

PERSISTENCE AND CHANGE IN CUSTOMARY TENURE SYSTEMS IN MYANMAR



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

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Myanmar is home to more than 100 ethnic groups whose communities have their own distinct identities, cultures and livelihoods. Many of these groups regulate land and resource access, use and management through their own customary tenure systems. However, these systems are under threat and are not legally recognised and protected by the Myanmar State.

Understanding how these customary tenure systems work – and the differences between them – is fundamental to identifying appropriate approaches for legal recognition and protection. The purpose of this thematic study is to develop a typology through systematically reviewing existing knowledge and comparing the various customary tenure systems in Myanmar.

1. A DEFINITION OF CUSTOMARY TENURE

Customary tenure is a community-based system for managing land and resources independent from statutory tenure. This means that the rules and procedures underlying these systems are determined and maintained by communities, not by outside entities such as governments. In this study, the following definition is used:

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

In the context of customary tenure, a community is in most cases a traditional village. However, the village does not necessarily correspond to an administrative village. It can consist of two or more small settlements and may be of mixed ethnicity. In some cases, neighbouring communities may share certain land areas or certain resources which are governed by joint tenure rules. In other cases, two or more traditional villages may have a shared territory and a joint customary tenure system. Communities should not be viewed as homogenous. Many are of mixed ethnicity and within any community there are differentiations in terms of rights, social status, power, interests, and capacities.

2. WHAT DO CUSTOMARY TENURE SYSTEMS HAVE IN COMMON?

Communities hold jurisdiction over their territories

In customary tenure systems, a community and its territory are inseparably linked. This does not mean that under customary tenure all land is owned communally. Rights can be held collectively, jointly or individually. Even when all community land is privatised – and collective or communal land no longer exists – community jurisdiction can still apply. A common expression of community jurisdiction is the restriction on the sale of land to people from outside the community.

Customary tenure systems contain a bundle of rights

Customary tenure systems are complex because they contain different and sometimes overlapping rights to various resources that are enjoyed by different individuals or groups in a community. These bundles of rights are generally understood as being comprised of five rights:¹

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

Customary tenure and community governance systems are inseparably linked

Customary tenure depends on the existence of community governance institutions and mechanisms for rule enforcement and conflict resolution. Well-functioning conflict resolution mechanisms are critical for the legitimacy and long-term sustainability of customary tenure systems.

Rights are based on the principle of first clearance and inheritance and have a spiritual dimension

It is very common for customary rights to originally be acquired by being the first to clear and cultivate vacant land (*dama-u-gya* in Burmese), after which the land could be given or sold to others and passed to descendants of the owner.

It is often believed that the village founders who first cleared the land created special relationships to the spirits of the land, which are responsible for land fertility. The descendants of village founders have a duty to maintain a good relationship with these spirits by conducting or leading the required rituals and offerings.

All community members who reside in the village have access to land

Under customary tenure, the rights of individuals or families in a community are enjoyed because they are a member of the community or another collective (such as a clan) that holds the land in common trust. This does not mean that there are always equal rights to land. However, those with exclusive or priority rights usually have the responsibility and obligation to ensure that all other community members can make a living off the land. Landlessness has been less common under customary tenure systems than with statutory tenure.

In most cases, the right of all village residents to have access to land also implies that when people leave their village, they cannot maintain any claim over their land until they return. However, in the context of increasing labour migration, these rules may change.

Intensively used land is private property of individuals or households

Extensively used land is often held as common property. Examples may include pastures, forests or shifting cultivation land. In contrast, house lots and intensively used land (such as irrigated and terraced paddy fields, orchards, and tea or coffee gardens) are usually the private property of individuals or households.

¹ For an example, see Schlager, E., & Ostrom, E. (1992). Property-rights regimes and natural resources: A conceptual analysis. *Land Economics*, 68(3), 249–62



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

Customary tenure systems are constantly evolving

Customary tenure systems may be many generations old and deeply rooted in the culture and traditions of a community. At the same time, just like the social system they are part of, these systems are constantly evolving in order to remain practically relevant.

3. HOW DO CUSTOMARY TENURE SYSTEMS DIFFER?

In Myanmar, three basic types of customary tenure systems can be identified:²

1. Systems with shifting cultivation land that is communally owned
2. Systems with a mix of collectively owned land and land that is privately owned by individuals or households
3. Systems in which all land inside the village territory is under private ownership, but where claims still cannot be given or sold to outsiders

For each particular community, the type of system depends on several factors that are briefly discussed here.

