policy, January 2016 (extwprlegs.l.fao.org/docs/pdf/mya152783.pdf)

recognition and protection of customary arrangements forms a core outcome under the strategy's governance pillar, reflecting the efforts of the Union government's efforts to mainstream the reform process.

However, despite the NLUP's intent to bring about the desired land reforms, the translation of policy recommendations into practice remains a challenge for government agencies and other stakeholders given the complexity and wide variation of customary arrangements within ethnic groups exacerbated by the changes arising from transition to settled agriculture. For development agencies like the International Fund for Agricultural Development (IFAD), this forms a central concern as IFAD-supported projects in Myanmar aim to contribute towards the transition of shifting cultivation systems but are acutely aware of the need to recognize and respect the customary systems of upland communities and to avoid compromising such arrangements due to the transitions induced by the projects. It is in this context that the present policy brief is contextualized.

Myanmar's land governance conundrum: An overview

Myanmar's present-day land governance issues stem from the colonial agricultural rent-seeking arrangements introduced by the British. Colonial efforts at management and control of land resources in Myanmar focused on the lowlands, where they were framed and operated through tax collection arrangements. Landholder rights were accorded to individuals who cleared land, cultivated the fields, and paid tax continuously for 12 years. Land that remained "idle" and did not generate taxes were categorized as "wasteland", a land category formally legalized through the Rules for the Grant of Wasteland passed in 1861. These were subject to legal appropriation by the state. This was further reinforced in 1894 through the Land Acquisition Act, which sanctioned the confiscation of such land "in national interest" without due process or compensation². These arrangements laid the foundation for a formal land governance system in the lowlands, or present-day Divisions (Yin or Taings), where user and ownership rights were formalized through tax arrangements.

In contrast, agricultural land in the uplands were predominantly under shifting cultivation operated within customary tenurial arrangements, with temporary fields that shifted annually or every two years, leaving the previously cultivated fields fallow for gradual regeneration into forests. Finding the

upland agricultural system complex and difficult to fit within the existing taxation framework designed for private property arrangements, the British preferred to consider upland systems as wastelands and subject to appropriation by the state for commercial plantations, forestry projects, and colonial estates to secure properties and estates for the British colonialists and local elites. Land governance systems in the uplands therefore lacked a formal taxation and registration system. Wastelands as a land category remain a central element of land management in present-day Myanmar, being reinforced in 1991 through the Wasteland Instructions and recently through the VFV Lands Act. This arrangement calls for urgent reforms, as a change of the status quo in the uplands or the states (Pyine or Dyine) is fundamental to addressing security of tenure for upland communities and central to the country's peace and reconciliation process.

The VFV Lands Act and the Farmland Law were enacted in March 2012 (with an amendment to the former in 2019) to foster large-scale agricultural investment and secure the tenure of farmlands. While the VFV Land Act paved the way for the allocation of VFV state land to rich individual investors, government entities, and domestic and overseas corporates for commercial agriculture, mining, hydropower installations, and related purposes, the Farmland Act put in place a mechanism designed to secure the tenure of farmlands through a land use certificate and registration system (Form 7), conferring property rights to sell, exchange, access credit, inherit, or lease. Additionally, the Farmland Law facilitates the conversion of VFV land into farmland through a permit to use the land. The two legislations, while accelerating agricultural and mining concessions in Myanmar, have exacerbated land confiscations, leading to expropriation and the displacement of existing users, particularly smallholders practising shifting cultivation.

This negative fallout is primarily a direct consequence of an extremely narrow definition of what constitutes "farmlands" and the failure to include upland production systems such as shifting cultivation and rotational agriculture, rendering these lands ineligible for the issuance of land use certificates. The tenurial complexity and appropriation arising from the limitation of definitions and the poor handling of the issue have not only resulted in the alienation and deprivation of land rights for upland and ethnic nationalities but also reinforced the perception of viewing such land as wastelands and raised serious questions on the implementation of the agricultural

²San Thein, Hlwan Moe, Diepart J-C and C Allaverdian (2018) Large scale land Acquisitions for Agricultural Development: A Review of Past and Current Processes. MRLG Thematic Study Series #9. Vientiane. MRLG

growth process itself. A much more serious concern, however, is the ramifications of the issue on peace building and the national reconciliation process in Myanmar.

