



Myanmar has adopted a National Land Use Policy in 2016 which mandates the enactment of a comprehensive National Land Law. Once a National Land Law is passed, all other laws will have to be harmonized with its provisions. This new law will be critical for the future of Myanmar's indigenous peoples, most of whom depend on land and natural resources for their livelihood.

Control over land and resources is also a key issue in the peace negotiations between the government of Myanmar and Ethnic Armed Groups, who demand the creation of a federal system of government. If and when a federal union becomes a reality and the federal states (the so-called 'ethnic states', where most of Myanmar's indigenous peoples live) have authority over land and forests, national and state-level policies and laws will also have to be harmonized.

There is an urgent need for Myanmar's civil society to be prepared for advocacy and negotiations for the recognition and protection of customary land in the new National Land Law, and in state-level laws and policies in a future federal union.

Therefore, POINT has conducted this study, which undertook

- to critically review relevant existing laws with regards to indigenous peoples' rights to customary land
- to make two case studies on the impact of the implementation of two laws, i.e. the Protection of Biodiversity and Protected Area Law and the Fallow and Vacant Management Law, on indigenous communities
- to review experiences with existing laws recognizing indigenous peoples' rights to land and resources in Cambodia and the Philippines
- to come up with concrete inputs to the formulation of provisions in the new National Land Law on the recognition and protection of customary land rights of indigenous peoples

Indigenous Peoples' Rights to Customary Land in Myanmar

CURRENT STATUS AND THE WAY FORWARD

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Acronyms

BCPA law	Biodiversity Conservation and Protected Areas Law
CADT	Certificate of Ancestral Domain Title, a certificate issued by the Philippines government recognizing collective land rights of indigenous peoples
CALT	Certificate of Ancestral Land Title, a certificate issued by the Philippines government recognizing land rights of individuals, families or clans of indigenous peoples
CF	Community Forestry
CFI	Community Forestry Instructions
CSO	Civil Society Organization
FPIC	Free Prior and Informed Consent
FUG	Forest User Group
GPS	Global Positioning System
ICCA	Indigenous Community Conserved Area
ICCs/IPs	Indigenous Cultural Communities/Indigenous Peoples
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDP	Internally Displaced People
IPRA	Indigenous Peoples Rights Act. Republic Act 8371, of the Republic of the Philippines
IUCN	International Union for the Conservation of Natures
MONREC	Ministry of Natural Resource and Environmental Conservation
NCIP	National Commission on Indigenous Peoples
NGO	Non-governmental Organization
NLUP	National Land Use Policy
SLORC	State Law and Order Restoration Council
SPDC	State Peace and Development Council
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
VFV Land	Vacant, Fallow and Virgin Land

Introduction

Since the democratic reforms were initiated and it opened up to foreign investment, Myanmar has undertaken several revisions of existing laws and passed new laws related to land and natural resources. Among others, a new Farm Land Law, the Vacant, Fallow and Virgin Land Management Law and the Environmental Conservation Law were passed in 2012, and the latter revised in 2018. A new National Land Use Policy (NLUP) was passed in 2016, and a revised Community Forestry Instruction in the same year and again in 2019. In addition, a new Forest Law and the Protection of Biodiversity and Protected Area Law were adopted in 2018, and the Land Acquisition, Resettlement and Rehabilitation Law was passed in August 2019.

Public consultations have been organized for some of the revisions and during the drafting of some new laws Civil Society Organizations (CSOs) have consistently submitted critical comments and suggestions for improvements. One of the issues that has been identified as most problematic in all existing laws – except for the new National Land Use Policy – is the absence of any recognition of tenure rights over customary land. This means that at present there is no recognition of the rights of indigenous communities to their customary land.

As mandated by the Land Use Policy 2016, a new, comprehensive Land Law is currently being drafted and is expected to undergo public consultation in the near future. So far, the allegedly existing draft has not been circulated and thus it is unclear to what extent, if at all, the draft law follows the provisions of the NLUP, and therefore whether customary land rights of ethnic nationalities (i.e. indigenous peoples) are going to be recognized and protected.

Once a National Land Law is enacted, all other laws will have to be harmonized with its provisions. Furthermore, control over land and resources is a key issue in the peace negotiations between the government of Myanmar and Ethnic Armed Groups (EAG), who demand the creation of a federal system of government. If and when a federal union becomes a reality and the federal states (the so-called ‘ethnic states’, where most of Myanmar’s indigenous peoples live) have authority over land and forests, national and state-level policies and laws will also have to be harmonized. Some EAGs, like the Karen National Union, already have their own Land Policy.

There is an urgent need for indigenous civil society to be prepared for advocacy and negotiations for the recognition and protection of customary land in the new National Land Law, and in state-level laws and policies in a future federal union.

Therefore, POINT has conducted a study, which undertook

- To compile factual information on the actual status of indigenous peoples' rights to customary land under the current laws and policies of Myanmar, by means of
 - a critical review of relevant laws with regards to the recognition of customary land rights of indigenous peoples
 - the documentation of the impact of the implementation of two specific laws, i.e. the Protection of Biodiversity and Protected Area Law and the VFV Land Management Law, on indigenous communities in Northern Karen State and in Southern Shan State, respectively
- To come up with concrete inputs to the formulation of provisions in the new National Land Law on the recognition and protection of customary land rights of indigenous peoples, based on
 - a critical review of existing legal mechanisms for the recognition of customary land in other countries in the region, i.e. the Philippines and Cambodia, including an exchange visit to the Philippines
 - workshops and consultation with lawyers and other experts on customary land rights and indigenous peoples' rights.

The results of these endeavors are presented in this report. In chapter 1, the review of current laws is summarized. Chapter 2 presents the two case studies that investigate the impact of the VFV Land Management Law and the Protection of Biodiversity and Protected Area Law on indigenous communities. Chapter 3 briefly discusses the legal obligations with regards to the protection of the rights of indigenous peoples, which Myanmar has accepted when ratifying the International Covenant on Economic, Social and Cultural Rights (ICESCR) and when voting in favor of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the UN General Assembly. This is followed by a brief review of the main provisions of part 8 on Land Use Rights of Ethnic Nationalities of the National Land Use Policy, which mandates the Myanmar government to legislate a National Land Law. The subsequent sub-chapter summarizes the findings of an analysis of experiences made in legislating and implementing laws for the protection of indigenous peoples' right to land in Cambodia and the Philippines. Based on this, the concluding sub-chapter presents proposals for provisions on the recognition and protection of customary land rights in Myanmar's future National Land Law.



CHAPTER 1

The status of land rights of indigenous peoples in Myanmar's laws and policies

Like elsewhere in the world, indigenous peoples in Myanmar have since centuries had their own customary laws and institutions regulating access to, use and management of land, forest and other natural resources. During British colonial rule, traditional local governance systems in the remote and hilly frontier areas remained largely intact as a result of the indirect-rule strategy applied in those areas. This means that much of the uplands, where the majority of Myanmar's indigenous peoples live, continued to be managed according to customary law until independence in 1948, and to some extent until today.

Following independence in 1948 Burma's Constitution declared the state as the ultimate owner of all land. In 1953, the Land Nationalization Act was adopted, which abolished private land ownership and at the same time provided farmers with land use, or 'tillage rights' to those using the land.¹ Land was exempted from appropriation if land owners were cultivating the land themselves, have been in possession of the land since 1948 and if most of the family members were Burmese citizens. They were given rights over a limited area of their land and for as long as they complied with the government regulations that applied to their land.²

The military government that came to power with a coup in 1962, following a socialist ideology, expanded nationalization to other sectors of the economy, and in 1974 drafted a new constitution following the model of Eastern European one-party states.³ With the Tenancy Act 1963 and the Tenancy (Amendment) Act 1965 the nationalization of land was completed. Private tenancy was forbidden, and the government could grant leases to any land irrespective of existing property rights.⁴ However, in reality, "these laws did little more than push existing tenancy practices underground", and "unofficial leases or transfers of land use rights were relatively common and officials tolerated them"⁵

In response to a deepening economic and political crisis in the 1980's and early 1990's, the SLORC (later SPDC) initiated economic reforms toward liberalization and more foreign engagement and investment, also in land.⁶ In 1991, the first law⁷ was passed that specifically aimed at making so-called 'fallow' or 'waste' land accessible to state-owned enterprises and foreign investors in the form of 30-years leases, since the amendment of 1998 for up to 50,000 ha per concession.⁸

The shift away from a socialist command economy toward a market economy is also enshrined in the new Constitution of 2008. It explicitly prohibits nationalization, but according to article 37-a, the state remains "the ultimate owner of all lands and all natural

resources above and below the ground, above and beneath the water and in the atmosphere in the Union”, while, in clause c, it “shall permit citizens right of private property, right of inheritance, right of private initiative and patent in accord with the law.” However, despite the provision that citizens can obtain the right of private property, only a minority of all farmers in the country have a legal document giving them some kind of tenure rights over land and forest.

Following the political reforms that led to general elections in 2010, two laws were passed in 2012 to address tenure insecurity: The Farmland Law, which provides for the registration of land by individuals and organizations, and, in continuation of the policy under the 1991 ‘Wasteland Law’, the Vacant, Fallow and Virgin Lands Management Law (amended again in 2018) based on which business concessions for ‘unused’ land can be issued. The two laws reintroduced the concept of private ownership, which means land tenure rights can be sold, traded, or mortgaged.⁹ Both laws have been criticized for being seriously flawed, and, especially with respect to the latter, for benefitting (foreign) investors rather than farmers.¹⁰ Moreover, in none of these laws are the customary land rights of indigenous peoples protected.

Farmland Law of 2012

The Farmland Law of 2012 gives farmers the possibility of obtaining formal Land Use Certificates (LUC) that can be transferred, inherited and mortgaged. The law is clearly targeting individually owned land in lowland farming areas. In the uplands, LUC have been granted only for individually owned rice terraces and other plots of permanently farmed land. The law does not mention customary tenure and it is not possible to obtain LUC for land under collective tenure, such as communal land, which is common in upland areas, particularly among indigenous communities. Furthermore, the law makes prescriptions and imposes limitations on land use. For instance, land should not stay fallow for longer periods and permission has to be obtained to change from seasonal crops to perennial crops.¹¹

In the Farmland Law of 2012, the different types of recognized farmland are mentioned, such as paddy land, *ya* land and *kiang* land (both refer to permanent non-irrigated crop land, but terms used vary in different parts of the country), perennial plant land, *dhani* land (Nipa palm land in coastal areas), garden land, land for growing of vegetables and flowers, and temporarily flooded alluvial islands. However, land used for shifting cultivation, which is the backbone of the livelihood of many indigenous communities, is excluded since the law only recognizes fields under cultivation in upland areas (it uses the term *taungya* for that), but not fallow land. Like in the Constitution, the law states that the state is the original owner of all land.

As mentioned earlier, under the Farmland Law a farmer can apply for a Land Use Certificate, which is popularly known as 'Form 7'. When receiving Form 7, a farmer has the right of land use and the land can be sold, pawned, leased, donated and inherited. But the Farmland Law limits farmers' ability to choose the crops they want to plant, as they are required to produce 'regular crops', which have to be mentioned when applying for a LUC. Failure to comply can lead to the withdrawal of the LUC.¹² The state retains delete the 's' of all land and can withdraw land use rights if the conditions of use are not met or are breached, such as by not informing the Farmland Administration Body (FABs) of reasons for land remaining fallow or by building structures without permission. The FAB may impose fines, withdraw land use rights or even jail the farmer.¹³

The Farmland Law does not recognize customary use or tenure rights, and therefore also no collective land tenure which is often found in areas where shifting cultivation is practiced. Though the law refers to *taungya* as farmland, it does not define the term and it is interpreted as upland fields under permanent land use, which means that fallow land is not included. As a result, most shifting cultivation land is classified as fallow land and thus falls under the VFV Land Management Law.

The Farmland Law also provides no explicit recognition of women's equal rights to own LUCs and to manage or inherit farmland. Although the constitution and NLUP recognize equal earnings for men and women, in the Farmland Law there are no provision for the rights of women as the Farmland Law stipulates that land will be registered to the head of household. Typically, men are regarded as heads of the households. This lack of explicit recognition of women's equal rights under the Farmland Law leaves them vulnerable.¹⁴

Conclusion

Because of the strict condition imposed on land use and the fact that the state is the ultimate owner of all land and thus has the right to withdraw any use rights granted, the Farmland Law does not provide real land tenure security for farmers.

Customary tenure systems of indigenous peoples are complex and often include different forms of individual and collective tenure, use and access rights. Due to the lack of recognition of customary tenure and the limited option of obtaining land rights certificates only for individually owned land, large parts of the customary land of indigenous communities are excluded from any legal protection. From the government's point of view, these lands are considered vacant, fallow or virgin land for which a different law has been passed. Other parts of the customary land of indigenous communities are covered by the Forest Law.

It is doubtful whether any revision of the Land Law can address these concerns because of the legal compartmentalization of land use and tenure rights resulting from the identification of different types of land and the legislation of separate laws for them. The Farmland Law

could, for example, include fallow land for *taungya*. However, fallow land under long-fallow systems may be temporarily covered by mature forest (and from the government's point of view be considered forestland), or may at one point in time be conserved as permanent forest (thus falling under the Forest Law). Or else, such land may be turned into an agroforest (then qualifying as farmland), but again used for *taungya* later on (and legally not be farmland anymore unless the law is changed).

Therefore, what is needed is a comprehensive national land law that also recognizes and protects the customary land of indigenous peoples, as mandated by the National Land Use Policy. It would replace the Farmland Law and other laws, like the controversial Vacant, Fallow and Virgin Land Management Law.

Vacant, Fallow and Virgin Lands Management Law

The Vacant, Fallow and Virgin Lands Management Law (VFV law) of 2018 is the revised law of 2012, which was opposed by many Civil Society Organizations (CSOs). It provides for the granting of land concessions for land considered unused. The law defines vacant and fallow land as “land on which agriculture or livestock breeding business can be carried out and which was tenanted in the past and abandoned for various reasons and without any tenant cultivating on it and the lands, which are specifically reserved by the State”.¹⁵ Most of the land thus considered ‘vacant’ or ‘fallow’ is in fact land under customary use and management by communities, like fallow land for shifting cultivation or grazing land. It may also be land that people were forced to abandon when they were displaced by armed conflicts. Virgin land is considered “wild land and wild forest land whether on which there are trees, bamboo plants or bushes growing or not, or whether geographically (surface) topography of the land is even or not and being the new land on which cultivation has never been done, not even once”. Since indigenous peoples often preserve parts of their forests as community, sacred or conservation forests which are never used for agriculture but for many other economic, cultural or spiritual purposes there is a danger that these forests are categorized as ‘virgin land’.