Livelihoods and land use

Customary tenure systems comprise various types of land and resources in a given landscape. Communities tend to depend on a prevalent livelihood system and this determines who can use which resources and in what way. Agroforestry (such as shifting cultivation) and farming are by far the most common forms of land use in Myanmar's rural areas. Livestock rearing is an integral part of most livelihood and land use systems, but only in a few exceptional cases is it the main livelihood. A livelihood system based on hunting and gathering is practised by only one ethnic group – the Moken of the Myeik Archipelago – where mobile family groups in boats use marine, coastal and inland resources on islands for subsistence and trade.

Long-fallow shifting cultivation systems

Long-fallow shifting cultivation is still practised in upland indigenous communities with low population densities – such as in parts of Chin, Kachin, Kayah and Kayin States, and the Naga Self-Administered Zone of Sagaing Region. One shared characteristic for many long-fallow systems is the complexity of their customary tenure systems. Extensively used land (such as forests, pastures or shifting cultivation land) is often held under collective ownership – although this is not always the case. Where collective

² Andersen, K.E. (2016b). *The Recognition of Customary Tenure in Myanmar*. Thematic Study #3. Vientiane: Mekong Region Land Governance.

ownership exists, there are variations regarding the social group that holds the collective rights. Another common feature is hereditary individual or clan rights over land, which are based on the principle of first clearance. Different ethnic groups may have different levels of individual or group rights over shifting cultivation land. However, overall management decisions are made collectively at the community level.

Intercommunity and pan-tribal customary tenure

In some cases, large and remote forest areas are used by several communities and are therefore considered a kind of joint common property with access rights for all members of those communities. Areas of particular cultural significance (such as sacred mountains or sites) may be considered the common property of a whole ethnic group, and caretaker responsibilities may be given to a village inside or near the sacred site, or to a pan-tribal civil society organisation.

Beyond land: Resource governance among farmer-fisherfolks and sea-based hunter-gatherers

Customary tenure systems also regulate resource use in communities of farmer-fisherfolk in coastal mangroves and wetlands as well as the sea-based hunter-gatherer system of the Moken communities in the Myeik Archipelago. Since the communities depend on both the land and resources from estuaries and the sea, these systems pose a challenge for the recognition and protection of their rights.

Demography: Population growth, migration and land use change

In many upland communities across the country, land scarcity as a result of population growth has forced farmers to shorten the fallow period of their shifting cultivation cycle. Where suitable land was available, farmers turned to using the land permanently through crop rotation or the construction of terraces for paddy fields. All intensively used land is held under private ownership. However, collective tenure rights are usually maintained at least over forests and grazing land, and the relationship between people and resources continues to be regulated under customary tenure.

The short-fallow shifting cultivation among the Pa-Oh in Southern Shan State³ and the permanent upland cultivation among the Kayan Kangan in Kayah State⁴ show that these communities can effectively maintain their jurisdiction over the entire village territory even if communal tenure does not exist or is limited.

Migration leads to considerable changes in community structure and also affects customary tenure systems in various ways at both the migrants' place of origin and their destination. This may be because of labour and/or land scarcity or the introduction of new forms of land access and use – such as inducing a land rental market and investment.



Gheba woman in her cardamom agroforest, Kayah State.
(Photo: Christian Erni)

Market integration

Global and regional integration and demand for commodities have triggered changes in land use. Small farmers may try to seize the opportunity offered by the market and adopt cash crops as an addition to subsistence crops – or often to replace them completely. Such changes have an impact on customary tenure systems.

From shifting cultivation to commercial agroforestry systems

In many upland areas, a transition from shifting cultivation to commercial agroforestry is leading to customary communal rights being replaced by individual rights. These processes may also profoundly alter social relations within the community.

For example, in Gheba communities in Leiktho sub-township in Kayah State,⁵ the privatisation of land formerly held under collective tenure has resulted in land accumulation by wealthier households, and loss of land for poorer households. These land transfers and the resulting land concentration happened within the customary tenure system framework. While disparities may be deepening, land remains in the hands of community members and there are no landless households to date. Once land becomes fully commodified, and when communities are no longer able to control and limit land sales to outsiders, their customary tenure systems may ultimately disappear.