The National Land Use Policy: A central instrument for reconciliation and redress

The National Land Use Policy (NLUP) tries to redress the injustice meted out to upland farmers, smallholders, and ethnic nationalities and lays the grounds for far-reaching land governance reforms. The National Land Resource Management Central Committee, with the country's vice president as chair and the Ministry of Natural Resources and Forest Conservation as vice chair, led the process to develop the policy. Guided by the principles enshrined in the "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security" (FAO 2012), the committee oversaw an inclusive and consultative policy-making process (though several ethnic groups expressed severe reservations on the consultation process itself, terming it inadequate and resulting in their withdrawal from the process and formation of the Land In Our Hands network^{3,4}).

The NLUP aims to recognize and protect legitimate land tenurial rights as recognized by the local community with particular attention to vulnerable groups, irrespective of whether these rights have been recorded, registered, and mapped. With a stated aim to strengthen land tenurial security for livelihood improvement and food security and to recognize and protect customary land tenurial rights and procedures of ethnic communities, the policy includes a specific part (Part VIII) devoted to the land use rights of ethnic nationalities. Of particular significance is the importance accorded to the recognition and protection of customary land tenure practised by shifting cultivators and rotational agriculturalists and the express intent to extend protection to such land from appropriation under the VFV Land Law (sections 68, 69, and 70 of Part VIII in particular). The policy also seeks to formulate basic principles for inclusive and sustainable land resource use and develop an umbrella law to resolve land-related issues, drawing on lessons from the implementation of land management reform pilots⁵.

Despite reservations from specific quarters, the NLUP has been welcomed and well received by a larger section of stakeholders, fostering a healthy

ownership among most. The policy has also drawn appreciation from within the country and praise of external aid agencies supporting the process. The NLUP's recommendations are already being reflected as critical objectives in important strategic documents such as the Agriculture Development Strategy and Investment Plan developed by the Ministry of Agriculture, Livestock and Irrigation. While these have been welcome developments reflecting the laudable progress made in addressing the land issue, the challenge facing the government now is the translation of the NLUP into action. Recommendations for immediate action have been forwarded by several agencies and a common refrain has been for a moratorium on the application of the VFV Land Act in the upland and ethnic nationality areas pending the formulation of the National Land Law and resolution of disputes. While steps are being put in place for the gradual translation of the NLUP into practice and in formulating the National Land Law, a formidable challenge facing the Central Committee and all others involved in the process is the operationalization of the recommendations in the context of shifting cultivation systems functioning under community tenurial frameworks in uplands and among ethnic nationalities of Myanmar.

What makes shifting cultivation unique?

Why is the operationalization of the NLUP's recommendations complex and challenging in the context of shifting cultivation? Two fundamental attributes make shifting cultivation distinctively different from settled agricultural systems: the unique nature of the practice and the tenurial framework within which the practice operates. To address the challenges of applying the NLUP's provisions to the context of shifting cultivation and harmonizing the customary tenurial arrangements to statutory legal frameworks, it is necessary to have a basic understanding of the tenurial framework under which the practice functions.

Shifting cultivation involves the clearing of vegetation – usually from a regenerating patch of fallow land – for the cultivation of crops. A multitude of crops are cultivated for one or two years before the farmer moves to the next patch, leaving the previous fields fallow to rejuvenate and regenerate into mature secondary forests given a sufficiently long fallow period. The fallow period is dependent on the village population and land available and has been known to stretch to over 25 years in the past. However, this period has

³Land In Our Hands Network (2015) National Land Use Policy of Myanmar: Our Response and Recommendations. LIOH, Rangoon, Myanmar

⁴Franco, J., T. Kramer, A. A. Fradejas, H. Twomey, P. Vervest, and R. Santos. (2015). The Challenge of Democratic and Inclusive Land Policymaking in Myanmar. Yangon: Transnational Institute

⁵ibid



drastically reduced in most areas to between 7 and 10 years due to gradual transitions to settled agriculture and increased land use pressure in certain parts of the country, especially areas adjacent to towns where transitions have been introduced by market forces, policies, or development projects such as those supported by IFAD. Shifting cultivation is unique because it involves two distinct land uses – agriculture and fallow forestry – that alternate in sequence and time on the same plot of land. A shifting cultivation landscape is thus a mosaic of agricultural fields interspersed with regenerating fallows of different ages, some of which may have matured into good secondary forests. Shifting cultivation, thus, is not just an agricultural practice but a landscape-level sequential (rotational) agriculture and forest management practice.