A Central Committee is given the authority to grant the right to cultivate or otherwise utilize VFV land. It is supposed to “form relevant region or state, union area Committees for the Management of Vacant, Fallow and Virgin Lands, with representatives of local ethnic groups, farmer representatives, CSO representatives and appropriate experts”¹⁶.

Use rights may be granted for a period of up to 30 years to local and foreign investors, governmental and non-governmental organizations, landless citizens and smallholder farmers. Businesses can be granted up to 30,000 acres (through repeated approvals of 3,000 acres at a time) of land to cultivate perennial crops, seasonal crops or industrial crops.¹⁷ This

is a reduction from the maximum of 50,000 acres in the 2012 law. Concessions can also be granted for smaller areas for poultry farming, aquaculture, mining and for other purposes.

Farmers can apply for use rights of VFV land of up to 50 acres.¹⁸ However, this rarely happens since registration of land under the VFV Law is a complicated, costly and time-consuming process with steps to be taken from the local to the state and final national level, i.e. the Central Land Management Committee.¹⁹ This is much beyond the means and abilities of most communities and clearly favors more resourceful private enterprises. It also appears that obtaining these concessions has in fact more often been just a means for grabbing land than putting it to productive use. It has been estimated that between 1992 and 2016, 3,968,314 acres of VFV land have been allocated to companies or individuals, but that only about 15% are actually used.²⁰

On 30 October 2018, the public was informed through a notification that, according to section 22 of the law, any person or organization using VFV land without the permission of the Central Committee has to apply for a permit to utilize the land “by submitting complete detailed information including the area of the vacant, fallow and virgin lands that have been utilized, within six months from the day when the Law Amending the Vacant, Fallow and Virgin Lands Management Law (2018) was enacted”, i.e. from 11 September 2018. Land users who fail to register their claim to their land within the given period face criminalization since the law states that in section 27, clause a, any person who is violating the provisions in section 22 “by utilizing the vacant, fallow and virgin lands without permission of the central committee shall be punished with a jail term not exceeding two years or a fine not exceeding five hundred thousand kyats²¹ or both”.

Local and international civil society organizations responded with concern. On November 16, a statement was posted which was signed by 346 local CSOs, expressing their opposition to the VFV Law, its amendment and the notification regarding the registration within six-months²² On the same day, another letter of concern was sent in the name of 41 local and international NGOs and local CSOs. On-the ground studies were conducted, and the results presented in a press conference in January 2019. It showed that most farmers were unaware of the VFV law and the new amendment and did not know about the deadline for registering their land or the process to follow.²³

In the same month, the Ministry of Agriculture, Livestock and Irrigation (MOALI) organized a formal meeting with CSOs in which officers explained that the purpose of the new instruction for registration was to secure the land of farmers and to help them get back confiscated land. Another meeting was supposed to take place with the Bill Committee, also in January, but it was cancelled in the last minute. Its chair had an informal meeting with CSOs in February 2019, in which he declared that no action would be taken against communities who have not registered, and that there was no need to worry. However, no official statement in response to the concerns expressed by local and international CSOs has so far been issued.

The government's – so far unofficial – claim that the amended VFV Law will help farmers secure their rights to their land is not very convincing given the experiences made so far which show that under the 2012 version of the law the beneficiaries of the law have been private companies, including foreign investors, to the detriment of communities who have often lost their land. It is questionable how the requirement for registration of land used without permission within such a short time period, as stipulated in the amended law, is supposed to help farmers secure their land rights.

According to chapter X, the land of indigenous peoples seems to be excluded from the application of the law. Section 30-a states that

Management of the following types of land shall not be governed by this law;

- (a) The lands for which the right to use as hillside cultivation (*Taungya* land) is granted under the existing law and rules,
- (b) Customary lands designated under traditional culture of the local ethnic people.
- (c) The lands currently used for religious, social, education, health and transportation purposes of the public and ethnic people.

While these provisions are a positive departure from the 2012 version of the law, which did not mention ethnic nationalities and customary land at all, there are still problems because of their lack of precision. With regards to clause a), the problem is that the right to *taungya* land is explicitly granted only in the Land Law of 2012, but in an interpretation that limits it to actual or permanently used plots and does not cover fallow land necessary for the rotational land use under shifting cultivation. The explicit exclusion of shifting cultivation as an eligible land use practice in community forests has been dropped in the revised Community Forestry Instruction of 2016 and 2019, but the right to practice *taungya* is not explicitly mentioned either (only the “Right to apply any agroforestry system that is suitable for local conditions, in implementing community forestry”).²⁴ The only clear reference to the right to practice shifting cultivation is in the National Land Use Policy, which is not a law. So, since the right to use land “as hillside cultivation (*Taungya* land)” as practiced by many indigenous peoples, i.e. as shifting cultivation, is not granted in any law, it could be argued that no *taungya* land is excluded from the VFV law. Permanent *taungya* land is already covered by the 2012 Land Law and thus excluded from the VFV Law anyhow.

Regarding clause b), the problem is that customary land is not defined. And all three clauses lack defined procedures on how customary land and *taungya* land or the lands mentioned under clause c) are to be identified and excluded from the application of the VFV law.

For the signatories of the CSO statement referred to above, the amended VFV Land Management Law contradicts the provisions in the NLUP, section 66(b) part 8, on land use rights of ethnic nationalities, according to which customary land tenure rights of ethnic nationalities shall be recognized and protected, whether or not existing land use is registered, recorded or mapped. The statement, in paragraph 3, points out that the VFV is the “polar

opposite to the federal democratic norms that ethnic people expressed their desire for in the 21st Century Pinglong Peace Process” and that the law “would impact seriously on the peace process that the Government and ethnic armed organization are engaging in”. It calls it an “unjust law that prioritizes the creation of a land market for investors to come in the name of development” and “makes millions of people into landless criminals”, and it therefore calls for the abolishment of the law and an enactment of a federal law that safeguards peoples’ integrity, their lives and livelihoods and their identities”²⁵. Various other organizations, among them the Untied Nationalities Alliance (UNA) and the Karen National Union (KNU) have also called for the abolishment of the law.²⁶

As the Myanmar Center for Responsible Business pointed out in a letter of concern sent to the Myanmar government in January 2019, a number of Myanmar land laws and amendments to those laws, including the VFV law, are not compliant with the International Covenant on Economic, Social and Cultural Rights (ICESCR), which the Myanmar government signed in 2017.²⁷

Conclusion

In 2012, when the original VFV Land Management Law was passed, it was heavily criticized by civil society organizations, local and international NGOs as well as legal experts, ethnic political parties and armed groups. The amended law does not offer any improvement and, given the fact that there is really no ‘virgin’ or ‘vacant’ land left in the country, i.e. that most if not all the land to which the law is supposed to apply is actually used and owned under customary law by indigenous and other communities (e.g. fallow land for shifting cultivation, community forests, agroforests, grazing land, sacred sites etc.), the law is indeed creating serious problems. The paragraph on the purported exclusion of customary land of ‘ethnic people’ is too vaguely formulated to provide the protection that indigenous owners of customary land need. If the intended exclusion was indeed strictly applied, there would in fact be hardly any land left that could be identified as ‘vacant’. Thus, there can be only one conclusion: the law is not only unjust, but, in stringent interpretation of its own provisions, obsolete and should therefore be abolished in its entirety.

However, as long as the law is in place, there is an urgent need to come up with rules and procedures for the identification of the types of land mentioned in chapter X, section 30, to which this law does not apply.

It could be argued that since customary land of ‘ethnic people’ is excluded, the law does not apply to the seven ethnic states, i.e. Chin, Kachin, Kayah, Kayin, Mon, Rakhin and Shan State, and the ethnic self-administered zones. This means that there is no need for indigenous peoples to comply with section 22 of the law and inform the government and apply for registration of the land they are using. It could be argued that since these lands

are excluded, it is the responsibility of the government to identify these lands prior to considering any application for land concessions in areas where indigenous peoples live.

Finally, taungya land is supposed to be excluded from this law if it has been granted under another existing law. However, only the Farmland Law mentions taungya land, but limited to permanent land. This means the provision on the exclusion of taungya land is irrelevant in the given formulation. It should be amended, simply stating that lands used under rotational hillside cultivation (Taungya land) is to be excluded.

Forest Legislation

Today's forest management system in Myanmar has its roots in British colonial rule in the 19th century, when the British introduced forest management methods developed in Europe to its colonies. Vast forest areas in British controlled India and Burma were declared as Crown Land and put under the jurisdiction of the colonial Forest Department. The government of independent Myanmar continued with this policy and all forests (as other lands) were nationalized.

There are numerous laws, rules and instructions regulating the management and conservation of forests and Protected Areas, amongst others, the Forest Law (passed in 1992, amended in 2018), and the Forest Rules of 1995 (currently being amended), the Biodiversity Conservation and Protected Areas (BCPA) Law (replacing the Protection of Wildlife & Wild Plants & Conservation of Natural Areas Law 1994) and the corresponding rules of 2002, the Logging Rules of 1936, the National Code of Forest Harvesting Practices 2000 and the Community Forestry Instructions of 1995 and 2016.

The Forest Law provides that a Scrutiny Body or a working committee has to be formed before the establishment of a Reserved Forest or a Public Protected Forest, respectively, and that both have to include "local (ethnic) communities and relevant experts". These bodies or committees are mandated to "inquire into and determine in the manner prescribed the affected rights of the public"²⁸. Thus, while the presence of indigenous and other forest communities and their land and other rights are to be identified, the communities do not have the formal right to withhold their consent and thus prevent the declaration of their land and forests as part of a Reserved or Public Protected Forest. Their right to Free Prior and Informed Consent (FPIC) is not granted.

The decision is taken by the Ministry of Natural Resources and Environmental Conservation (MONREC) "with the comment of the Nay Pyi Taw Council, State or Regional Cabinet, and with the approval of the Union Cabinet". This includes the decision on the recognition of customary forests in section 7(d). It is the only provision that vaguely refers to customary forest management, stating that "The Ministry, with the comment of the Nay Pyi Taw Council, State or Regional Cabinet, and with the approval of the Union Cabinet [...] may

recognize the natural forest and mangrove conserved customarily (traditionally) by the local people”. What ‘recognize’ means is not defined, i.e. there is no provision granting and protecting the customary rights over these forests, nor to any other land and resources in areas that are part of the public forest estate.

On the ground, there is also much confusion and conflict because of unclear and overlapping boundaries of Reserved Forests, Public Protected Forests and Protected Areas. Once established, Public Protected Forests and Reserved Forests are regulated by the Forest Law according to which many of the every-day livelihood activities of indigenous and other forest-dwelling communities are punishable offenses, such as, among others, “trespassing and encroaching and domesticating the animals in the forest land”, pasturing domesticated animals, “breaking up, clearing, digging or causing damage to the original condition of the land”, “extracting, moving or keeping in possession any non-timber forest product without a permit with the exception of permission under any existing law”.²⁹ Only one provision grants limited rights to use forest products related to livelihood activities of local people without a permit.³⁰

The Myanmar Timber Enterprise (MTE) has the legal mandate to harvest the timber in the areas under the management of the MONREC. Since indigenous and other forest communities’ customary rights to their forests are not recognized, the MTE can harvest timber also in these forests. Logging in their forests is threatening the livelihoods and food security of the communities.

The draft **Forest Rules** 2019 are no real improvement on the original rules of 1995. Like before, chapter II (sections 6, 10 and 12) de-facto abolish the rights of local communities to their land and forests in Reserved Forest and Public Protected Forest. Section 6 lists 11 prohibited activities, many of them identical to those mentioned in section 40 of the Forest Law, that are key livelihood activities of indigenous and other forest communities. Section 12 states that if any rights still held after the creation of the Reserved or Public Protected Forests “are not enjoyed within (3) consecutive years” from the date of declaration of the Reserved Forest or Public Protected Forests, “such right shall be deemed terminated”. This means that shifting cultivators lose any rights over their land if they want to have fallow periods longer than three years, which is necessary for a sustainable shifting cultivation cycle.

Furthermore, chapter III, section 32 gives the Forest Department the authority to declare, with approval of the Nay Pyi Taw Council or State/Region Government, any part of “forest-covered land at the disposal of the government” [...] “as an area where the shifting cultivation (taungya) is not allowed”.

Section 21 on procedures for the recognition of customary conserved natural forest and mangrove of local communities is as vaguely formulated as section 7 in the Forest Law, which it refers to, repeating that the ministry ‘may’ (and thus also may not) issue such procedures.

Among the powers of the Director General defined in Section 15 of the draft Forest Rules, is the changing, amending and determining of the boundary of proposed Public Protected Forest. As stipulated in section 15. (a) (i), this is to be done “after excluding land on which land use right was obtained traditionally”. While this represents an opportunity for communities to obtain recognition of their customary rights in connection with the establishment of a Public Protected Forest, no such provision exists with regards to Reserved Forest. However, the Forest Law of 2018 gives the Minister of MONREC the power to change part or the whole of Reserved Forest into Public Protected Forest and abolish Public Protected Forest upon informing the parliament (Pyidaungsu Hluttaw).³¹

When the whole or part of a Reserved Forest is cancelled, the rights of local people are not automatically restored. According to the draft Forest Rules, “the rights of the people to extract forest-produce and land use which are void at the time of constitution shall not be resumed”.³² In the Biodiversity Conservation and Protected Areas Law, this provision was deleted, “to allow customary tenure rights and the rights of forest users that were violated in the past to be restored, and to allow restoration of rights of returning IDPs and refugees in the future”.³³

Only since the issuing of the first **Community Forestry Instructions (CFI)** in 1995 is it possible for communities to obtain legally recognized use rights (but not ownership rights) over forest land and resources. The CFI of 1995, which were revised in 2016 and are currently being revised again, provide use rights to Forest User Groups (FUG) for a 30 years period, which is renewable.

The revised CFI of 2016 and the draft of 2019 are a considerable improvement over the original CFI, above all because they allow not just the use of timber and other forest products for private use, but also their commercial sale. FUG can form legal associations for the extraction, commercialization and marketing of timber and other forest products.³⁴ FUGs are allowed to practice agroforestry which is “suited for the region in implementation of CF”³⁵, and the explicit reference to shifting cultivation as a prohibited activity inside a CF has been dropped.³⁶

According to the 2016 CFI, only people who live within a five miles radius around the respective forest area and who have lived there for at least five years, “and those who really depend on the forests” can form a FUG.³⁷ This has been retained in the draft CFI of 2019, as well as the provision that “distance and settlement time may be relaxed, if the forest has been traditionally and customarily managed by the local community”.³⁸ Regarding the areas permitted for the establishment of CF, the new CFI mentions, among others, “Forest lands traditionally managed by the local community according to the culture or customs”.³⁹ New in the 2019 draft CFI is the inclusion of “Natural forests and mangrove forests conserved by the local communities in accord with their tradition”, with a reference to section 7 of the 2018 Forest Law.

