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

*An Analysis of the Legal Framework of Land Governance*

Layshi Township, Nagaland © von der Mühlen, Manuel

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ABSTRACT

Myanmar is currently undergoing a triple transition: From an autoritarian military regime to democratic governance; from a centrally controlled to a market economy; and from more than sixty years of armed conflict to peace in its border areas.

Myanmar is a multi-ethnic state with 135 officially recognized ethnicities. The uplands are home to ethnic minority groups like the Chin, Kachin, Pa-O, or Naga. These groups attained semi-autonomous status during the colonial era and were largely left untouched by the passing military regime. Recent ceasefire agreements have facilitated the incorporation of the country’s uplands, as the government seeks an allocation of the frontier lands to investors and businessmen.

This strategy is accompanied by a land tenure reform process since 2012. The Farmland Law (2012) and the so-called Vacant, Fallow and Virgin Lands Management Rules (2012) are designed to cause a shift from common to private property regimes. In contrast, the recently enacted National Land Use Policy or NLUP (2016), which guides decision makers in the development of the country’s first ever National Land Law, does recognize customary tenure.

Through this research, I examine the National legal framework of land governance. I provide insights into the land tenure reform process of a country in transition, and the inevitable challenges and opportunities faced by the people concerned. I address questions about (i) the ambiguity of Myanmar’s land governance framework and its consequences for customary tenure security; (ii) how the reform impacts on customary tenure security; and (iii) how current land laws must be amended to strengthen customary tenure security. Since the land tenure reform process is particularly prevalent in upland Myanmar, I focus on the country’s ethnic minority hill groups.

My analysis shows that the legal framework is used by those in power for arbitrary land concessions. Large-scale land acquisitions are being facilitated and customary tenure systems weakened by nearly all relevant laws. While the NLUP (2016) offers more hope for customary tenure to become officially recognized, there is still a long way to go for an all-encompassing National Land Law. I thus propose policy recommendations in the form of amendments to existing laws. The government must, inter alia, (i) re-classify farmland categories to include shifting cultivation; (ii) define the meaning of ‘vacant’ lands, excluding lands left fallow by shifting cultivators; (iii) clearly specify conditions under which the state can claim legal land ownership; and (iv) align all existing land laws with the NLUP (2016).

My research findings indicate that the land tenure reform process in its current state leads to an uncertain future of customary tenure systems. In the interest of long-lasting peace, customary tenure should be protected. The NLUP (2016) provides the foundation for reform that must now be put into action. Only when the land rights of upland ethnic minority groups are protected will Myanmar’s triple transition be successful.

Keywords: Myanmar; land redistribution; customary tenure; shifting cultivation; large-scale land acquisitions
Figure 1: Myanmar Country Map
The land issue is one of the biggest challenges in Myanmar. Most of the lands were grabbed illegally and thus there are a lot of problems regarding land ownership [...] Those illegal land acquisition and land grabbing have been happening in Myanmar seriously since 20 years ago. There could be a few land cases even before that. The legislative branch of government has been trying to solve all those land issues since 2013. However, it is not as successful as expected. We are now trying our best to solve land cases at soonest.

Aung San Suu Kyi, State Counselor¹

¹ Source: As cited in Leckie and Arraiza 2017, p. 40
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**Notification:** I have spelt out the complete term of each abbreviation whenever I mention it for the first time in each chapter. The rest of the chapter uses only the respective abbreviation. Only terms mentioned at least two times throughout the paper are abbreviated.