³ Farmers and Land Workers Union. (2016). *Customary tenure in Nan-Pan village, Southern Shan State, Myanmar*. Briefing paper. Yangon: Mekong Region Land Governance.

⁴ Karuna Mission Social Solidarity-Loikaw. (2017a). *Livelihood, Land Use and Customary Tenure in Kwaingan. A Report of a Participatory Action Research*. Loikaw: Karuna Mission Social Solidarity (KMSS)-Loikaw.

⁵ See GRET (2019). *Farming systems analysis in Myanmar: Methodological background, selected case studies and synthesis of field-based studies across five states and regions of Myanmar*. Yangon: LIFT. See also Promotion of Indigenous and Nature Together (2019). *Indigenous Peoples' Rights to Customary Land in Myanmar Current Status and the Way Forward*. Yangon: POINT (Promotion of Indigenous and Nature Together).



Collective rice harvest in Kwaingan community, Kayah State. The paddyland here is individually owned and the forests in the background owned by the community. (Photo: Christian Erni)

Culture and social organisation

Culture and social organisation may also determine how much customary tenure varies between different communities. This influence is evident in the differing rules on ownership and inheritance of land, particularly regarding land ownership by women. A customary tenure system is also shaped by sociopolitical organisation. Some upland societies are traditionally more egalitarian around access to and ownership of land compared to the stratified aristocratic societies of the lowlands and a few ethnic groups in the uplands.

Cultural variations in long-fallow shifting cultivation systems

One example of how culture and social organisation determine variations in customary tenure within a particular type of land use is the diversity found in long-fallow shifting cultivation systems. In Northern Chin State, some plots of shifting cultivation land are held under private ownership based on the principle of first clearance, but all other land is under communal ownership and distributed fairly among families at no cost each season.⁶ In contrast, in some communities in Southern Chin State, large blocks

of shifting cultivation land are controlled by either a few aristocratic families or one single family.⁷ Other families then have to pay to access a plot of land. Among the Kayan Hlahui in Kayah State, tenure rights over land are either held by individuals or collectively by clans.⁸

State interference

Direct interference by the State in customary tenure systems is one of the main drivers of change. The State often does not recognise customary tenure. At the same time, common property resources (such as forests) and land that is not registered are often declared as State property. This categorisation means that it becomes illegal for communities to use the land or resources. State allocation of land to private companies is the main cause of land loss by small farmers in Myanmar. In addition, the imposition of statutory tenure on communities potentially undermines customary tenure systems.

Lowland peasant systems

A close relationship and sentimental attachment to land is not an exclusive characteristic of indigenous communities in the uplands but has also been reported from

⁶ Boutry, M., Allaverdian, C., Tin Myo Win, & Khin Pyae Sone. (2018). *Persistence and change in Hakha Chin land and resource tenure: a study on land dynamics in the periphery of Hakha*. Of Lives and Land Myanmar research series. Yangon: GRET.

⁷ Andersen, K.E. (2015). *Study of Upland Customary Communal Tenure in Chin and Shan States. Outline of a Pilot Approach towards Cadastral Registration of Customary Communal Land Tenure in Myanmar*. Yangon: Land Core Group, p. 45.

⁸ Karuna Mission Social Solidarity-Loikaw. (2017). *Livelihood, Land Use and Customary Tenure in Khupra. A Report of a Participatory Action Research*. Loikaw: Karuna Mission Social Solidarity (KMSS)-Loikaw.

long-settled Bamar communities in the Dry Zone.⁹ Customary tenure systems among Bamar communities today are reportedly weaker than among indigenous communities. However, this difference is more a result of historical and recent State interference rather than being linked to culture and ethnicity. In the lowlands, Bamar communities have been administered by the State for centuries¹⁰ and nearly all farmland is currently governed by statutory law. However, some land remains under communal management – such as grazing land – and rules to regulate the transfer and inheritance of land still exist informally.¹¹ The law provides for the possibility to obtain legal documents such as Land Use Certificates. However, many communities are often not aware that they can obtain these documents. Others may have heard of the possibility to obtain a certificate but do not know how to apply and do not have easy access to the relevant government offices.¹² This is particularly the case for communities in remote areas.

Armed conflicts

Armed conflicts have affected ethnic nationality areas over many decades. The devastating impacts on all aspects of life for communities also extend to customary tenure systems. Many communities have been alienated from their ancestral lands over which they held customary tenure. They have been forcefully relocated by State security forces or have had to evacuate their villages to escape violence. In the resettlement areas, they often have little if any tenure security, and they may be competing over land and resources with native communities.