Most significant is paragraph 11 which states, that the allotment of forest land to a FUG shall be situation-specific and that, among several factors, the District Forest Officer shall take into consideration the “Boundary of the area demarcated and accepted in accordance with the local customs and traditions”.⁴⁰ This is the closest the CFI gets to recognizing customary tenure.

However, since the CFI are only departmental instructions and its provisions have no legal basis in the Forest Law or any other law, the CFI do not offer legal protection of customary tenure.

Conclusion

Customary land and resource rights of indigenous communities are not recognized and protected in the Forest Law. Only customary conserved forest ‘may’ (or may not) be recognized, but there is no legal protection of these forests, nor of any other land and resources in the public forest estate. The Forest Rules provide for the possibility to exclude “land on which land use right was obtained traditionally” when a new Public Protected Forest is to be established, but there is nothing in the rules as to what status this land will have, i.e. as what kind of land it will be classified and under which law it will fall.

Customary land and resource rights of indigenous communities are only weakly recognized and protected by the CFI. Decision-making power by communities is very limited, reflected in the requirement for getting approval of a management plan and submitting regular reports. Communities are still granted only temporary use rights and there is no recognition of their ownership rights over their customary lands and forests.

Under the current forest legislation in Myanmar, many livelihood activities of indigenous and other forest communities are criminalized, including the practice of shifting cultivation, on which many indigenous communities depend for their livelihood.

There is no due process seeking the consent of indigenous and other forest communities prior to the declaration of Reserved or Public Protected Forest, or before logging or other resource extraction permits are issued.

The recent revisions and amendments of Myanmar’s forest legislation still fail to address the needs and rights of indigenous and other forest-dependent communities. There is improvement, but far too little. Further revisions are needed, as part of the comprehensive legal reform mandated by the NLUP.

For the time being, until a comprehensive law protecting customary land is put in place, there is a need to push the MONREC to strengthen the few existing provisions on the rights of indigenous and other forest communities by improving the corresponding Forest Rules, and to change and abolish others that violate the rights of indigenous and other forest communities, in particular:

- “Section 13. (a) If the Ministry cancels, with the remark of the Naypyitaw Council or State/Region Government, and approval of the Union Government, the whole or a part of the reserved forest under sub-section (a) of section 7 of the Forest Law, the rights of the people to extract forest-produce and land use which are void at the time of constitution shall not be resumed.”
This should be deleted (like in the Biodiversity Conservation and Protected Areas Law)
- “Section 15. (a) (i) changing, amending and determining the boundary of the proposed protected public forest without affecting the objectives of prescribing the protected public forest after excluding land on which land use right was obtained traditionally.”
There is a need to provide for specific procedures. There should be a similar provision with respect to Reserved Forest.
- “Section 21. The Ministry may, under sub-section (d) of section 7 of the Forest Law, issue procedure for the recognition of natural forest and mangrove conserved by the local communities according to their customary practice.”
The language should be made stronger, i.e. use ‘shall’ instead of ‘may’.

Biodiversity Conservation and Protected Areas Law

Restrictions on land and resource use are also imposed on communities living inside Protected Areas. The Biodiversity Conservation and Protected Areas (BCPA) Law of 2018 (which replaced the Wildlife, Wild Plants & Conservation of Nature Areas Law of 1994) potentially criminalizes many of the activities which are part of the day-to-day livelihood and customary land use of indigenous and local communities.

For example, all hunting – and therefore also subsistence hunting of indigenous communities – requires a license⁴¹, which will be difficult if not impossible for most of communities in remote areas. Simply entering Protected Areas that are not declared open to the public is a punishable act. Likewise, grazing of domesticated animals, plucking of wild plants (and therefore gathering of wild food and herbal medicine) without permission, and cultivation are not allowed.⁴²

With respect to the recognition of the rights of communities’ and their role in conservation, the new law is slightly better than its predecessor, the Wildlife, Wild Plants & Conservation of Nature Areas Law of 1994, which does not provide for any possibility of participation of indigenous and other local communities in biodiversity conservation, or the recognition of their rights in or near Protected Areas.

Among the major changes in the BCPA law is the recognition of the role of local communities in biodiversity conservation. Local Community Protected Areas are mentioned

as one of the recognized categories of Protected Areas.⁴³ According to article 13 (e), the Director General “may permit the practice of community participatory Protected Area management by local communities that ensures a balance of continuous sustainable social-economic development and the sustainable preservation of bio-diversity”, and article 17 (g) provides for “coordinating expertise and technical support to local groups from the States and Regions for management of Protected Areas”.

Article 13 (g) provides for the possibility to create Buffer Zones within or at the boundary of Protected Area “if necessary for regional development activities, socio-economic development of local communities and development of eco based tourism”. However, the activities permitted within these Buffer Zones are very limited: “Within the determined buffer zone permission may be granted in accordance with prescribed regulations and procedures to conduct local community forests, community based tourism, locally managed marine surface area management”. Many of the core livelihood activities of indigenous communities, like shifting cultivation and other forms of agriculture, or livestock rearing are not permitted even in these Buffer Zones.

Furthermore, there is no clear definition of Local Community Protected Area. There is a similarity with the Community Forestry Instruction in terms of the terminology: *Tay Ta Khan Pyea Thu a Cuh a Pyweh* for Community Forest and *Tay Ta Khan A Cuh A Pyweh* for Local Community Protected Area. With regards to the former, the management system is imposed by the government on communities, which is contradictory to customary land tenure of indigenous peoples. Therefore, indigenous peoples’ organizations and other advocacy groups dislike the term *Tay Ta Khan A Cuh A Pyweh* used in the new BCPA law, and they propose the use of ‘Indigenous Community Conserved Areas’ (ICCA) instead, which is an official Protected Area category of the International Union for the Conservation of Natures (IUCN) that recognizes community management systems and customary management practices.

According to Article 9 (e), grievances arising from determining and establishing a Protected Area have to be investigated by a Preliminary Scrutiny Body that includes “the local community, representatives of NGO’s and relevant experts”. While this allows to bring the voices of community members into the body, the communities do not have the right to give or withhold their consent to the establishment of a Protected Area, which means that they do not have the right to FPIC, as provided for in the UNDRIP.

Conclusion

The BCPA law has been criticized because it was developed and passed without public consultations and inputs from stakeholders. It recognizes the participation of local communities in conservation activities, and especially the right to manage Community Protected Areas by themselves. However, the problems that still need to be addressed are the

meaning of Community Protected Area in the law and the lack of clear procedures for the recognition and the community rights to manage them.

Furthermore, considering the severe restrictions imposed on indigenous communities and the almost complete lack of recognition of their rights to their land, resources and livelihood systems, the BCPA law contradicts the National Environmental Policy article 7 (a)(6) which states as one of the policy principles that “The rights of indigenous people and ethnic nationalities to their lands, territories, resources and cultural heritage, and their roles in environmental conservation and natural resources management, are recognised and protected”. Since the BCPA law has been passed before the National Environmental Policy, it needs to be revised in order to bring it in line with the National Environmental Policy and ensure the full protection of indigenous peoples' rights in the law.

Land Acquisition, Resettlement and Rehabilitation Law 2019

The Land Acquisition, Resettlement and Rehabilitation Law 2019 replaces the Land Acquisition Act of 1894. Its stated objectives⁴⁴ are “to protect the interest of a person whose land is legally acquired for public purposes”; “to acquire the land through a process involving affected persons and local people by the issuance of a prior notice, negotiation, and decisions in a transparent manner”; “to ensure fair compensation” to affected persons, “provide resettlement and socioeconomic rehabilitation” and “to prevent adverse environmental and socioeconomic impacts resulting from the use of acquired land”.

The Land Acquisition, Resettlement and Rehabilitation Law mentions, but does not properly recognize, the customary land rights of indigenous peoples, who are referred to in the text five times (as “ethnic nationalities”, “ethnic representatives”, “ethnic groups” and “ethnic minorities”⁴⁵). At first glance, the law seems to recognize the customary land tenure rights of communities. According to paragraph 3 c (iv) in chapter I, the definition of “Land Owner” also includes “a person who is accepted by local community and recognized by the Nay Pyi Taw Council or relevant Region or State Government as the owner according to customary practices of ethnic nationalities, though he/she has no legal document”. This kind of recognition can also be found in the NLUP and Forest Law (in the latter, the recognition of Customary Conserved Forest). But like the NLUP and Forest Law, the Land Acquisition, Resettlement and Rehabilitation Law 2019 fails to clarify how to recognize community customary land.

Furthermore, as pointed out by the Myanmar Center for Responsible Business in its analysis of the draft law⁴⁶,

The words....“and recognised by relevant Region or State government as the owner...” could be problematic if legitimate rights were denied due to lack of State/Region recognition.

Adoption of a Land Rights law recognising customary tenure rights would address this problem which is why we recommend that LAA [Land Acquisition Act] is paused until that is in place.

Also, according to chapter IV on exemption from confiscation, the law seems to recognize customary land tenure. Among the types of land that are exempted from acquisition – unless the acquisition is approved by parliament (Pyidaungsu Hluttaw) – it mentions “Land used by ethnic groups for traditional purposes and sites being protected as sacred places”.⁴⁷

The law provides for prior public notification and prior information of affected landowners, but there is no provision on the right of landowners to participation in decision making. While the draft of 2017, in article 14 (d) in chapter 5 states that “In assigning duty to the Land Acquisition Implementation Board, it shall cause to do all processes transparently and with the decision making processes participated by the aggrieved families”, the law of 2019 makes no such reference. Likewise, the draft provided that the Land Acquisition Implementation Team should collect “public comments on the proposal for land acquisition”⁴⁸, and “carry out calling objection from the public interested on the purpose and situation of land acquisition, accepting written objection, hearing, calling to submit documents, conducting field surveys, if necessary”⁴⁹, and there shall be a “collection of the list of aggrieved families and situation of grievances”⁵⁰. All these have been deleted in the approved law; what remains are much weaker provisions. Paragraph 3 on the meaning of terms states that “Notification Declaring the Necessity for Land Acquisition means a transparent announcement to the public that there is an intention to acquire the land; or the public can raise any objection or demand any entitlements or know land acquisition process”. Article 11 provides that after the Central Committee’s notification, “the relevant Region or State Government or Nay Pyi Taw Council” shall review the proposal and, among others, conduct “a field investigation on the proposed land, explaining the public to ensure that the proposal for land acquisition is clearly understood by the public and procuring opinions; inviting the relevant members of parliament to such meetings”.

The right to objection is limited to the possibility that “an affected person” who is “not satisfied with the issuance of the Notification Declaring the Necessity of Land Acquisition [...] may submit the letter of objection to the relevant Region or State Government or Nay Pyi Taw Council along with sufficient reasons and sound evidence, within 45 days from the date of such issuance”⁵¹. Landowners are given the right to go to court, but only with regards to compensation and damages,⁵² not the act of dispossession as such.

Neither communities nor individual landowners have any possibility to prevent appropriation of their land and resettlement by the State. There is no provision that recognizes the right of indigenous peoples to FPIC. This means that there is no way that forced dispossession and resettlement can be prevented. The law foresees compensation and rehabilitation, and measures to mitigate the social and environmental impacts, like in article 48 (a), according to which the Resettlement and Rehabilitation Implementation Body “shall,

if necessary [...] take necessary measures to ensure resettlement does not cause impacts on the livelihoods, social lives and environment of Landowners and locals residing in such an area”.⁵³ Article 50 makes special reference to vulnerable groups, among them indigenous peoples. It says, “ The Resettlement and Rehabilitation Implementation Body shall take special care and arrange to ensure that their resettlement and rehabilitation activities do not cause any harmful effect on vulnerable groups including women, children, ethnic minorities and traditional owners”. However, given past experiences with forced resettlements in Myanmar, and elsewhere in the world, it is doubtful that the state will be willing and able to implement this. Finally, chapter X also provides for the possibility of simpler and quicker procedures for land acquisition if the government considers that as “urgent”.

Conclusion

The Land Acquisition Law does vaguely refer to - but does not properly recognize - the customary land of indigenous peoples. It is obvious that only the passing of a National Land Law in line with the National Land Use Policy, which would provide for the much-needed protection of customary tenure, can address this problem.

The final law is even weaker than the draft regarding consultation and the right of the public and landowners to object. There is no provision ensuring genuine participation of customary landowners in the decision-making process, or the right to give or withhold consent. The provisions are also rather vague regarding the information sharing and consultation process and thus, in sum, to not comply with the requirement for Free and Prior Informed Consent of indigenous peoples as provided for in international law, i.e. the UNDRIP.

Survey Law

Having identified the need to have a standardized National Geodetic Reference System, the Myanmar government is currently drafting a Survey Law. The draft made available for public consultations has raised concern among CSOs and international NGOs , particularly with regards to article 46 which states that “Anybody without license who survey or surveying for map production is found shall be fined not less than 1,000,000 Kyat (US\$ 650) and the criminal materials shall [be] capture[d] as public finance”.⁵⁴ It is feared that this provision will also be applied to community mapping commonly used in various project activities, among others the documentation of customary tenure and resource management. According to the definitions of terms given in article 3, survey means “measuring the land by using land survey instruments, laser screening technologies or digital image technologies. Surveying includes the establishing of the Geodetic Stations, surveying of Ground Control Points and Be[n]ch marks. Although it is not clear what ‘land survey instruments’ means, the definition has been interpreted as not including community mapping. Nevertheless, civil society

representatives consider it important that there is clarity on whether community mapping will be permitted under the new survey law.

Likewise, there are concerns that other articles will cause problems to community mapping or other mapping activities conducted by CSOs and NGOs: Article 29, which states that fees must be paid “to GOM to connect and obtain Geospatial Data Services” and article 32, according to which “A digital copy of the surveying geospatial data produced by governmental departments, organizations, licensed companies and surveyors shall be provided to Survey Department, without fees, within 30 days upon the date of completion of the work”. Furthermore, the use of paper or digital forms of any topographic maps without permission from the Survey Department can be considered criminal since article 40 states that “Any individual, companies or organization except Government Department are not allowed to use any of Topographic maps, aerial Photo, Ground Control Points and Elevation Points produced by Survey Department without permission.”

Conclusion

Civil society organizations and international NGOs participating in the consultation on the draft Survey Law agree that the law goes too far in controlling mapping activities, making independent mapping that is using satellite images, GPS ground surveys and topographic maps, among others, punishable offences. There is an urgent need to engage with the government to ensure that independent mapping for project activities like community mapping are allowed under the new law.