Such duality of land use is never considered while formulating policies in the context of managing shifting cultivation. Shifting cultivation lands thus fall under the purview of agriculture because of the cultivation phase and are perceived as forests during the fallow phase – the same piece of land under two subjects at different time periods, with the two agencies dealing with these subjects oblivious of the fact that these dimensions occur on the same piece of land though separated in time. This results in a duality of jurisdiction with conflicting (and diametrically opposing) interests for the same plot of land, causing such land to be subjected to different, often conflicting laws, regulations, and management, many of which are contradictory and negatively affect the upland farmers by restricting their control, decisions, and investments on such plots. This duality in land use and the resultant

ambiguity in perception lead to the exclusion of such lands as farmlands under the Farmland Law and the inclusion of regenerating shifting cultivation fields under VFV lands, giving rise to the complexities and challenges in applying the provisions of the NLUP in a pragmatic and practical manner.

The second dimension of this complexity is the customary tenurial framework within which shifting cultivation functions. The customary norms under which shifting cultivation functions vary not only among ethnic nationalities but even from one village to the next within the same nationality. Customary access regimes show a wide range of variations, from annual access to land through lottery or inheritable user rights given as a concession by tribal chieftains to well-defined, equitable access rights to land that are inherited from one generation to the next – inalienable except in extreme cases of indebtedness. In all these cases, ownership rights do not get vested on the individual but remain with the clan or the village; in other words, the right holder has a heritable tenurial or user right but does not have ownership rights or the right to sell or lease the land. This tenurial right holds true for all the plots that the household cultivates in the different parcels of shifting cultivation land. In practice, a household will hold tenurial rights in as many land parcels as the length of the fallow cycle prevailing in the village. Once the shifting cultivation land enters a fallow phase, the tenurial rights of the household temporarily ceases to be operational until the next cultivation on the plot and the land reverts to common property, becoming open to all members within the village for collection of wild edibles and other produces except for any trees (and its produces)

planted by the household during the cultivation phase. The customary tenurial framework suggests a strong common property framework with individual tenurial rights. This duality, together with rights on multiple plots, comprises the second level of complexity that needs to be harmonized while applying the NLUP's provisions.

In recent times, shifting cultivation systems have witnessed a transition to settled agriculture in certain parts of the country, driven by a combination of policy, increased market access, and growing community aspirations. These transitions have in some cases transformed traditional customary tenurial arrangements into *de facto* private property rights. Such lands sometimes conform to the norms required for registration under the Farmlands Act but remain unregistered because of their location in the uplands. While harmonizing the customary tenurial arrangements with the statutory frameworks, the focus must be on changes in tenurial arrangements consequent to transition and safeguards must be put in place to ensure that such transitions do not result in elite capture, strip existing rights, or erode the social fabric.

Way forward: Possible approaches and potential solutions

The above account would suggest that, essentially, four aspects of the customary tenurial arrangements reflecting the rights of the shifting cultivators need to be kept in perspective and safeguarded while operationalizing the NLUP's provisions and harmonizing customary tenure with statutory provisions of the proposed National Land Law: collective rights, individual rights, the rights over fallow lands, and transitioning to settled systems. These aspects can be broadly described as follows:

1. The ancestral collective rights of communities over their shifting cultivation land must be recognized and registered as customary land, irrespective of whether these are under current cultivation, fallow, or have regenerated into woodlands or forests. This recognition should include rights over all land parcels, respecting the fallow period practised.
2. Recognizing the ancestral tenurial rights of the household over their agricultural fields in all parcels, even if a plot is fallow and regenerating, the present condition of the plot should not be grounds to alienate households from their ancestral rights and deprive them of tenurial rights, rendering them illegal occupants on their ancestral land.

3. The parcels under a fallow period should not be deemed as idle and vacant or as wastelands. They should be recognized and registered as regenerating arable land and integral parts of the village's shifting cultivation lands, thus removing them from the purview of the VFV Land Act. Appropriation of such land for conversion to agricultural, mining, or other activities could negatively impact tenurial rights. It would also change land use patterns and permanently prevent the regeneration of forests, potentially contribute to a reduction of forest cover locally and nationally, and negatively impact ecosystem services provided by the regenerating fallows.
4. Any significant conversion of land use should therefore first be done by existing users in the communities, preferably accompanied by measures for intensifying their land use (such as through the provision of improved soil fertility and moisture management practices) and other measures for ensuring sustainable land management (e.g. reforestation and soil and water conservation measures). Second, any granting of land to outsiders should only be done following a consensus at the village level and applying the principle of free, prior, and informed consent and confirmation that appropriate safeguard and mitigation measures will be adopted. Moreover, such an investment needs to demonstrably benefit the communities concerned, contributing both to poverty eradication and sustainable land management.