<table>
<thead>
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<th>Full Form</th>
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<tbody>
<tr>
<td>CFC</td>
<td>Community Forestry Certificate</td>
</tr>
<tr>
<td>CLR</td>
<td>Classic Land Reform</td>
</tr>
<tr>
<td>FAB</td>
<td>Farmland Administrative Body</td>
</tr>
<tr>
<td>FPIC</td>
<td>Free, Prior and Informed Consent</td>
</tr>
<tr>
<td>GAD</td>
<td>General Administration Department</td>
</tr>
<tr>
<td>LAA</td>
<td>Land Acquisition Act</td>
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<td>MBLR</td>
<td>Market-Based Land Reform</td>
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<tr>
<td>LNA</td>
<td>Land Nationalization Act</td>
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<tr>
<td>LUC</td>
<td>Land Use Certificate</td>
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<tr>
<td>NLD</td>
<td>National League for Democracy</td>
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<td>NLUP</td>
<td>National Land Use Policy</td>
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<tr>
<td>SEIA</td>
<td>Social and Environmental Impact Assessment</td>
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1 INTRODUCTION

1.1 Background Information

Myanmar has an area of 670,000 km² with a population of 51.4 million people (Kraas et al. 2017). Most people depend on land for their livelihoods, almost 70% of the total population lives in rural areas. The country is administratively divided into the Union in Nay Pyi Taw, 14 Regions and States, 74 districts, 330 townships, 3,301 wards, 13,588 village tracts, and 63,798 villages (Kraas et al. 2017). Myanmar is a multi-ethnic, multilingual, and multi-religious country with 135 officially recognized ethnicities. The Bamar constitute the largest ethnic group, Burmese is the official language, and Buddhism the all-prevalent religion. Myanmar’s uplands are dominated by ethnic minority groups (non-Bamar) and home to 40% of the total population (Stokke et al. 2018). Figure 2 shows the distribution of the major ethnic groups throughout the country.

1.2 Research Problem

Myanmar is currently undergoing a triple transition: From an authoritarian military regime to democratic governance; from a centrally controlled to a market economy; and from more than sixty years of armed conflict to peace in its border areas (Htun 2015; KHRG 2015; WB 2018).

The government intends to develop a National Land Law incorporating all previous land laws. In this process, guided by the National Land Use Policy (2016), it follows a strategy of incorporating the uplands – until recently largely untouched and still dominantly governed through common property regimes – into the public system of land governance (Hirsch, Scurrah 2015). The lack of recognition of customary systems undermines the tenure security of upland ethnic minority groups and threatens their way of life (Vicol et al. 2018).

Figure 2: Major Ethnic Groups of Myanmar

Source: Stokke et al. 2018, p.4
Lowland farmers have been familiar with statutory law and the concept of private property since the British colonial regime controlled their lands to secure access to paddy rice and collect taxes (Andersen 2016; Mark 2016a). Tenure security through private property institutions in the uplands cannot be a replicable model, however. For Myanmar’s hill communities, customary tenure means livelihood and identity (Mark 2015). Myanmar must outline a different legal framework of land governance for its upland ethnic minority groups (USAID LTP Toolkit 2018).

Shifting cultivation is the dominant agricultural practice of Myanmar’s upland ethnic minority groups and their main source of livelihoods (Springate-Baginski 2013). It represents an extensive multifunctional landscape use integrating the economic and environmental value of the land, while capitalist and collectivist farming systems segregate landscapes into forest conservation and intensive agricultural land use zones (Castella et al. 2013). Transition from shifting cultivation to permanent agriculture is a response to broader political economic pressures to commercialize agriculture, often blind to the ruptures caused in rural livelihoods (Scurrah et al. 2015).

Large-scale land acquisitions (LSLA)² can tremendously transform the livelihoods in their target region through alteration of use, access, and ownership rights to land (Oberlack et al. 2016). Lands held under common property regimes are vulnerable to involuntary land loss in contexts of weak legal enforcement mechanisms of customary land rights presenting an easy target for investors (Fuys et al. 2006; ILC 2006). Figure 3 shows the most frequently reported adverse (negative) livelihood outcomes of LSLA on a global scale.