Overall conclusion

This brief review of existing laws on land, forests and environmental conservation in Myanmar has shown that there have been some improvements in recent amendments with regards to the right of indigenous peoples, but that there are many gaps and, overall, they all fail to fully recognize and protect the rights of indigenous peoples to their land, forests and natural resources. For the economic and cultural survival of indigenous communities and other poor farmers in the country the revision of existing and enactment of new laws that recognize customary tenure and in particular communal land rights will be critical. The review found that there is a need for amending some of the laws discussed, but that one of them, the VFV Land law, is by far too problematic and should simply be abolished. Most important is the passing of a comprehensive National Land Law and, subsequently, the harmonization of all other laws dealing with land, forest, environmental conservation and related matters, like surveying.

The legislation of a comprehensive National Land Law is mandated by the National Land Use Policy of 2016. However, three years after the adoption of the NLUP, the National Land Law

is still in the drafting process while, as the review shows, several other laws related to land and natural resources have already been drafted, passed or amended. Some of them, like the amended VFV law, are utterly problematic for indigenous and other communities living in upland and forested areas.

Given the extent and speed of land grabbing currently ongoing in Myanmar, legislating a new National Land Law that recognizes and protects the customary land rights of indigenous peoples and other vulnerable groups in the country is urgent. By doing that, Myanmar would also fulfill the obligations it has accepted by ratifying the UN Convention on Economic, Social and Cultural Rights and, with regards to indigenous peoples, by voting in support of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples



CHAPTER 2

The impact of existing laws on indigenous communities

The findings of the legal review presented in the previous chapter reveal that there is inadequate protection of indigenous peoples' rights to their land in the laws. This chapter contains the results of two case studies which aimed at gaining an understanding of the impact of two of these laws on the life and livelihood of indigenous communities. The first case study was done in a community of the Danu people in Southern Shan State whose lands were given as a land concession to a private company under the VFV Land Management Law. The second study was conducted in a Gheba community in Karen State, whose lands have been included in a Public Protected Forest under the Forestry Law.

Land Confiscation in Southern Shan State: Taung Gaung Bwa Village

Taung Gaung Bwa village is a Danu community located in Ywar Ngan Township in the Danu Self-administered Zone in Southern Shan State. The village belongs to Ye Oo Kyauk Myaung village tract. The name of Taung Gaung Bwa means 'merging cave', which refers to a cave with three entrances, one at the East, one at the West of the mountain and the third at the South of the mountain.

The year of the establishment of the village is unknown. The pioneer settlers of the village were originally from Kan Kyi village, Knighkung village and a few from other villages. The pioneer settlers moved to the current location of the village to do farming, and as time passed, the number of households increased. During the establishment of the village, there were two people with the same name, U Kyawh Lin, and both were honorable and respected by the villagers. One was well known for his talent in leadership and the other for his religious devotion. The spiritual leader was called Payadayaka Lin (village headman), and the political leader was called Tukyi Lin (chief of the village). He was the first chief of the village and his descendants of the fourth generation now still live in the village. The villagers believe that about 200 years passed since they had their first chief.

Today, the total population of the village is 1,956 people with 370 households. Most of the villagers belong to the Danu indigenous people. There are also members other ethnic groups in the village such, as Pa Oh, Shan and Burman. Most of the villagers are farmers. The main crops they plant for their livelihood are coffee, paddy grown in taungya fields and green tea. As secondary crops they plant bamboo, Jenkol bean, other beans (red and small), corn

and chayote. In the past, oranges were one of their main income sources but nowadays, for unknown reasons, it is not possible to plant orange on their soil anymore. Other sources of income are daily wage labor, making tofu, bamboo hats and cement bricks.

Land use and management

The village land is red soil, which is fertile and suitable for most crops. They have classified their land into five categories: taungya land, orchard land, cemetery land, and land belonging to the temple. There is also land considered unholy where they cannot do any plantation. They believe that if they do, they will become sick or have bad luck. The village does not have vacant and virgin land, all the land is occupied. The way they got to own land is by inheriting it from their forefathers and through cultivating virgin land. They define their boundaries in the traditional way by using boundary markers such as trees and stones. In the past, whenever there were conflicts between villagers, they had to consult with elders who were honored and respected by the community and settled the case. Today, elders still play that role, but serious cases are also taken to court. Unlike in other indigenous communities, women can own and inherit land. And it is the parents' duty to give land to their children equally whenever their sons or daughters get married.



Fig. 01. *Some of the remaining land of Taung Gaung Bwa village, planted with flowers as a cash crop.*

Land Confiscation by the military and Shwe Than Lwin Company

In 1995, while farmers were at their farm doing cultivation, military came saying the land had been confiscated by them and they were now forbidden to cultivate it. After that, the military erected boundary markers. In 1999, Shwe Than Lwin Company took over the land from the military. The villagers came to know that their land was handed over to Shwe Than Lwin only when the company put up a signboard. The total area of land occupied by Shwe Than Lwin company in Ywar Ngan township is 1,376 acres from five village tracts: 301 acres from Kyauak Maung village tract, 550 acres from Ywar Ma village tract, 274 acres from Nyaung Ai village tract, 100 acres from Kyauk Pung village tract and 151 acres from Kyan Taw village tract.

Shwe Than Lwin company applied for the use right to the land and registered it under the VFV Land Management Law of 2001. It was granted a 30-years use right. But the company had to return 150 acres of land which did not have proper documents proving that the land had been given by the military. These 150 acres were categorized as 'State Land' in 2005. In 2014, the General Administration Department (GAD) of the Ministry of Home Affairs at Taung Gyi gave temporary use rights over the abandoned 150 acres to 60 farmers who are the original owners of the land.

On the occupied land, Shwe Than Lwin company planted seasonal crops such as corn, and beans and perennial crops such as green tea, rubber, mango, cypress and Kadam tree (*Neolamarckia cadamba*). Many villagers had to work as a daily laborer as they no longer had enough land for their livelihood. In 2010, a member of a Danu political party who is knowledgeable about land rights issues told the villagers of Taung Gaung Bwa they could get back their land if they demanded it. So villagers started demanding the return of their land from the company. Among others, they wrote a petition letters to the state government and held demonstrations. The company started to negotiate and offered them compensation for their land. The company paid 800,000 to 1,000,000 Myanmar Kyat (US\$ 520 to 650) per acre as compensation to the farmers for their land. The compensation awarding ceremony was held in six steps, the first on 1 January 2015, the last on 2 September 2015.



Fig. 02. *Land confiscated by Shwe Than Lwin Company. A road was made for transporting crops, but most of the land has not been planted and is not used in any other way.*

Except for a few farmers and those cases in which the ownership was unclear or there was a conflict, all farmers accepted the compensation offered by the company for their land. Although the amount of compensation was too little and far below the current market price, most of the farmers accepted it. There are several reasons for that. Many farmers believed that they could never get their land back. Even though they were trying to negotiate with the company, they did not believe they could get their land since they knew that such cases have been rare. They were also influenced by the propaganda of brokers. These men would visit the farmers, bringing them small gifts, sometimes alcohol, trying to convince them that they can help get the compensation, for which the farmers had to pay an agent fee. These brokers urged them to accept the compensation, arguing that if they did not accept while they were offered, the company could change its mind and stop offering any compensation. They were also told that they could never win a case against the company. Many farmers misunderstood the compensation, believing that the compensation was only for the loss they suffered for not cultivating their land for a decade. Many farmers did not know they could lose their land forever by signing the agreement of accepting the compensation. The compensation agreement states that by “accepting the compensation, the farmer may no longer interfere in the planting of land by the company”.

The company compensated 382 farmers for 978 acres and then applied for the use of 955 acres of farmland to the land and irrigation department, excluding land with complex and unclear ownership. On 11 February 2016, when the Department of Vacant, Fallow, and Virgin Land Management of Shan State approved that all the 955 acres are used as agricultural land, cultivated and planted, the Department of Land and Irrigation approved the reclassification of this land as farmland on 11 March 2016. Nevertheless, the company applied for the granting of land use right for 282 acres out of the 955 acres that had been registered as farmland. The company applied for an industrial lease for this land to build

hotels and restaurants, a golf club and golf training club as well as a traditional souvenir shop. Villagers from Taung Gaung Bwa village only got to know about the application by the time the company submitted it, which was announced in the newspapers. The villagers objected and the granting of the industrial lease has been postponed.

Member of State Parliament U Aung Soe Min, representative from Ywar Ngan Township, raised questions in parliament regarding Shwe Than Lwin Company's land occupation in Ywar Ngan Township, and the whole process of handing over the land to the company by the military.



Fig. 03. *Farmer from Taung Gaung Bwa village touching the cement post he had put up at the boundary of his land. Next to it the boundary post erected on his land by Shwe Than Lwin Company.*

The impact of land confiscation

The land confiscated by Shwe Than Lwin company in Taung Guang Bwa Village is 270 acres. The land has been occupied for more than two decades now. Before the confiscation took place, the farmers had paid tax every year for the land and for the crops they planted. Some of the farmers had Form 105 (which is not a certificate of ownership or use right but merely a boundary map) for some plots of their land. Although there were not many job opportunities in their community, the villagers never had to worry about food and had not much difficulty in meeting the basic needs of the family. After the confiscation of their land, many families faced difficulties in providing for their needs. Many children had to drop out from school, many family members had to leave to look for jobs in nearby communities and across the country. Moreover, many parents became desperate, fell ill and died before their time.

A farmer and '100-household leader'⁵⁵ told about the tragedy he faced because of the land confiscation. He is a 100-household leader in the village although he is only in his mid-30s,

because he is honored and respected by his community. He was forced to drop out of school as his parents could no longer cover the costs for the school, even though the admission fee for the state school is not very high. Even as a young boy, he had to work to support the family. Comparing his family's condition with the past he said, "Before the confiscation took place, my family had not much to worry about and all the family members were happy. Because of the confiscation I had to drop out of school as my parents could no longer support me and if I did not have to drop out of school, my life would be much better".

A 58 years old mother of eight children also described how they had suffered because of the confiscation: "Everything became difficult as we had to buy everything including rice and vegetables. Before we didn't need to buy rice. We always had enough for a year." Her family was broken up as her son and daughter had to find work outside of the community. She herself had to work for the Shwe Than Lwin Company on her own land as daily laborer in order to provide for the needs of the family. Her family has not been able to live together for more than two decades since the confiscation. With tears in her eyes she said, "One day, my daughter called me saying that she can't send money as she had been sick and not able to work. My heart pounded in pain and at the same time I felt shame as a mother. If our land hadn't been confiscated, we would not have to live apart and I would be able to take care of my children when they become sick".

For a 24 old mother of two children the confiscation was also a tragedy: "Because of the confiscation, my father and mother had to leave the village to work and my father got malaria and passed away. When my father passed away, I was just inside of my mother's belly and never had the chance to see my father". She could not even complete her primary school because the family had to break apart. She believes that if their land had not been confiscated, she could have completed higher education and would have a better life than she is having now.



Fig. 04. *Young mother from Taung Gaung Bwa village. She lost her land and now has to earn a living by making bricks.*

Violation of rights and attempts to address them

Overall, the land confiscation by Shwe Than Lwin company had many negative impacts on the villagers, not just economically but also socially. The children's education, the health and the general wellbeing of family members are affected as families broke up, some of them leaving the village to find work.

Even though most villagers have accepted the compensation money, some farmers did not. They want to get their land back. They believe that if they get back their land, all family members can be reunited and live together again, and pass on the land which was inherited from their forefathers to the future generations.

As a matter of fact, both the military and Shwe Than Lwin violated existing laws, i.e. the 1894 Land Acquisition Act, the 1995 Land Acquisition Law, the Farmland Law and the VFV Law of 2012/2018. During the confiscation of land by the military in 1995, there was no prior informing of the confiscation and nor offering of compensation. According to the 1894 Land Acquisition Act and the 1995 Land Acquisition Law, the military was supposed to inform and give compensation for their land, which did not happen. According to the 2012 Farmland Law, article 31 and 32, if the project is not completed within six months from issuing the permit, the land should be returned to the original owner. Also according to the 2012/2018 VFV law, article 22, if the land is not used in accordance with the terms of the land use grant, the use right granted shall be revoked. Since Myanmar voted in favor of the UNDRIP at the UN General Assembly in 2007, and since it signed and ratified the International Covenant on Economic, Social and Cultural Rights, the dispossession of the communities by the military and Shwe Than Lwin are also violating international law.

Farmers who did not accept the compensation for their land requested the state government and central government to return their land and recognize their ownership right to their forefathers' land in accordance with the NLUP 2016. But the farmers' lands have not been returned till today. Therefore, 25 farmers sent a letter informing both the company and the state government that they were going to cultivate their land (about 48 acres) since the company is not using it. In the first month of 2019, farmers started cultivating their land. The company filed a case in court for trespassing of the company's property. Five farmers leading the group were charged and are facing a lawsuit. In response to media coverage of the case, the government has called the company and farmers for meetings three times in order to try and reconcile them.

However, for those farmers who have accepted the compensation and signed the agreement with the company, there is little hope that they will ever get their land back.



Fig. 05. A group of villagers from Taung Gaung Bwa village whose land has been confiscated but who refuse to accept compensation and want to have their land back. They are holding a poster on a training on FPIC.

Establishment of a Public Protected Forest: Leiktho Sub-township in Karen State

This study is about challenges faced by Gheba indigenous communities living in Meik Tha Lin Taung Public Protected Forest in Leiktho sub-township of Karen State. Leiktho Sub-township lies in Thandaunggyi Township in the northern part of Karen State. It borders with Taunggo township in the South, Kayah State in the South-east, Southern Shan State in the North-east, and Pinmana township in the North. The Taunggoo-Leiktho-Loikaw highway connects them to the markets where the people from Thandaunggyi sell their goods.

Thandaunggyi township is the place of origin of the Gheba indigenous people. Some of them also live in Pynmana township in Naypyidaw Region. The Gheba used to be in contact with Christian missionaries in Kayah State. Thus, there are many Christians in their villages, and there are at least two churches on average in a Gheba village. One third of the Gheba Karen are Baptist and other Protestants, and two third are Roman Catholic.

259,082 acres of Thandaunggyi Township have been declared by the government as Public Protected Forests and Reserved Forest since 1999. The Public Protected Forests are Sinphyu Taung Public Protected Forest, Yauk Thawa Public Protected Forest, Myit Ngan Public Protected Forest and Meik Thalin Taung Public Protected Forest.

Meik Thalín Taung Public Protected Forest covers 50,479 acres in 12 village tracks: Lower Ngwe Taung, Shan Lay Pin Gyi, Lower Shan Lay Pin, Meik Thalín Taung, Thaw Pone, Kyey Kathaw, Kyauk Thaga, Kyamai, Ahdoe Tey Pyaw, Kyey Min, Maung Balauk, Maung Kyaw. The villages in Thaw Pone, Kyey Kathaw, Maung Balauk and Maung Kyaw are Kayah villages, the rest are Gheba Karen villages. Meik Thalín Taung village track is the center of the Public Protected Forest, which is named after that village.