Communities are also experiencing significant insecurity because of the existence of parallel governments of the Myanmar State and those established by ethnic armed groups, and their competing claims for legal jurisdiction and policies regarding land and resources.¹³

Forcefully relocated communities

For displaced communities, maintaining customary tenure systems is difficult, if not impossible. A case study among forcefully resettled Karen communities in Bago region shows the extremely difficult conditions these people are facing and the effect on their customary tenure system.¹⁴ Many have remained landless, eking out a living as daily labourers in their resettlement area. Where the security situation has improved, the older generation is looking to return and regain control over their ancestral territories and re-establish customary tenure. However, many adults

who were born in the resettlement site do not have any relationship to their ancestral land and are unwilling to move back to remote areas with their parents.

4. PARTIAL AND COMPLETE SYSTEMS: ADDRESSING CUSTOMARY TENURE SYSTEMS ON A SPECTRUM

The effectiveness of customary tenure systems to secure the rights of the community members does not depend on conditions of low population densities, the presence of collective rights, or a particular kind of livelihood system or type of land. Effectiveness depends on the assertion of community jurisdiction. It is the community-based regime of tenure that needs protection, irrespective of the lands to which it applies.¹⁵ Customary tenure systems may have changed substantially or only a little over time and there may be a change in how collective rights exist alongside private individual rights. However, the crucial element for the sustainability of customary tenure systems is the community's determination and ability to govern its territory according to its own internal rules and regulations. This ability is challenged primarily by increasing State interference.

In most of the lowlands, community jurisdiction over village territory has been largely replaced by State jurisdiction. Only some elements of the original customary tenure system have been retained – such as tenure rules for grazing land. Such systems can therefore be considered **partial systems of customary tenure**.

In contrast, a **complete system of customary tenure** is where community territory is held as common property over which the community holds jurisdiction through customary law. A key indicator of community jurisdiction is not the presence of communal or other forms of collective tenure rights, but the effective enforcement of customary tenure by the community governance institution – above all, the assertion of control over transfer of land, including restriction on or regulation of sale to outsiders.

Identifying a system as either partial or complete may sometimes be difficult because of the dynamic nature of customary tenure systems and the multitude of causes and agents of change (see the figure below). However, this distinction helps to focus on the key criterion for identifying customary tenure systems that should be recognised and protected by the law: the level of autonomy a community has in governing its land and resources.

⁹ Boutry, M., Allaverdian, C., Mellac, M., Huard, S., San Thein, Tin Myo Win, & Khin Pyae Sone. (2017). *Land tenure in rural lowland Myanmar: From historical perspectives to contemporary realities in the Dry zone and the Delta*. Of Lives and Land Myanmar research series. Yangon: GRET.

¹⁰ Huard, S. (2020). Nobody Owns the Land: How Inheritance Shapes Land Relations in the Central Plain of Myanmar. *Journal of Burma Studies*, 24(1), 79–117. University of Hawai'i Press.

¹¹ Kahan, D. (2001). *Dry Zone Farming Systems Study*. Yangon: United Nations Development Programme and Food and Agriculture Organization. See also Huard op.cit.

¹² For an example, see Norwegian Refugee Council (2019). *Obstacles to Housing, Land and Property Rights in Northern Mon State. A Field-Based Assessment of Formal and Informal Procedures and Practices*.

¹³ For an example, see Lundsgaard-Hansen, L. M., Schneider, F., Zaehring, J.G., Oberlack, C., Win Myint, & Messerli, P. (2018). Whose Agency Counts in Land Use Decision-Making in Myanmar? A Comparative Analysis of Three Cases in Tanintharyi Region. *Sustainability*, 10(10), 3823.

¹⁴ Based on a field study conducted by Prawit Nikornuaychai, partly published in Erni, C. (2018). *Indigenous peoples, land rights and forest conservation in Myanmar*. Copenhagen/Yangon: International Work Group for Indigenous Affairs and Promotion of Indigenous and Nature Together.

¹⁵ Wily, L. (2016). Customary tenure: remaking property for the 21st century; in: M. Graziadei and L. Smith (Eds.), *Comparative Property Law: Global Perspectives* (p.463). Cheltenham: Edward Elgar.