![Figure 3: Most Frequent Adverse Livelihood Outcomes of Large-Scale Land Acquisitions](source: Oberlack et al. 2016)

²Combining definitions from multiple sources, LSLA is herein defined as governments and private investors from domestic and foreign countries securing large tracts of lands and waterbodies, including communally held indigenous territories, for agricultural production, infrastructure or industrial development, resource extraction, and resource conservation by means of long-term lease or purchase agreements (Foljanty 2009, p.3; Oberlack et al. 2016).
The seizure of customary held lands in the uplands is now being facilitated, ironically, through the nationwide ceasefire agreement enabling a shift from decades of civil war to the inflow of capital from domestic and foreign investors (Hirsch, Scurrah 2015). Figure 4 shows the overlap between the locations of present day ethnic armed conflicts and large-scale development projects across Myanmar.

![Figure 4: Distribution of Ethnic Armed Organisations and Natural Resource Extraction in Myanmar](source: Stokke et al. 2018)

Without amendments, the current legal framework of land governance increases vulnerability and risks poverty for millions of people (Leckie, Arraiza 2017; Mark 2016b). The government must therefore legally recognize customary tenure and shifting cultivation as realities on the ground to strengthen tenure and livelihood security (Mark 2016b).

### 1.3 Research Questions

1. Why is Myanmar’s legal framework of land governance considered ‘ambiguous’; and what are the consequences of this ambiguity for customary tenure security of upland ethnic minority groups?
2. How does Myanmar’s land tenure reform process impact on customary tenure security of upland ethnic minority groups?
3. How must Myanmar’s land laws be amended to increase customary tenure security for upland ethnic minority groups?
1.4 Research Relevance
The research is situated in the current land redistribution debate. It is directly linked to indicator 1.4.2 of Myanmar’s report on the Sustainable Development Goals to implement Goal 1: End poverty in all its forms everywhere measuring its success by the proportion of the adult population with secure tenure rights and legally recognized documents (UNDP, CSO 2017).

Myanmar is emerging from decades of civil war. The arrangement of the land redistribution process will have profound consequences on how citizens relate to one another (Mark 2016b). The research is relevant for any country recovering from ethnic armed conflict where state sovereignty is challenged by multiple institutional actors (RRI 2015).

The National Land Use Policy (2016) calls for research on customary tenure to better understand what is at stake and facilitate recognition of customary land rights. This study contributes to a better understanding about the role of customary tenure in Myanmar’s legal framework of land governance. The results can be used to revise the ongoing land redistribution process to be more sensitive to rural livelihoods.

1.5 Research Approach and Outline
I have chosen an analysis of the legal framework of land governance to better understand the complexity behind the ongoing land tenure reform process in Myanmar. I have consulted relevant land laws before independence (1894 – 1947), after independence (1947 – 2012), and recent land laws and policies (since 2012). It is important to become familiar with comparatively old laws since these are still legally applied in Myanmar despite being outdated. Nevertheless, I have specifically focused on the reforms since 2012 because they have the most profound consequences for customary tenure security of ethnic minority groups in the uplands. In addition, I have analysed many secondary sources covering relevant topics like customary tenure, shifting cultivation, and LSLA in the context of Myanmar.

The remainder of the paper is structured as follows. The THEORETICAL FRAMEWORK provides background information on land tenure security and systems, including customary tenure, as well as land redistribution to better understand what inspires countries like Myanmar to reform their agrarian structure, and what is at stake. Where applicable, I refer to the respective information in the context of Myanmar. This is followed by an analysis of customary tenure in the LEGAL FRAMEWORK OF LAND GOVERNANCE. The DISCUSSION addresses the research findings and policy recommendations before the CONCLUSION summarizes the main idea, main findings, and most important policy recommendations. In the ANNEX, I take a closer look at customary tenure systems and rural livelihoods of Myanmar’s upland ethnic minority groups through a case study on the Naga.
2 THEORETICAL FRAMEWORK

2.1 Land Tenure Systems and Security

2.1.1 Land Tenure Security

The term land tenure refers to property rights to land of groups and individuals (Kuhnen 1982). Land tenure is characterized through a ‘bundle of rights’, rather than a single right to land (Feder, Feeny 1991; Ostrom, Hess 2007). The literature (ibid) commonly distinguishes the following five types of tenure:

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

As shown in table 1, the level of property rights to land is defined by the rights holder.