The study was conducted in Lower Shan Lay Pin and Tat Taung villages of Lower Shan Lay Pin village track, Amaya village in Shan Lay Pin Gyi village track, Tit Khaung village in Kyamai village tracts, and Upper Nan Cho and Meik Thalín Taung villages in Meik Thalín Taung village tract.

Tit Khaung village in Kyamai village tract was founded over 200 years ago. Before the village was founded, owners of elephants stayed in that areas. Thus, Tit Khaung is named after them. A school up to grade six was run with own funding for 50 years before U Nu, the first Prime Minister of Myanmar, has appointed government teachers. Still, there is no clinic in the village. The majority of the villagers are Gheba Karen, a few are Sgaw Karen from Bago and Burman who are married to Gheba Karen, and Kachin who came to live as missionaries.

Upper Nan Cho village in Meik Thalín Taung village tract was founded in 1801. There are 86 households with over 400 people. It is said that the village was founded after defeating the Padaung indigenous people. They found Padaung jewelries when they dug the soil. The school was a founded in 1970 as a branch of the Mya Htin village school and was recognized by the government in 1973.

Upper Meik Thalín Taung village in the same village tract was founded in 1810 and now has 86 households and a population of 411 people. Before the Italian missionary Father Angelo came in 1890, they were animists. Even though the village was founded before Father Angelo came, in the official village history they recognize the village only since the period of Father Angelo's mission and consider him the village founder.

Tat Taung village and Lower Shan Lay Pin village are in Shan Lay Pin village track. Tat Taung village was founded around 1937 and today has around 68 households with a population of over 370 people. They are Gheba Karen and a few are Burman who are married to Gheba Karen. They descended from Kyattuang Taung village. Lower Shan Lay Pin village was founded over 100 years ago. The population is 847 people. There is San Kaik clinic within the village and there is a primary school.

Amaya village is in Shan Lay Pin Gyi village tract. It was founded by U Maya with ten to fifteen households in the year 1129 of the Myanmar calendar (1767 according to the Gregorian calendar). Today, the population of Amaya numbers 293 people in 65 households. In 1974-75, the school was founded. There is a clinic in the village. Amaya village is not only in Meik Tha Lin Taung Public Protected Forest, but part of it is also in the proposed Ma Lauk Chaung Public Protected Forest.

All these villages lie around 3000 feet above sea level and are connected with an unpaved road to the township center Leiktho.



Fig. 06. *Children in Upper Nan Cho village. It is one of the many villages that were made part of Meik Thalin Taung Public Protected Forest without the villagers' consent.*

Livelihood

The main livelihood of the Gheba indigenous people in Leiktho is agroforestry. Terrace farming along the riverbank is only for subsistence rice. Cardamom is the main income source. Alternative income sources are coffee, turmeric, elephant foot yam, charcoal, Jenkol bean (*Archidendron pauciflorum*), firewood collection and wage labor. The harvest time of cardamom is in September and October, coffee is harvested in February, and Jenkol bean is harvested in August. Since 2016, destruction of cardamom plants by mice in the wake of bamboo flowering has affected their income source extremely. Consequently, debt and labor migration have surged. Mice could not be killed with pesticides and traps. As one farmer said, "If we use pesticides, it is dangerous to animals, however, the traps also are a risk to children. Besides, the fact that we are in a Public Protected Forest makes me worry about my children's future." At the same time, the cardamom price has gone down from 15,000 Kyat to between 8,000 and 9,000 Kyat (from USD 10 to 5.2- 5.8) per kilo. Therefore, some started to plant turmeric. There are some traders who come to the villages to buy their goods seasonally. Mostly they are from Leiktho. These villages are only half an hour drive by car from Leiktho town.



Fig. 07. *The communities grow coffee, cardamom and other cash crops under large trees that form a dense canopy. These are agroforests that have been used by the Karen of Leiktho since generations.*

Until today, the communities practice both customary and government administration. Some villages have communal land, and all have church land. As the population increased, there is no more land which is vacant. They said, “We don’t have an inch of vacant land in our village. When you look at our place you will think it is big forest, but there are many cardamom and coffee plants inside this big forest.” They do not cut down big trees when growing cardamom and coffee, since they grow better in the shade of trees. At the same time, it helps to protect the watershed. Extraction of trees for charcoal is not allowed on communal land but only in own agroforests. Besides, they get wild vegetables from the forest. Only salt, oil, garlic and onion are bought at Leiktho market and from itinerant traders who tour the villages to sell vegetables and other goods.



Fig. 08. Cardamom growing under trees along the road.

The creation of the Public Protected Forests and its impact on the people

Meik Thalín Taung Public Protected Forest was created in 2003 during the time of the military government. None of the villagers were informed of the establishment of a Public Protected Forest on their land. According to focus group discussions, they became aware that they were living in a Public Protected Forest only in 2011, when the Settlement and Land Record Department⁵⁶ ceased to ask for payment of land tax. The present area of Meik Thalín Taung Public Protected Forest is 50,479 acres large, down from the previous 60,000 acres due to the exclusion of village land, graveyard, school and lanes. However, any expansion of the settlement area is prohibited.

The military government erected a boundary pillar of the Public Protected Forest in 2005 at Tit Khaung village. Since then, the few villagers who live besides the pillar have known that they are living in a Public Protected Forest. But there has not been any dispute between the government and the communities. The villagers did not know the impact of a Public Protected Forest. They said, “The government never interfered due to the Public Protected Forest. Now, we are worried about our land. What will it be if we cannot register our land?” Most of the villagers are now aware of the Public Protected Forest because they were not able to apply for a land use certificate (known as Form 7) in accordance with the Farm Land Law 2012. Some village heads came to know that their land is in a Public Protected Forest when Forest Department staff told them so in monthly administration meetings. Villagers used to pay land tax since the so-called Council period, i.e. before the military took over in 1962, and the government gave receipts for both farmland and orchards. However, land taxing has stopped around 2011 and they were told that the villages are now in Public Protected Forest and the land is not managed by the Settlement and Land Record Department any longer.⁵⁷

Among them, Amayar village is not only in Meik Thalin Taung Public Protected Forest, but also in the proposed Ma Lauk Chaung Public Protected Forest. Ma Lauk Chaung Public Protected Forest was proposed by the Forest Department without any consultation with the affected villages. They learned about the proposal due to the technical working group formed for Ma Lauk Chaung Public Protected Forest, comprised of a Member of State Parliament, officers of the Department of Land Administration and the Department of Agriculture, and village heads. The technical working group was formed without the consent of the community members. Some villagers had applied for a Form 7 for their land. The Department of Land Administration came to measure the areas, but when the villagers followed up on the application process and land measurement, they were only told that their case had been submitted to the Thandaunggyi Department of Land Administration.



Fig. 09. *Sacks of charcoal have been brought to the roadside for selling. It is another source of income of Leiktho villagers.*

The communities' response to defend their rights

The communities submitted a petition letter to Nay Pyi Taw central government office, asking for the cancellation of the establishment of Malauk Chaung Public Protected Forest. CSOs, local activists from the affected communities, NGOs and communities held workshops and awareness raising on the proposed cancellation of Malauk Chaung Public Protected Forest. After a meeting of the Forest Department and communities, the creation of the Public Protected Forest was put on hold.

Several meetings have also been held on Meik Thalin Taung Public Protected Forest. Catholic priests, pastors and village heads from different villages gathered to protest against the Public Protected Forest which makes villages and their orchards illegal. Ten village tracts organized joint protests. At the same time, awareness raising trainings related to land and forest laws and policies were held at Meik Thalin Taung village. Two meetings on Public Protected Forest were organized by the NGOs MATA and Gheba Affair. Local organizations like Lumuhtat based in Leiktho, and village administrators actively engaged in advocacy and awareness raising.

According to focus group discussions, they are determined to defend their rights no matter what will happen in the future. Their concern is that if they lose their land there will be nothing to hand down to the future generations. They said that they are not educated, and they depend on these lands for their children's education. Most of them think that even though currently there is no direct impact of being located inside a Public Protected Forest, it will affect their children. From interviews in lower Shan Lay Pin village it was learned that officers from the Forest Department insisted that they apply for 30-years land use rights within Meik Thalin Taung Public Protected Forest, which probably means he suggested to apply for a Community Forestry Certificate. However, the villagers don't know anything about Community Forestry, and, above all, they cannot afford to pay the application fees as they are struggling with their daily livelihood. Some participants think that the creation of reserved and protected forests is like torturing. The exclusion from their native land will mean starvation and death.



Fig. 10. *Women returning from working in their agroforests.*



CHAPTER 3

Toward the protection of customary land rights of indigenous peoples in Myanmar: Lessons learned and proposals for the implementation of the NLUP

The lack of legal protection of indigenous peoples' land rights in Myanmar has led to large-scale grabbing of their land by the state and private companies that resulted in destruction of livelihoods and the social fabric of communities, increasing poverty and health problems.

However, Myanmar has a dual obligation to address this problem and take measures to protect indigenous peoples' rights to land and resources in a new National Land Law: First, because of its commitment to uphold international law, which it accepted by voting in favor of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in the UN General Assembly in 2007 and by ratifying the International Covenant on Economic, Social and Cultural Rights in 2017, and, second, because the National Land Use Policy (NLUP) of 2016 mandates to legislate a National Land Law following its provisions, which includes part 8 on the Land Use Rights of Ethnic Nationalities.

The National Land Law and Myanmar's international legal obligations

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was supported by Myanmar when it was put to vote in the UN General Assembly on September 13, 2007. The UNDRIP contains several articles that refer to the rights of indigenous peoples related to land, among them the following:

Article 8.2: States shall provide effective mechanisms for prevention of, and redress for: (b) any action which has the aim or effect of dispossessing them of their lands, territories or resources.

Article 10: Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 26.1: Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

Article 26.2: Indigenous peoples have the right to own, use, develop and control the lands, territories and resources and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

Article 28.1: Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the United Nations General Assembly in December 1966 and has been in force since January 1976. The ICESCR is part of the International Bill of Human Rights, along with the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and its two Optional Protocols. Myanmar signed the ICESCR in July 2015 and ratified it on 6 October 2017.⁵⁸

This is not a quote, so it's OK to use the same font

The provision relevant with respect to the protection of the rights of indigenous peoples to their land is in Article 1, paragraph 2, which states:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Using the term 'all peoples' instead of 'states' implies that this provision covers rights of groups separate from nation-states, and thus includes indigenous peoples.⁵⁹ Furthermore, the Committee on Economic, Social, and Cultural Rights (CESCR) in its General Comment No. 12 on article 15 of the Covenant regarding the right to take part in cultural life⁶⁰ states:

These are quotes, so they should have another font, like you did in the chapter on the Philippines (page 60 etc.)

The strong communal dimension of indigenous peoples' cultural life is central to their existence, well-being and full development, and includes the lands, territories and resources which they have traditionally owned, otherwise used or acquired. [...] States parties must therefore take steps to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.

The UN Food and Agriculture Organization's (FAO) Voluntary Guidelines for Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, which has informed and guided the development of Myanmar's National Land Use Policy, also refers extensively to indigenous peoples and their rights. Among others, it clearly states⁶¹ that

States should provide appropriate recognition and protection of the legitimate tenure rights of indigenous peoples and other communities with customary tenure systems, consistent with existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments.

Mandating a new National Land Law: The National Land Use Policy

In 2013 the government of Myanmar started drafting a National Land Use Policy (NLUP), conducted public consultations in 2014 and 2015 and in January 2016, after six drafts, adopted the new NLUP. The aim of the NLUP is “to implement, manage and carry out land use and tenure rights in the country systematically and successfully, [and it] shall be the guide for the development and enactment of a National Land Law, including harmonization and implementation of the existing laws related to land”.⁶² It provides for the establishment of a “National Land Use Council for the implementation of the National Land Use Policy and related laws”.⁶³

For Myanmar’s indigenous peoples it is most important that the policy recognizes customary land tenure practices and communal tenure arrangements, which is elaborated in Part 8: “Land Use Rights of Ethnic Nationalities”. In this part, the new NLUP refers to, among others

- The “customary land use tenure systems”, “traditional land use system of ethnic nationalities”, and “customary land use rights”⁶⁴ and “land tenure right”⁶⁵ (although it does not define any of these terms)
- Establishing of a process for recognition of the rights of communities, not just individuals

It provides, among others, for

- Preparation and revision of customary land use maps and records of ethnic nationalities in a participatory manner with involvement of representatives and elders
- Formal recognition and protection of the customary land tenure, land use and rights of ethnic groups, whether or not existing land use is registered, recorded or mapped
- Review and reclassification of customary lands of ethnic groups “that fall under current forest land or farmland or vacant, fallow and virgin land classifications”, and their registration and protection as ‘customary land’⁶⁶
- Temporary suspension of “land allocation to any land user, other than for public purposes [...] until these lands are reviewed, recognized and registered as customary lands”⁶⁷
- Protection against grants or leasing of land by the government allowed under any existing law
- Restitution of land lost “due to civil war, land confiscation or natural disasters or other causes”⁶⁸
- Recognition of land use rights relating to rotating and shifting cultivation in farmland or forestland

In part 10 on Harmonization of Laws and Enacting New Law, the NLUP states that “A new National Land Law shall be drafted and enacted, using the National Land Use Policy as a guide for the harmonization of all existing laws relating to land in the country”.⁶⁹

As concluded in the legal review in chapter 1, the enactment of a new National Land Law in accordance with the National Land Use Policy is indispensable for addressing the legal shortcomings in Myanmar's present legislation on land, forest and conservation, especially with regards to the protection of the customary land rights of indigenous peoples. Drawing up a strong chapter on customary land, following and elaborating on what is outlined in part 8 in the NLUP, will be critical, but it can be challenging. Thus, before attempting to make recommendations on a text on customary land for a new land law, it may be advisable to learn from experiences made in other countries in Asia, which have passed laws recognizing land rights of indigenous peoples. The next chapter tries to summarize key lessons learned in drafting and above all implementing laws on indigenous peoples' land rights in Cambodia and the Philippines, two of the few Asian countries that have enacted such laws.

Protecting land rights of indigenous peoples: Lessons learned in Cambodia and the Philippines

Cambodia

The population of indigenous peoples in Cambodia has been estimated to be around 400,000 people, roughly 2.5% of the total population and comprising 24 different ethnic groups. The majority of them live in the Northeast, other indigenous communities live in the Central-North, the North-West and West of the country.