While the formulation above helps conceptualize the central focus for the way forward, it is necessary at this stage to examine the options that can provide solutions to the challenge facing the stakeholders. The following are suggested approaches, in line with the intentions suggested in several provisions of the NLUP as well as parts of the Agricultural Development Strategy and Investment Plan:

1. To address the first concern – recognition of ancestral rights – the traditional village authority (TVA) should be recognized as the collective owner and custodian of ancestral lands where shifting cultivation is practiced. In the absence of a TVA, this should be conferred to a registered village society (RVS) comprising the husband and the wife from each household within the village. This recognition must include all parcels of land used for shifting cultivation, irrespective of their current use. The concerned land use council set up in each tract, district, and state under the NLUP must include all such lands as part of ancestral lands, diligently mapping and registering them as community land for shifting cultivation. This

approach can address the requirements laid out under various provisions in several sections of Part VIII of the NLUP.

2. Individual tenurial rights of a household or family should be governed as per customary tenurial arrangements in practice. The governance of individual tenurial rights should be managed by the TVA or RVS to retain the flexibility inherent in customary tenurial arrangements. The TVA or RVS should codify the rights of each household and family by registering the details of shifting cultivation land in all parcels as a statute or internal rules with the land use council. Changes or modifications of rights should be discussed and ratified in a meeting involving all households called by the TVA or RVS. The rules may be modified accordingly with due intimation to the concerned council. Awarding the collective owners this recognition and responsibility will help harmonize traditional customary tenurial norms while bringing them under the ambit of the statutory framework.
3. Given the widespread transition to settled agriculture, the TVA or RVS should consult all households and families and adopt a resolution to retain the collective ownership of lands transformed to permanent commercial farms and prevent the privatization of shifting cultivation land. As provided in most customary tenurial arrangements, land tenurial rights should be awarded to the family or household as long as they continue cultivating the permanent crop, but the land would revert to the community as soon as the family or household ceases to continue cultivation. This right can be inherited by the next generation but should remain non-transferable. Such a step will ensure that collective ownership of the land is not converted to private ownership and the customary tenurial arrangements are continued. It would also provide the necessary tenurial security which will pave the way for long-term investments for smallholder farmers who wish to undertake more commercial production and also ensure a mechanism that will safeguard against elite capture. Award of such rights must also be duly recorded in the village statute or internal rules and intimated to the land use council at appropriate levels.
4. The duality of land use in shifting cultivation means fallow periods are categorized as idle, vacant, or a wasteland, resulting in the state appropriating or confiscating the fallows under various laws. The European Union and Food and Agriculture Organization's Food and Nutrition Security Impact, Resilience, Sustainability and Transformation programme suggested an interim

mechanism to procure a community forest certificate until such time as a more permanent solution can be identified. Provisions under Articles 13 and 14 in conjunction with Article 7 of Myanmar's Forest Law (1992), updated in 2018, allow for agricultural plantations to be established. A suitable refinement of these articles may provide a window of opportunity to allow taungya practices – agricultural crops grown for a short term together with tree crops – to continue legally on such land, thus accommodating the rotational agro-forestry character of the practice while ensuring that ecosystem services provided by the fallows are safeguarded. It must be pointed out here that if section (1) above is accepted and acted upon, the need to register the fallows under provisions of the Forest Law becomes redundant.

5. To address the misconception that shifting cultivation fallows are idle, vacant wastelands and hence subject to the provisions of the VFV Land Law, there is a need to revise the colonial definition of wastelands. Colonialists categorized a parcel of land as wasteland whenever tax could not be levied. With the widespread acceptance of concepts of ecosystem services, no piece of land can be considered a wasteland unless it is absolutely degraded and can provide no ecosystem services. A regenerating fallow provides several provisioning and regulating ecosystem services and therefore cannot be scientifically termed a wasteland. These services can include the use of such land for grazing, collection of wild edibles and other non-timber forest products, or even as habitats for animal-based products. The definition of wastelands therefore needs to be revised to accommodate the advances in scientific thinking regarding the value of land. Such a revision will bring about substantial changes in land governance, removing many of the conflicts and land disputes arising out of legislations such as the VFV Land Act.
6. Part III of the NLUP (Ch 1, sec 21(i)) provides for the allocation of reserved land areas to landless citizens in order to improve livelihoods, promote social stability, and manage land encroachment. As larger areas are increasingly brought under permanent commercial production from shifting cultivation, the danger of land grabbing and elite capture have become real. To arrest this and prevent the poor and disadvantaged from becoming deprived of their lands, the TVA or RVS (as the case may be) should (a) earmark and designate parcels for potential conversion to permanent agriculture (after consultation with all households) and (b) set up designated land banks specifically for the poor as a non-negotiable condition for permitting the transformation of

their land whether by themselves or on a lease or contract with commercial firms or companies. In such cases, priority should be given to granting of land for permanent commercial production by members of the community, subject to the approval of the TVA or RVS. Where land is granted to an outside investor, this should strictly be on lease and subject to the principle of free, prior, and informed consent; confirmation that appropriate safeguard and mitigation measures will be adopted; and evidence of an agreement that such an investment will demonstrably contribute to poverty eradication and sustainable land management. All land-granting agreements (lease or contracts) should be approved by a relevant government authority (potentially the land use council at the district level), following the prior approval of the TVA or RVS and with the community's consent.