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<thead>
<tr>
<th></th>
<th>Owner</th>
<th>Proprietor</th>
<th>Claimant</th>
<th>Authorized User</th>
<th>Authorized Entrant</th>
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<tr>
<td>Access</td>
<td>X</td>
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<td>Withdrawal</td>
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<td>Alienation</td>
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*Source: Ostrom, Hess 2007*

2.1.2 Land Tenure Regimes

Land tenure regimes are the institutional arrangements that define and regulate the rules, principles, procedures, and practices through which societies establish and regulate peoples’ relationship to land (FAO 2002; USAID 2007).

Land rights are held under one of the following four globally recognized *land tenure regimes*:

1) **State property regime**: Property rights are held by some authority in the public sector, but can partly be transferred to individuals (by leaseholds or concessions);
2) **Individual property regime**: Property rights are held by an individual or legal body, but can partly be restricted by the state;
3) **Common property regime**: Property rights are held by the community. Members can use the commons within a demarcated territory independently, based on strict rules and procedures. Non-members are excluded;

4) **Open access**: Property rights are not assigned, access unregulated. States often claim ownership to lands under common property regimes because they do not recognize the latter.

*Source: Davy 2009; GTZ 1998*

Although these four major tenure categories can be distinguished in theory, they often overlap and change over time (MRLG 2017). For example, a forest area may officially be classified as state land but considered common property on the local level with villagers holding rights to practice shifting cultivation and collect firewood (MRLG 2017).

### 2.1.3 Customary Tenure

Customary tenure describes a set of rules and regulations, which have been established over time by a community to sustainably manage their lands and natural resources (MRLG 2017). Though not recognized in formal statutory law, customary rights and associated rules and institutions are legitimate in the eyes of local communities: They are well known, accepted and enforced by communities, and in most cases by neighbouring communities as well (MRLG 2017).

**What Customary Tenure is NOT**

Customary law does not have to be old to be legitimate. It is also not a static concept, but adaptive to local and global contextual changes. Furthermore, customary law refers not only to communally held lands, but also to clan-based, household, and individual ownership rights within village boundaries (Andersen 2016; MRLG 2017).

It is estimated that indigenous peoples and local communities either own, control, or could claim 65% of the global land mass (RRI 2015). At present, 18% of this land mass is legally recognized customary land: 10% through ownership, 8% through designation without ownership rights. In comparison, Myanmar has designated merely 0.07% of its land mass and not acknowledged any ownership rights to ethnic minority groups. The complete lack of customary tenure recognition is characteristic of fragile states like Myanmar (RRI 2015).
2.2 Land Redistribution

Definition
Throughout history, governments have attempted to change their land governance institutions to overcome obstacles to social and economic development because of shortcomings in the existing agrarian structure (Kuhnen 1982). Land redistribution or land tenure reform is herein defined as *legislation intended and likely to directly redistribute ownership of, claims on, or rights to current farmland, and thus to benefit the poor by raising their absolute and relative status, power, and/or income, compared with likely situations without the legislation* (Lipton 2006, p. 328)

Classic Land Reform
In classic land reform (CLR), households owning more land than a specified *ceiling* must surrender this excess to the state (Lipton 2009). The CLR attempts to reduce inequality by transferring land rights from large landholders to smallholder farmers raising the latter’s absolute and relative status, while monetarily compensating the previous landholders for their ‘loss’ of land (Lipton 2009).

People with direct or indirect interests in the amount and terms of land transfer try to influence government officials and their agencies. They often succeed in resisting land tenure reform until the rural poor become a large and increasingly mobilized interest group that can no longer remain unattended (Lipton 2009). After all, “[i]t would be naïve to assume that those who monopolize power and land will simply step aside and divest themselves of their wealth and social position […]” (as cited in Borras, Saturnino 2006, p. 115).

Despite its redistributive character, the CLR is often (though not necessarily) blind to communal land rights (Lipton 2009). Communal lands are often (though not necessarily) considered open access/public lands in the eyes of the reformers (Lipton 2009). On the next page, Chile offers a historical example of CLR with respect for communal land rights, followed by MBLR restoring the *status quo*.