In 2001 Cambodia passed a new Land Law which recognizes indigenous peoples as a legal category and their communal land rights. The Law on Forestry, adopted soon afterward in 2002, also recognizes indigenous peoples and rights that are not tied to specific territories. In 2009, the Ministry for Rural Development adopted a National Policy on the Development of Indigenous Peoples (NPDIP)⁷⁰. Cambodia is one of only five countries in Asia that officially recognize indigenous peoples by using this term.⁷¹

The 2001 Land Law, in Part 2 on Immovable Property of Indigenous Communities (articles 23 to 28), provides for the titling of communal land of indigenous communities and the "responsibility of the traditional authorities and mechanisms for decision-making of the community, according to their customs".⁷² In 2009, sub-decree 83 on Procedures of Registration of Land of Indigenous Communities was approved.

Three years later, in 2012, a program was launched by Prime Minister Hun Sen which had a considerable impact on indigenous peoples' land rights in Cambodia. Known as Order 01, the program had the purpose of speeding up land titling all over the country. Thousands of students were mobilized to measure land used by local people of up to five hectares per family, for which they could obtain private land titles if they could demonstrate that they were actively using the land.⁷³



Fig. 11. Members of the Kavet community Lam Oeuy in Ratanakiri province.



Fig. 12. Tampuan women at the market in Banlung town, the capital of Ratanakiri province.

Shortcomings of the 2001 Land Law

Several shortcomings have been identified in the Land Law, the most important of which are briefly summarized here.

Non-recognition of ancestral rights and the imposition of centralized land governance by the state

Indigenous peoples cannot claim land on the basis of ancestral rights because the law annuls all rights to land prior to 1979. There is no law granting indigenous peoples the right to self-governance, and the Land Law puts land governance entirely into the hands of the state. While the Law provides for some protection of land rights of indigenous communities, it also gives the state the power to grant land concessions to private companies. Indigenous peoples and their communities do not have the right to FPIC and therefore have no means to prevent land grabbing or any other unwelcome intervention in their territories.⁷⁴

Insufficient coverage, arbitrary limitation and legal compartmentalization

In the 2001 Land Law, ownership rights are not recognized over an entire territory but are tied to use of specific parcels of land by a community. They are limited to residential land, land in actual agricultural use, and reserved land necessary for shifting cultivation. The nature of the 'reserved land' for shifting cultivation is further clarified in Article 4 of the sub-decree. In the sub-decree's article 6 two more types of customary communal land rights are identified: spiritual forests land and burial ground forest land, for each of which an upper limit of seven hectares is given. Other kinds of customary communal land common in indigenous communities, like grazing land, forest land or land with water sources, are not recognized.⁷⁵ Once titled, the communities cede all claims over their land that has not been included. Some rights over community forests are recognized by the Forestry Law, but communities have to apply for community forestry rights separately, which are only temporary use rights for a duration of 15 years (renewable) and usually only cover smaller areas than the community forests traditionally used.⁷⁶ Thus, there is an unnecessary legal compartmentalization resulting from the distinction between forest land and non-forest land. Finally, the arbitrary limitation of the size of spiritual forests and cemetery forests to seven hectares is problematic because the actual size of these culturally important areas may exceed this limit.



Fig. 13. Spirit forest of a Tampuan community in Ratanakiri province.

National interests prevail over indigenous peoples' rights

While article 26 provides that the collective ownership granted to indigenous communities “includes all of the rights and protections of ownership as are enjoyed by private owners”, at the end of the article it is also stated that “The provisions of this article are not an obstacle to the undertaking of works done by the State that are required by the national interests or a national emergency need”, thus making the ownership rights of indigenous communities rather arbitrarily subject to the absence of “national interest” or “national emergency need”.

***Lack of interim protection, bureaucratic
and lack of political will to implement***

move at least these words up to the first line

Land is not recognized as indigenous peoples' land until it has been proven so, and the burden of proof is put on the communities.⁷⁷ Furthermore, the law does not include any provisions for establishing a mechanism for the interim protection of indigenous peoples' lands until they have been titled. As experiences showed, this would be much needed for preventing the massive land grabbing that has happened since the passing of the Land Law. Land concessions have been and continue to be granted over large areas, often of customary land and forests of indigenous communities. The laws that are governing the allocation of land for land concessions provide only limited protection for customary land owners and “policies and institutions created to resolve the competition with customary users for land and resources, in practice subordinate the claims made by smaller land users to claims made by more powerful business interests”⁷⁸.



Fig. 14. Longkhung village, a Tampuan community in Ratanakiri Province. Cashew and rubber plantations have expanded right to the settlement boundary.

At the same time, titling of indigenous communities' communal land has been very slow due to the lengthy and complicated application process which requires, first, the Ministry of Rural Development to recognize the identification of an indigenous people and community; second, the Ministry of Interior to register the community as a legal entity; and third, the Ministry of Land Management, Urban Planning and Construction to carry out the land titling, including the surveying of the land, public notification and the issuing of the title.⁷⁹



Fig. 15. The chief of the Tampuan community Laeun Krein, showing the village territory map used in the application process for the registration of the community as a legal entity.

Due to these bureaucratic and technical difficulties, so far, no community has been able to complete the registration process on its own. “Success is dependent on strong communities, support from the local authorities, donors and NGOs and also the effectiveness of partners’ activities.”⁸⁰ Some communities may find it too challenging and just give up. Partly as a result of this complicated procedure, partly due to the lack of political will to title indigenous communities’ land, only 24 indigenous communities had received communal land titles as of May 2019. However, according to a statement issued by the Ministry of Land Management, Urban Planning and Construction, the year 2021 was set as the deadline to complete land registration nationwide, including the registration of indigenous peoples’ land.⁸¹ Given the fact that it has been estimated that the full coverage of formal land titling “is likely to take at least 15-20 years”⁸², that there are approximately 455 indigenous communities in Cambodia⁸³, and that the government has so far been dragging its feet in titling indigenous communities’ lands, it is rather doubtful that this target will be met.

Legal inconsistencies between the Land Law and the Sub-decree

Inconsistencies have been identified between the 2001 Land Law and the sub-decree 83 on the Procedure for the Registration of the Indigenous Peoples’ Communal Lands, resulting in the lack of clear distinction of the domain of ownership for communal land and state land. While the Land Law recognizes reserved land necessary for shifting cultivation as the property of indigenous communities, article 6 of the sub-decree regards it as state public land, along with spiritual forest land and burial ground forest land.⁸⁴

The state’s claim of ownership over some of indigenous peoples’ land and the ambiguity as to the status of collective ownership of indigenous communities over the land for which they have a title is also found in article 26 of the Land Law. On the one hand, it unambiguously states that “collective ownership includes all of the rights and protections of ownership as are enjoyed by private owners”, on the other hand it also says that “the community does not have the right to dispose of any collective ownership that is state public property to any person or group.”

Unclear terminology

Several terms used in the law are not properly defined, like, among others, ‘administrative authorities’, which, according to article 25, have to recognize customary communal land rights of communities before they can be formally recognized. More specific terms like ‘commune chief’ or ‘district governor’ would be needed for clarifying the level of authority responsible for this initial recognition. Likewise, the terms ‘competent authority’ and ‘local authorities’ need to be defined.⁸⁵

The problem with the term ‘communal’

In Cambodia, the term ‘communal’ in ‘communal land title’ is problematic because of the past experience with a violent communist regime (the Red Khmer) that imposed extreme communalization on the people. Furthermore, indigenous land use and tenure is often not,

or not anymore, communal. But there is little awareness among indigenous communities that communal land titling is more about keeping land governance in the hands of the people rather than the state.⁸⁶

Insecurity and confusion over the meaning of 'traditional'

The identification of indigenous communities in article 23 as a group of people who have a “traditional lifestyle” and “cultivate the lands in their possession according to customary rules of collective use”, and the need to demonstrate that they are indigenous and have a ‘traditional lifestyle’ in order to be able to make their claims has led to confusion and insecurity among some indigenous communities. Communities which do not practice shifting cultivation or feel they do not have a ‘traditional lifestyle’ any longer, may not even consider applying. Fortunately, the government does not really enforce the provisions of the law related to ‘tradition’.



Fig. 16. Villagers of Kralah, a Kreung community in Ratanakiri province, harvesting shifting cultivation rice. The photo was taken in 1998. Today, many Kreung and in other indigenous communities do not practice shifting cultivation anymore.

Communal titles are limited to single communities leading to fragmentation of indigenous territories

Communal land titles are given to single villages only and, as mentioned above, are tied to use of limited types of land. It is not possible to apply for larger areas comprising more than one village, or all villages of an indigenous people. This experience was, for example, made by the Kachok indigenous people who comprise only of seven villages and wanted to apply

for a joint communal land title for all their villages as one Kachok indigenous' communal land, but were not able to do that.⁸⁷ As a result of the titling of the land of individual communities only, the insufficient coverage of land types and the legal compartmentalization discussed above, the traditional territories of indigenous peoples become fragmented. The need to apply for communal land titles village-by-village is one of the reasons why titling has taken so long.

Non-indigenous communities are not eligible for communal land titles

According to the 2001 Land Law, communal land titling is restricted to indigenous communities, which means that Khmer and Lao communities, who also have collective customary use rights over certain types of land like community forests, grazing land and shifting cultivation land, are not able to apply. Also, indigenous communities have to prove that they are indigenous, and it is the Ministry of Rural Development that is ultimately deciding who is indigenous. Many indigenous communities who have lost their language and customary ways of living may not feel that qualify as 'indigenous' and think they cannot apply.

Formalization of institutions is problematic

Since the recognition of communities as legal entities is a requirement for obtaining a communal land title, communities are forced to establish formal community organizations, which then are recognized as legal entities. This implies the creation of governance systems for the community organizations in accordance with the legal requirements, but not in accordance with customary self-governance of communities, which they may potentially be undermining. In the past, indigenous self-governance was not based on written laws, but for the communal land titling process by-laws must be written and governance structures have to be set up which usually are very different from the original community governance structures and often do not function well.⁸⁸

Problems with the Forestry Law

Indigenous peoples' right to forest land are not protected by the Land Law, only certain use rights are granted in the Forestry Law of 2002. Article 2 "ensures customary user rights of forest products & by-products for local communities", and article 40 recognizes "traditional user rights" of non-timber forest products, of timber for local needs and for grazing. The Community Forestry Sub-decree of 2003 provides for the granting of community forests to local communities. However, these are not permanent rights but only conditional and temporary (though renewable) use rights for a period of 15 years. The application process is rather lengthy and complicated, requiring eight different steps.⁸⁹ The general provisions in the Forestry Law regarding traditional use rights – which would apply to forest areas also outside community forests – have never been implemented. While community forests are small in size and tend to be granted mostly in degraded forests, large areas of good forests are given to companies as logging concessions and economic land concessions.⁹⁰

Problems with Order 01

The land titling program launched in 2012 aimed at addressing increasing discontent of rural people due to the massive land grabbing that had happened during the previous decades by providing tenure security to hundreds of thousands of families. It specifically aimed at people living inside Economic Land Concession areas, Forest Concessions, and other types of state land.⁹¹ Originally, Order 01 included a directive for granting collective property titles to indigenous communities, but this part of the program was dropped because it was considered too costly and time-consuming.⁹² Thus, only individual private titles could be obtained.

Unlike the implementation of the provisions on communal land titles for indigenous communities, Order 01 was implemented rapidly and effectively. Between June 2012 and December 2014, approximately 610,000 titles have been issued for a total of 1.2 million hectares of land.⁹³ However, the implementation of Order 01 was controversial for several reasons:

Partial titling of land

While purportedly aimed at addressing land conflicts between communities and land concessions, many contested areas were not covered by the Order 01 program and no efforts were made to resolve conflicts between communities and well-connected and powerful actors, like military officials, political cronies and foreign concessionaires.⁹⁴ In areas covered by the Order 01 program, it was very likely that land owners got some of their land titled, but often only part of their land was included. A study showed 75% of the people interviewed did not receive titles for all the land that was surveyed, and more than 50% said that some of their plots were not surveyed at all.⁹⁵ As the next paragraph will show, most problematic was the implementation of Order 01 in indigenous communities.

Divisions in communities and fragmentation of community land

In indigenous communities, land survey under Order 01 was done only if the respective household signed a declaration that they 'leave the community' and give up their claims to all customary land.⁹⁶ In communities that had applied for communal titles, community members had to withdraw from the collective claim and their land had to be excluded from the land for which the communal title was applied for. This led to divisions within the communities and fragmentation of land ownership of indigenous communities.⁹⁷ Reasons for 'leaving the community' were rumors that communal titles were weak, and that companies could easily take the land without compensation,⁹⁸ that they were not able to sell land anymore, and the fear that they would also not be able to obtain bank loans using land as collateral.⁹⁹ The latter is not correct. Some banks in Cambodia allow communal titles to be used as collateral.¹⁰⁰ In fact, during the implementation of Order 01, pressure was put on families to accept individual titling, presenting them the choice of either having individual land rights recognized or not getting any land rights at all since the option of communal land titles was presented as insecure.¹⁰¹



Fig. 17. *Tierr village, a Tampuan community in Ratanakiri province where Order 01 was implemented causing much confusion.*

Loss of rights to fallow land, spirit forests and burial forests

Students doing the survey under Order 01 refused to include land with trees on it, arguing it was not actively used. Thus, fallow land was not covered by the individual titles issued, while it can be included in communal titles.¹⁰² Likewise, spirit forests and burial forests could not be covered under Order 01,¹⁰³ and, generally, villagers interviewed in some areas said that access to the forest has become more restricted since Order 01¹⁰⁴.

Heightened danger of loss of land, culture and livelihood

Land under a communal title cannot be divided up and sold. Conversely, land under private individual titles can be freely disposed of. As community members who refused to engage with the Order 01 program and held on to their communal land claim pointed out, having an individual title carries the risk of losing the land due to debts or just the desire to make money by selling land. As the study by Milne¹⁰⁵ shows, “land sales were seen by the more ‘community-oriented’ Bunong as a road to poverty, rather than a way to get easy money”. For “the more ‘traditional’ Bunong, land is seen as fundamental to their identity and future livelihoods. For them, it was a moral problem to engage in land markets, and they recognized that communal title could help to prevent the erosion of their land and culture”¹⁰⁶

Customary tenure arrangements are usually complex, defining multiple access, use and ownership rights of community members. Access and use rights over communal land and forest have been critical for their livelihood. Therefore, another problem of individual

private land titling under Order 01 is “that it simplifies complex local patterns of land use and management into western concepts of ownership [...]. This results in multiple users and their rights being excluded by a single private entity [...] Private land titling, allocations for concessions and land markets have ignored the security of access that vulnerable and marginalized Cambodians require over common resources. [...] By allowing for shared use, customary arrangements facilitate a degree of equitable access to resources. Excluding users from these resources has led to landlessness, land concentration and land insecurity”¹⁰⁷

Philippines

Despite the use of an ethnic variable in the population census of 2010, no official figures on the indigenous population of the Philippines have been made public. It is estimated that indigenous peoples number between 10% and 20% of the national population, or 10 to 20 million. They are concentrated in the Cordillera mountains of Luzon island in the North and Mindanao island in the South. Smaller populations live on Palawan and Mindoro island, the Visayas islands and parts of Luzon.¹⁰⁸



Fig. 18. Kankana'ey men from the Cordillera region attending a traditional ceremony.