7. The NLUP suggests participatory land-use mapping indicating the customary tenurial arrangements. To promote transparency and forward-looking planning, participatory perspective land use planning exercises should be encouraged to plan and map current and future land use changes. Such maps should then be converted to digitized versions applying GIS and RS methodologies and harmonized with OneMap Myanmar. This will not only help to increase transparency but can also be an effective visualization of the prior informed consent process. Such exercises should in fact be regularly done as a first step in recognizing existing farming systems and customary rights and facilitating transitions to more permanent farming systems.
8. Steps should be taken to initiate proof-of-concept pilots, preferably in ongoing bilateral development projects such as the IFAD-supported Eastern States Agribusiness Project and the Western States Agribusiness Project. These pilots would aim to test, validate, and draw lessons to harmonize customary land tenurial arrangements with statutory systems, particularly the proposed National Land Law Bill, thereby ensuring tenurial security for the marginalized shifting cultivators and ethnic nationalities of Myanmar. Such pilots should inform the development of the legislative and regulatory framework as well as the formulation of a longer-term strategy for systematically rolling out implementation, including for building capacity at the community and local government levels.

Key recommendations

1. Introduce a moratorium on the application of the VFV Land Act in the uplands and ethnic nationality areas until the land alienation and governance issues are resolved through the ongoing reforms process and the formulation of the National Land Law.
2. Revise the prevailing definition of wastelands (which is based on colonial concepts of rent and taxation) to accommodate conceptual advances on the value of land as providers of ecosystem services. Fallow but regenerating land does provide provisional and regulator services and hence cannot be considered as a wasteland. The wasteland categorization should be restricted to severely degraded land incapable of rendering any ecosystem services.
3. To harmonize customary land tenurial arrangements with statutory frameworks, recognize the TVA where existing or take steps to establish an RVS, with universal membership of the husband and the wife from all households as the custodians of ancestral lands functioning under customary tenurial arrangements that include shifting cultivation lands (under current cultivation or fallow and regenerating into forests). This should include all land parcels cultivated for shifting cultivation.
4. To safeguard individual household and family tenurial rights, codify existing customary tenurial access arrangements of each household or family as a village statute or internal document prepared by the TVA or RVS and ratified in a general meeting involving all households or families and overseen by the local land use council. Any changes to a household or family's rights must be discussed and approved in a meeting attended by all households and ratified by the assembly. The statute or internal rule must be registered with the relevant land use council, but governance of the provisions should be the responsibility of the TVA or RVS.
5. Recognizing the rapid transition of shifting cultivation lands to permanent commercial cropping and the need to protect customary rights and safeguard against privatization and elite capture of such land, the TVA or RVS should pass a resolution involving all households or families to retain the customary ownership over such lands even in the case of change in land use. Households or families adopting permanent agricultural practices, whether commercial plantations or otherwise, should be awarded customary tenurial

rights that will be inherited by next generations, but this right will remain non-transferable and in force as long as the family or household continues such cultivation.

6. To prevent appropriation of fallow land for concessions or confiscations, community forest certification should be applied till such time as the issue is resolved through provisions of the proposed National Land Law. This will also ensure that ecosystem services provided by such fallows are safeguarded and are not eroded due to appropriation for large-scale agriculture, mining, or other commercial purposes.
7. Participatory perspective land use planning and mapping exercises should be initiated to map ancestral lands under customary tenure and used for shifting cultivation, community forestry, and other community uses. This exercise should

involve the application of modern tools such as enlarged satellite images so that present and future land use planning can be subsequently digitized and harmonized with the OneMap Myanmar mapping initiative.

8. For any proposal of large-scale agricultural transformation, a non-negotiable condition should be mandated to set up land banks especially designated for accommodating the poor and disadvantaged households in such transformation efforts and to prevent land-grabbing attempts by the elite or companies.
9. Proof-of-concept pilots to test and validate the assumptions underlying the above options should be encouraged to draw lessons which then inform approaches for harmonizing customary tenurial frameworks into the proposed National Land Law.

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