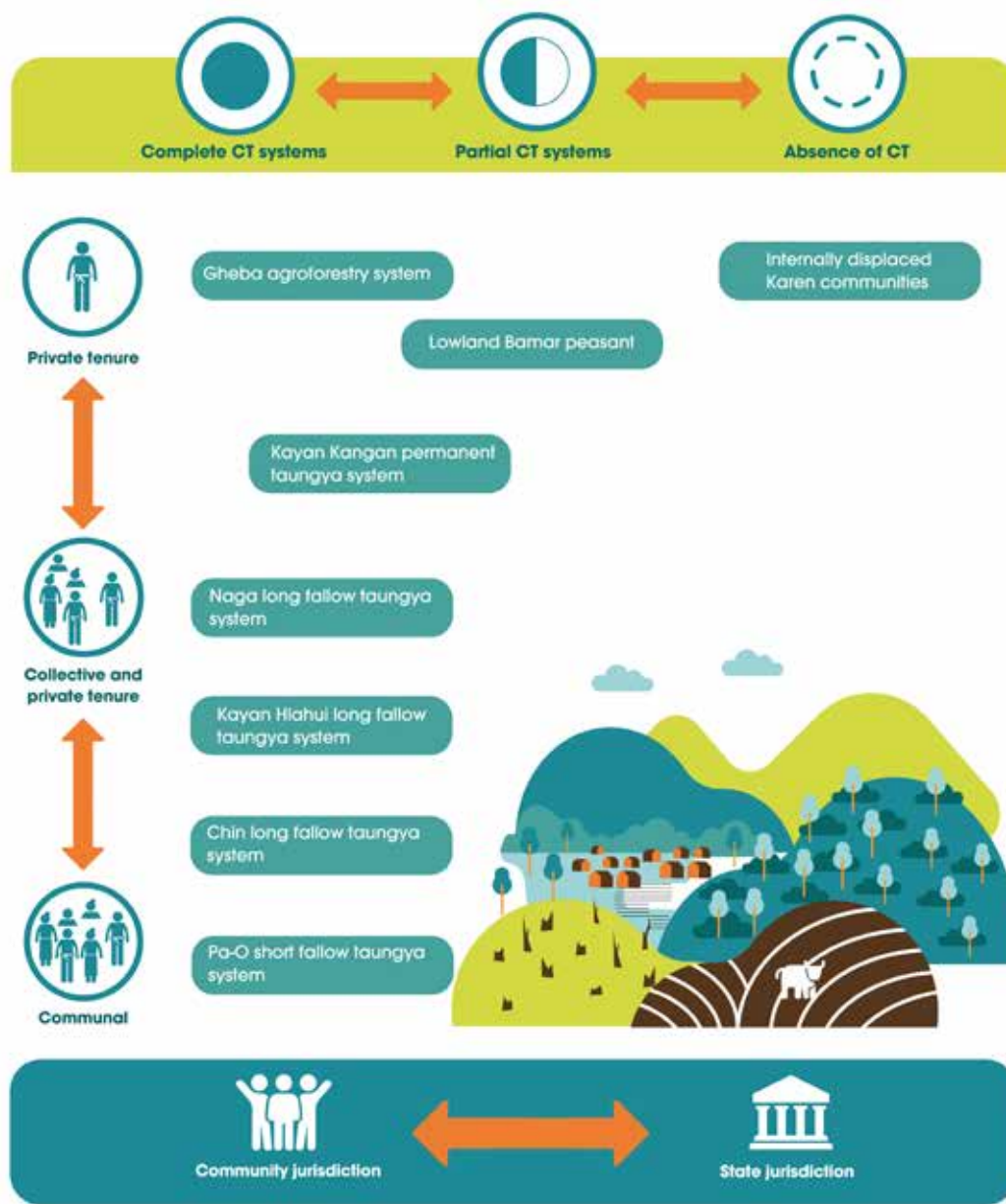


Figure: The customary tenure system continuum

As a first step toward the identification of policy options for the recognition and protection of customary tenure, this thematic study provides a review of existing knowledge about the various customary tenure systems in Myanmar. After a reflection on the definition of customary tenure, the study identifies common features of customary tenure systems as well as distinguishing criteria, which form the basis of a proposed typology. It concludes that, in all cases, community jurisdiction over land and resources within the territory needs to be recognised, regardless of the actual forms of tenure for the different land types within the community's territory.

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Please visit www.pointmyanmar.org

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