Fig. 19. *Matigsalug men and women wearing traditional clothes at a celebration. The Matigsalug were one of the first indigenous people in Mindanao whose Ancestral Domain was titled.*

Indigenous peoples, their ancestral domains, traditional indigenous institutions and practices are recognized in the Philippine Constitution of 1987. In 1997, Republic Act 8371, known as the Indigenous Peoples' Rights Act (IPRA), was passed. It is seen as one of the most progressive national laws for the protection of the rights of indigenous peoples, who, in the IPRA, are referred to as Indigenous Cultural Communities/Indigenous Peoples (ICC/IP). It recognizes indigenous peoples' inherent rights, including the right to self-determination, customary law, the right to a self-determined development, and to Free and Prior Informed Consent in relation to any developments impacting on them. It also recognizes indigenous peoples' right to ancestral domains (including the right to mineral and other natural resources), and the law established mechanisms for the delineation and titling of ancestral domains. The IPRA also created the office of the National Commission on Indigenous Peoples (NCIP) as its implementing agency.

One of the main responsibilities of the NCIP is to delineate ancestral domains and issue a Certificate of Ancestral Domain Title (CADT) for collective land rights, or a Certificate of Ancestral Land Title (CALT) for land rights of individuals, families or clans. CALT's have been claimed and issued mostly in the Cordillera region in Northern Luzon, only few elsewhere in the country, where CADT's are the preferred option. These regional differences are thought to reflect differences in property relations, tenure arrangements and social

organization prevalent in different regions.¹⁰⁹ By 2015, the NCIP had awarded 158 CADTs and 258 CALTs with a total coverage of over 4.3 million hectares or 14% of the total land area of the Philippines. 557 applications remained pending.¹¹⁰

The IPRA recognizes ancestral domain rights by virtue of Native Title,¹¹¹ which it defines¹¹² as referring to

pre-conquest rights to lands and domains which, as far back as memory reaches, have been held under a claim of private ownership by ICCs/IPs, have never been public lands and are thus indisputably presumed to have been held that way since before the Spanish Conquest;

Since the IPRA recognizes ancestral domains as Native Titles and thus the private ownership of land by indigenous peoples, it recognizes that ancestral domains are, and have never been, part of public land and thus state property. An ancestral domain is “not created through the classic conversion of alienable and public, i.e. state owned land. Through the issuance of ancestral domain titles (CADT) rather, the Philippine state acknowledges and officially and symbolically certifies the private character of such land and the ownership thereof by an indigenous group”.¹¹³

Ancestral Domain rights are comprehensive territorial rights. According to the IPRA's Implementing Rules and Regulations:¹¹⁴

Ancestral lands/domains shall include such concepts of territories which cover not only the physical environment but the total environment including the spiritual and cultural bonds to the areas which the ICCs/IPs possess, occupy and use and to which they have claims of ownership.

Ancestral domain consists of lands, inland waters, coastal areas, minerals and other natural resources.

The right to Ancestral Domains includes the right of ownership, the right to develop lands and natural resources (including the right to negotiate terms and conditions for their exploration), the right to stay in their territories, rights in case of displacement, the right to regulate the entry of migrants, the right to safe and clean air and water, the right to claim parts of reservations, and the right to resolve conflict in accordance with customary law.¹¹⁵ The IPRA also clearly states that indigenous peoples have priority rights in the harvesting, extraction, development or exploitation of any natural resources within Ancestral Domains.¹¹⁶



Fig. 20. *Timuay Braulio, traditional leader of the Subanen people of Mindanao island, and Myrna L. Caoagas, former director of NCIP's Ancestral Domain Office, are showing the CADT issued to the Subanen of Labangan in 2008.*

CADTs and CALTs, together with the right to FPIC, provide indigenous communities with legal instruments to assert and defend their rights to their land and resources. Even though a CADT may not always be sufficient to prevent unwelcome interventions, it was found that “at least it can increase the bargaining power of indigenous communities in negotiating with investors on the terms of access or, in the worst case, on the terms of their own resettlement and compensation”.¹¹⁷ Having a CADT also gives communities more power in negotiating with Protected Areas authorities, and can lead to increased confidence in dealing with migrant settlers.¹¹⁸ However, having a CADT does not solve all the problems indigenous peoples are facing. They are confronted with considerable challenges, aptly summarized by Wenk¹¹⁹:

After the great success of titling, real work begins with which the title-holders are largely left to themselves. The management of a territory beset by conflictive claims is extremely complex: CADT-holders are to deal with outsiders interested in land, with settlers within, with competing land claims and the allocation of land to individuals, with local government units unwilling to cede power, with competing claims by neighboring groups, with development plans of local governments, with lawyers working for and against them, with problematic leaders within their own managing elite, with questions of natural resources management at large, with fiscal problems, with unemployment, with security issues. And more.

The challenges faced by holders of CADTs are augmented by fundamental flaws in the IPRA itself and, above all, the way it is implemented. Some of the main problems identified are summarized in the ensuing paragraphs.

Rights come with imposed responsibilities

The rights to Ancestral Domains as provided in the IPRA are tied to specific responsibilities, outlined in section 9 of chapter III on “Rights to Ancestral Domains”. These include the responsibility “to preserve, restore, and maintain a balanced ecology” and “to actively initiate, undertake and participate in the reforestation of denuded areas and other development programs and projects”. The “right to develop, control and use lands and territories traditionally occupied, owned, or used” is linked to the “right to manage and conserve natural resources within the territories and uphold the responsibilities for future generations”¹²⁰. Likewise, “the right to negotiate the terms and conditions for the exploration of natural resources in the areas” is granted “for the purpose of ensuring ecological, environmental protection and the conservation measures, pursuant to national and customary laws”.¹²¹ This means that indigenous peoples who obtained a CADT are not free to do with their land and natural resources as they like but are obliged to implement environmental conservation and restoration measures. Thus, the IPRA “puts the burden of both conservation and restoration on the local population, regardless of whether local people are in fact responsible for the depletion of natural resources”.¹²²

Competing laws and claims, bureaucratization and state control

IPRA puts the burden of proof of prior occupation on the indigenous communities applying for a CADT. This, and all other steps in the application and approval processes are very bureaucratic, complicated and costly. Furthermore, there are several conflicting government policies and administrative orders that can cause delays in the issuance of a CADT or a CALT, and different laws, like the National Integrated Protected Areas System (NIPAS) Law, the Mining Act of 1995 or the Land Reform Law, are in conflict with IPRA, leading to overlapping jurisdiction over land.¹²³

In section 52 i), the IPRA provides that through notification by the NCIP that an area is an Ancestral Domain the legal basis of all claims of jurisdiction of land within that Ancestral Domain by other agencies (such as, among others, the Department of Agrarian Reform, Department of Environment and Natural Resources, Department of the Interior and Local Government, the National Development Corporation) shall be terminated. This means, for example, that titled Ancestral Domain areas, which are private lands, are no longer part of the forest category of public land and the Department of Environment and Natural Resources loses legal claim to the titled areas. However, it retains regulatory authority over the resources therein.¹²⁴

Most problematic is section 56 which provides that “Property rights within the ancestral domains already existing and/or vested upon effectivity of this Act, shall be recognized and respected”, thus subjecting indigenous peoples’ property rights to other existing rights and

the power of the state to approve or reject their title application. Although IPRA recognizes Ancestral Domains as Native Titles (which is therefore not public land), the fact that “the prior (pre-colonial, time immemorial) native title rights of the indigenous population are subordinate to the prior (pre-IPRA) rights of various other stakeholders, highlights the halfheartedness with which the Philippine state has approached the ancestral domain issue”¹²⁵. The recognition and acknowledging of the rights of third parties in the IPRA “is understood to be one further discriminatory act against indigenous people, amounting to the re-establishment through the back door of the fiction that allowed dispossession of indigenous lands since Spanish times”.¹²⁶

Ultimately, through the complex rules and requirements, overlapping laws and the bureaucratization of the title application process the State retains (or regains) control over indigenous peoples’ territories which the IPRA recognizes as having been “held under a claim of ownership, occupied or possessed by ICCs/IPs, by themselves or through their ancestors, communally or individually since time immemorial”.¹²⁷ As Gatmaytan¹²⁸ concluded:

Perhaps because of the particular experience of Philippine indigenous groups, titling and the sense of security it imparts are often regarded as a benefit. Much less attention is paid to its costs: Homogenization of tenure, commoditization of land and resources, bureaucratization of life, and ultimately, integration into the apparatus of the state.

Institutional weakness and lack of political will

Generally, there is a lack of political will to implement IPRA effectively, with weak political support by national and local governments. There has been more success in the Cordillera region where indigenous peoples are numerically and politically dominant, and where there is consequently more support from local governments as well as NCIP offices.¹²⁹

Due to the general lack of political will, NCIP is severely underfunded and understaffed, and its personnel often lack the capacity to work effectively.¹³⁰ Furthermore, some NCIP staff are not supportive and display a rather discriminatory and arrogant attitude toward indigenous peoples.¹³¹ Experiences have also shown that in cases of inter-agency conflicts due to unclear and overlapping mandates, the NCIP “becomes disempowered and marginalized; mimicking in this way the marginalization and disempowerment of the indigenous communities it is mandated to serve. This marginalized NCIP cannot effectively work for the benefit of its clientele”.¹³²

In fact, since the government realized that the rights of indigenous peoples recognized in the IPRA “can be made to work against the interests of the government and of those in power” and in order to protect itself, it “has begun to restrict the range and meaning of these rights”¹³³. It has been argued that this process began with the Supreme Court decision in 2000, in which indigenous peoples’ ownership of their land was explicitly recognized, but not their right to natural resources within their lands¹³⁴, which contradicts IPRA and the

implementing Rules and Regulations¹³⁵. One of the main moves in weakening indigenous peoples' control over their land, it has been found, is the government's weakening of the provisions on Free and Prior Informed Consent in IPRA.¹³⁶ Hence, for Bennagen¹³⁷

it is tempting to conclude that the IPRA has already been "amended" and now only reads: "An Act Creating A National Commission on Indigenous Peoples, Appropriating Funds Therefor and For Other Purposes". What happened to the words, "To Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Peoples? These latter were the letter, and the heart, and the spirit of the law.



Fig. 21. *At the provincial office of the NCIP in Calapan, Oriental Mindoro. Lack of human and financial resources limit the effectiveness of the NCIP's work.*

Insufficient protection from encroachment and the question of autonomy

A CADT alone does not guarantee protection from encroachment. As Yang¹³⁸ observed when working with the Bugkalot in Northern Luzon:

It is a sobering reality that a title is but a piece of paper—itself neither altering existing power asymmetries, nor empowering indigenous peoples, nor protecting their territory against encroachment—and that new challenges begin once a title is legally secured.

And, as Rutten¹³⁹ realized, ironically, “the CADT often becomes a vehicle for investors to access indigenous land rather than a means to protect it”. A CADT can attract investors’ interests, and private companies or politicians may offer assistance to communities in their CADT application, manipulate them to serve their interests to strike a deal with the communities or some of their leaders or obtain access to land and resources in return for their assistance. Poverty and low literacy rates make indigenous people vulnerable to company promises, like providing income, water, roads, health services etc. The FPIC processes, which are mandatory for any outside intervention in indigenous peoples’ territories, are often manipulated by NCIP officers in favor of companies.¹⁴⁰

Authors like Gatmaytan have come to conclude that the problem lies in giving too much value to tenure and tenure instruments, assuming “that legal recognition of ownership readily translates into political and cultural autonomy, or the power to exercise self-determination”,¹⁴¹ and not taking into account that “land-titling has historically been an instrument for the extension of state sovereignty and administration over a political or economic frontier”.¹⁴² He argues that there has been too much focus on Ancestral Domain, “leading to the neglect of the larger, more fundamental issue of auto-determination”.¹⁴³ NCIP has been trying to issue “as many CALTs and CADTs as it can”, and to back the CADTs it issued when these are used as instruments of control of political self-determination”.¹⁴⁴

Problems with the legal personality, external divisions and elite capture

Indigenous communities and peoples are recognized as title-holding legal personalities. The IPRA states that a CADT “shall recognize the title of the concerned ICCs/IPs over the territories identified and delineated”.¹⁴⁵ And according to the Rules and Regulations for the implementation of the IPRA,¹⁴⁶

A majority of the members of the ICCs/IPs in a specific area, through their own recognized Council of Elders/Leaders, may file a petition with the NCIP through the Provincial Office for the identification, delineation and recognition of their ancestral domain. No other entity shall file said petition and to ensure the legitimacy of the Petition, the same shall be signed by all members of the concerned ICCs/IPs’ Council of Elders or popularly recognized and accepted leadership body.

In practice, however, the CADT-holding group or community is often represented by an indigenous peoples’ organization, a federation or foundation, many of whom are legally registered with the Security and Exchange Commission (SEC) of the Philippines, which allows them, among others, to open bank accounts in the name of the organization, conduct business transactions, or file cases in court.¹⁴⁷ However, registration is done also because it

is understood as a mark of trustworthiness, commitment, and organizational and administrative competence. While neither the IPRA nor its predecessor scheme DAO 2 legally require IPOs to be SEC registered in order to apply for a certificate of claim

move these two words down to the second line (it is not good to have only one word in the second line of a title)

and title respectively, many groups are pressurized by sheer necessity to do so. If they do not, they cannot – with a view to their financial, legal and commercial needs – move forward.¹⁴⁸



Fig. 22. *The Ancestral Domain Office of the Federation of Matigsalu-Manobo Tribal Councils (FEMMATRICS). The office was built with money from an investor who wanted to lease part of the Ancestral Domain for an agro-industrial plantation.*

Ancestral domains usually comprise at least several communities, in some cases indeed the entire territory of an indigenous people. However, customary indigenous governance structures (especially regarding land and resources) are often limited to the level of a village or kin group, and the organizations created to represent larger groups or a whole tribe or people are more prone to manipulation and elite capture.

Furthermore, the idea of communal land tenure that is frequently projected on indigenous peoples often does not fit with the reality on the ground, where tenure arrangements are much more complex. It has been argued that it is “this simplification of complex local realities that makes the titling of large ancestral domain possible, just as it enables post-titling deals with investors”¹⁴⁹. For example, with reference to the legally registered tribal federation FEMMATRIC that holds the CADT of the Ancestral Domain of the Matigsalog people, Wenk¹⁵⁰ argues that concluding from such simplified legal assumption “that the one organization speaks for and represents all people, acts accordingly, and will or can distribute any income evenly, is at best naïve”.

IPRA gives leaders and elders a prominent role, which has been seized by self-styled leaders to initiate or manipulate the formation and registration of an organization that serves their interests, or to directly have their names registered as CADT holders. As part of the strategy of outsiders in getting access to land and resources in indigenous peoples' areas, leaders are co-opted or even 'created' by companies and politicians, often with the help of NCIP officers. Even without direct outside manipulation, IPRA was found to promote "a new type of indigenous leaders with the capacities to negotiate with state officials and investors, and frictions often arise with established traditional indigenous leaders".¹⁵¹

Local elite capture has affected cases of Ancestral Domain management and FPIC negotiations with investors.¹⁵² Well-connected, powerful leaders or individuals claiming to be leaders have effectively grabbed land belonging to the community by having their names registered as CADT holders.¹⁵³ In his study among the Banwaon of Western Mindanao Gatmaytan¹⁵⁴ concluded:

My sense is that the very idea of having the entire territory covered by a single title was threatening, in that the various sektor [part of the territory owned by families or individuals, C.E.] would be 'papered over', subsumed under a single title. Decisions over land and resources would then have to be negotiated between the co-owners, one of whom had access to guns and men willing to use them. How fair could such negotiations be? Despite the law's assurances, 'ancestral domains' can in effect be titled to one man, if he were powerful enough to dominate his co-owners.

The problem of inclusion and exclusion

Indigenous peoples who are successful in regaining control over their territories may exclude others from access to land and resources. The IPRA explicitly states that the right to Ancestral Domain includes the right to regulate the entry of migrant settlers and organizations into their areas.¹⁵⁵ However, especially in Ancestral Domains with significant settler populations, experiences have shown that, "The physical exclusion of settlers from the domain or their exclusion from governing bodies is not an option, for all practical and moral purposes".¹⁵⁶ It is also possible that indigenous groups are defined as outsiders "by rival indigenous land claimants, using competing criteria of entitlement".¹⁵⁷ In other cases, groups of people want to be included, but are not, while others may want to be excluded but are included.¹⁵⁸



Fig. 23. Signboard at the boundary of the Ancestral Domain of the Buhid of Mindoro island. The Buhid have great difficulties preventing encroachment by illegal loggers and settlers.

The way forward: Key issues to be addressed in a National Land Law in Myanmar

The review of laws and the case studies presented in this report clearly show that Myanmar's current laws on land, forests and the environment do not protect indigenous peoples' rights. By ratifying the Covenant on Economic, Social and Cultural Rights and by voting in favor of the UNDRIP, Myanmar accepted the obligation to rectify this, which is reflected in the National Land Use Policy's part 8 on the Land Use Rights of Ethnic Nationalities. The new Land Law currently being drafted offers an opportunity to fulfill the mandate given by the NLUP.

The review of experiences made in Cambodia and the Philippines with national laws on indigenous peoples' land rights has allowed to identify a number of lessons learned that can inform the reflection and discussion on how to address indigenous peoples' rights in a future National Land Law in Myanmar. The following paragraphs provide a summary of key issues that should be considered in the drafting of the provisions dealing with land rights of indigenous peoples.

Recognition of pre-existing rights

Indigenous peoples have lived in their ancestral territories since pre-colonial times and prior to the formation of a nation state. Therefore, indigenous peoples' rights to their land, territories and resources are pre-existing rights (reflected in the legal concept of Native Title), the recognition of which should be the foundation on which all legislation for the protection of customary land rights of indigenous peoples are to be built.

Reference to ICESCR and UNDRIP

Myanmar has ratified the ICESCR and voted in favor of the adoption of the UNDRIP by the UN General Assembly. Both are important international legal instruments for the protection of indigenous peoples' rights to land, territories and resources and should guide national legislation. Explicit reference to these two legal instruments should be made in the National Land Law.

Recognition of the complexity of customary tenure

Indigenous peoples' customary tenure systems are complex and multi-layered, comprising rules and regulations for rights to access, withdrawal (use of resources), ownership, management, transfer of rights on different types of land, including agricultural land, forest land, grazing land, inland water bodies, coastal areas, minerals and other natural resources.

The Land Law needs to recognize the right of indigenous peoples to govern land and resources through their own customary systems.

Full protection of land rights

Indigenous peoples' pre-existing rights to their land, territories and the right to their customary land governance should be protected through the legal recognition of

- the right of ownership of their territories comprising all types of land, including agricultural land, forest land, grazing land, inland water bodies, coastal areas, minerals and other natural resources
- the right to manage and develop their land and natural resources based on their own customary tenure systems
- the right to regulate the entry of outsiders
- the right to regulate (allow or prohibit) and to negotiate terms and conditions for the exploration and exploitation of natural resources in their territories
- the right to Free and Prior Informed Consent (FPIC) regarding all interventions in indigenous peoples' lands

Re-classification of land categories and collaborative management and conservation

The recognition of pre-existing (Native Title) rights of indigenous peoples to their lands, territories and resources implies that indigenous peoples' lands are not part of the public domain. Therefore, government zonation and land classification should not affect indigenous peoples' ownership of these areas, and all other legal claims, both those of government agencies and private enterprises, over these areas should be considered invalid. Governance of indigenous peoples' territories thus should fall under one single administration, not, as before, under different agencies according to different land categories.

Certain national laws may apply to some of these areas, like, e.g., laws on biodiversity protection, forest conservation and sustainable management of natural resources. These will have to be harmonized with state-level laws and land governance in indigenous areas. Certain zoning, e.g. of forest land or Protected Areas, may be retained under the indigenous land governance system and collaborative arrangements may be made with government agencies, like the Forest Department or Ministry of Natural Resources and Environmental Conservation for conservation and management of these areas.

Customary tenure and the burden of proof

In indigenous peoples' areas, recognition of their customary tenure rights to their land should be the default assumption and point of departure for land classification. Customary

tenure rights should be the default category until proven otherwise, and the burden of proof should lie with those contesting these rights.

Addressing the diversity of situations on the ground

The diversity of customary tenure systems is partly linked to the diversity of situations on the ground in indigenous peoples' areas. The National Land Law needs to take this diversity into account in its provisions on the protection of indigenous peoples' rights to land, territories and resources. The distinction of situations should be made with regards to indigenous peoples' land, territories and resources lying in

1. The current Ethnic Nationality States, i.e. Chin State, Kachin State, Kayah State, Karen State, Mon State, Rakhine State, Shan State
2. The Self-administered Areas in Ethnic Nationality State and non-ethnic regions, i.e. Palaung, Pa-o and Danu self-administered zones and the Wa self-administered division in Shan State, and the Naga self-administered zone in Sagaing Region
3. Elsewhere in non-ethnic regions

Furthermore, the law should take into account,

4. Different scales of recognition, i.e. recognition of the rights over
 - a. Large indigenous territories (covering the territories of e.g. entire large ethnic or sub-ethnic groups)
 - b. Small indigenous territories (covering the territories of small ethnic groups or sub-groups)
 - c. Groups of villages
 - d. Individual villages
 - e. Parts of villages (e.g. land of clans of a village)
5. The fact that customary land rights may not always be claimed over a contiguous area, but exist as a patchwork/mosaic of claims along with that of other landowners
6. The fact that customary rights may not always be based on ancestral ties to an area but also exist over recently established areas of communal use
7. The fact that in addition to full customary tenure rights to an area there may be areas to which a particular indigenous group has customary access rights

Different mechanisms need to be established by the National Land Law to address the diversity of situations and bases for claims, i.e. ancestral connections to a particular area, customary management systems and use.

These mechanisms may include, among others,

1. Recognition of the authority of Ethnic Nationality States over governance of land, territories and resources, which means the authority to legislate state-level laws on land and resources
2. Recognition of the authority of self-administered zones and divisions over governance of land, territories and resources, which means the authority to legislate laws on land and resources for these areas
3. Recognition of indigenous zones or territories in Ethnic States and non-ethnic states within which indigenous peoples' own customary land tenure systems apply. Some of these zones may want to obtain recognition as self-administered zones, which falls under the jurisdiction of other laws. These zones or territories should have full ownership of the lands within their territory and the right to govern land and resources within the territory, subject to federal and state/regional level regulations
4. Recognition and titling of indigenous communities' collective land rights at different scales, i.e. at the level of groups of communities, individual communities or part of communities. The rights-holding entity (community, group of communities, part of a community, clans/families) should have full ownership of the lands within their territories and the right to govern land and resources, subject to federal and state/regional level regulations
5. Recognition and titling only of the commons of a community or group of communities (excluding other land that may be or will be covered by individual titles). The respective right-holding entity should have full ownership of the commons and the right to govern land and resources therein, subject to federal and state/regional level regulations
6. Recognition of the right to access to certain areas or resources lying outside the territory proper of a community (e.g. water bodies, fish and other aquatic resources, forest resources etc.), including the right to joint management of these resources together with the owner of the land within which the resources are located, and the protection of these resources against alienation and destruction.

Communal vs. individual land rights: Land loss and the need for collaterals

The demand for the recognition of communal land rights is often criticized as simplification of complex customary land use and management systems. It is also argued that communal titling carries the danger of elite capture and deprives individuals and households from accessing credit due to the inability to provide collaterals. Conversely, individual titling has been found to lead to accelerated loss of land, fragmentation of land holdings, loss of culture and community cohesion. However, there is not just an either-or solution. Recognition of collective ownership and land governance above all means that the collective (community,

tribe, people) governs land and resources within its territory in accordance with its own customary system, which implies the recognition of multiple and layered rights, including individuals' or families' ownership or use rights over land and resources.

The need to have collaterals for obtaining loans can be solved in other ways than just issuing individual land titles. For example, farmers' groups with mutually assured joint responsibility vis-à-vis the creditor can be formed (like in Thailand) or communal land can be accepted by banks as collaterals (e.g. in Cambodia). Credit unions are another alternative (e.g. in East Kalimantan in Indonesia).

In indigenous areas where the desire for the recognition of individual land rights is strong, this should be respected. However, prior to that, the community's right to territorial land governance should be recognized, which can help in preventing loss of land through debts and other means of land grabbing.

Land rights and self-determination

Issuing of legal documents like ownership certificates or land titles is important but is not necessarily sufficient for the protection of customary tenure rights of indigenous peoples. Self-governance of land through customary tenure systems should be ensured within a broader framework of self-determination, which is one of the basic rights of indigenous peoples recognized in the UNDRIP. This broader recognition and protection of the right to self-determination has to be provided through other laws and constitutional provisions that are part of a federal system of governance.

The need for interim protection

In order to prevent land grabbing during the process of identification and recognition of indigenous peoples' lands, interim measures need to be put in place. These may include, among others, a moratorium on issuing of land concessions, land use, lease or ownership certificates.

The rights-holding entity

Indigenous peoples and communities or part of communities (e.g. families or clans) are to be recognized as rights-holding legal entities without the need for them to establish and register separate legal personalities (associations, foundations etc.). If groups of communities or tribes/peoples decide to form alliances/federations, they should also be recognized as rights-holding entities.

Land governance: Federalism and the principle of subsidiarity

Land governance in indigenous peoples' areas should be guided by the dual principles of indigenous peoples' right to self-determination and subsidiarity, which means that land governance should be exercised at the lowest possible level, i.e. by communities, within the regulatory framework developed at the level of Ethnic States, Self-administered Zones, and the Union (i.e. the National Land Law).

Procedures for land categorization, zoning, application of recognition and delineation of customary territories should be simple, unbureaucratic and participatory, done jointly by the rights-holding entity (community, tribe, people, federation of communities or tribes etc.) and a single administrative office at the corresponding (lowest possible) level of government (i.e. village tracts, township, district, state). The issuing of certificates/title deeds should be done in a simple and unbureaucratic manner by the relevant authority, i.e. the Federal Ethnic State, Self-administered Zone and facilitated through its respective line agencies at the lowest relevant level (i.e. village tracts, township, district, state), depending on the size of the indigenous territory to be recognized. Certificates/title deeds should be co-signed by the responsible government agency and the representatives/leaders of the respective right-holding entity.

Checks and balances to ensure accountability and avoid elite capture

To ensure the upholding of participatory principles, transparency and accountability in land governance, systems of checks need to be put in place at all levels. Joint Land Boards/Land Councils could be established with representatives of the responsible government administrative bodies and representatives of indigenous peoples, tribes, federations of tribes/communities, and of communities.

Particularly with regards to large territories there is the danger of elite capture, which makes it necessary to establish mechanisms that ensure the protection of lower-level rights (land rights of individuals, families, clans, communities). This can be achieved, for example, through rules and regulations on customary land governance that ensure basic democratic principles and oversight mechanisms within customary governance systems with regards to land and resources, for example the creation of separate Land Councils complementing the customary governance institutions. Women's participation and representation in these bodies needs to be ensured.

The problem of inclusion and exclusion

In indigenous areas with complex patterns of ethnicities there is a danger that smaller ethnic groups are subsumed against their will in the territories of larger ethnic groups. Ensuring transparency and participatory principles in the procedures of identification, demarcation

and recognition (titling) of indigenous territories implies that these smaller groups' right to self-determination and FPIC is respected and that, if they wish, their territories are excluded and obtain separate recognition.

Land and resource rights of non-indigenous populations in indigenous areas have to be respected unless their possession of land has been achieved fraudulently. They have to be included in the indigenous land governance system in a just manner, maintaining international human rights standards. They should be represented in land governance bodies like land councils.

Existing land claims, use rights, lease agreements and concessions in indigenous peoples' areas

Land claims, certificates of land use rights, lease agreements and concessions held by individuals and private companies have to be re-assessed with regards to the manner in which they were issued (i.e. whether the holders of customary rights over these areas have given their consent or not) and, based on the outcome of the re-assessment, either cancelled or re-negotiated.

Restitution of former indigenous rights over land, territories and resources

Indigenous communities, families and individuals who were displaced by armed conflicts, natural disaster or land grabbing have the right to full restoration of their rights or, where not possible (e.g. where land is permanently destroyed by natural disasters) to restoration of land and resource rights and livelihood elsewhere.

Land appropriation in national interest

Any appropriation of indigenous peoples' land, territories and resources in the national interest shall be done only with Full and Prior Informed Consent of the affected communities, families or individuals.

Harmonization of laws and need for other laws

Once the Land Law is adopted, other laws will have to be harmonized accordingly and new laws, like on indigenous peoples' rights to self-governance or self-determination, have to be passed.

Definition of terms

There is a need to clearly define key terms to be used in the law. Some of these are:

- Collective rights
- Communal land
- Communal rights
- Community
- Customary land
- Customary land use/management
- Customary law
- Customary rights holder
- Customary tenure and customary land rights
- Legal entity
- Rotational taungya (shifting cultivation)
- Taungya land

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