Market-Based Land Reform
The focus of Market-Based Land Reform (MBLR) is almost exclusively technical, administrative, and economic with the intention to capitalize on the remaining commons (Borras et al. 2010). According to MBLR proponents, poverty can be addressed by transforming communally held lands from ‘sleeping capital’ into privately owned and financially interchangeable rights that can be turned into assets (Borras et al. 2010). They believe that turning this ‘extra-legal’ property into individual titles incentivizes banks to hand out credits to rural people, which encourages the latter to invest in their now legally protected lands (Soto 2000). This model is intended to ensure that the state give up its regulatory functions over land and establish a land rental market (Borras et al. 2010).
Criticism on the Market-Based Land Reform

The idea of ‘capitalization by formalization’ (p. 837) offers a simple solution to a complex problem (Löhr 2012). However, apart from manifold shortcomings of this approach, land tenure is too complex to be tackled by a ‘one-size-fits-all’ approach legalizing ‘extra-legal’ property (Deininger, Binswanger 1999). Property rights are not intangible, they describe social relationships, which are not adequately considered through MBLR. Since the MBLR has dominated land governance frameworks worldwide over the past decades, land tenure reform has largely shifted from its classic character of ‘redistribution’ to ‘efficiency’ without considering inequality (Borras, Saturnino 2006; Lipton 2009). Myanmar has adopted a MBLR framework with the consequence of increased inequality and tenure insecurity in its rural hinterlands (Boutry, Allaverdian 2017).

Legal Pluralism

In contrast to an exclusive focus on private property regimes, legal pluralism refers to the co-existence of at least two different property regimes in a multi-ethnic society like Myanmar (Benda-Beckmann 2001; Dekker 2005). The legal entry point to recognize customary alongside individual land rights requires modifications in legal provisions that (i) refer to customary rights; (ii) regulate the conservation of natural resources; and (iii) regulate the use and exploitation of land and resources (Almeida 2015). In my policy recommendations, I thus propose modifications to legal provisions regulating customary tenure and use of land and resources.

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3 The conventional solution to land tenure insecurity can be criticized, inter alia, on the following grounds: (i) It can break communal ‘safety nets’; (ii) it is based more on ideology than on scientific evidence; and (iii) it falsely assumes a causal relationship between land tenure security and private property rights (Gilbert 2001; Goldfinch 2015).
3  LEGAL FRAMEWORK OF LAND GOVERNANCE

3.1  Land Tenure Reforms and Their Impacts on Customary Tenure

3.1.1  Land Tenure Reform Before Independence (Prior to 1947)

The British colonizers followed an export-oriented development strategy to produce paddy rice and selected cash crops and collect tax revenues from agricultural land. This required land acquisitions on a large scale (Ferguson 2014). In the Bamar-dominated lowlands, the British introduced the Land Acquisition Act or LAA (1894), which outlines when and how the government may acquire lands from private rights holders (Ferguson 2014). Importantly, during British colonialism, many upland ethnic minority groups gained autonomous status, were exempted from taxes, and could freely choose which crops to plant (FSWG 2011; Mark 2016a). In other words, many upland ethnic minority groups relished de facto recognition of their customary way of life (FSWG 2011; Mark 2016a).

The LAA (1894) has several shortcomings with negative implications on customary tenure security (USAID LAA Analysis 2017). First, it lays out rules for land acquisitions in the name of public interest without specifying the meaning of public interest. This makes it relatively easy for the government to grab lands on the grounds of public interest without providing further justifications. Second, the LAA (1894) fails to provide for control mechanisms. It also fails to provide adequate means of compensations in case of evictions (USAID LAA Analysis 2017).

3.1.2  Land Tenure Reform After Independence (1947 – 2012)

The Constitution of 1947 was amended in 2008. Together with the Land Nationalization Act or LNA (1953) and the Forest Law (1992), it constitutes the most important legal document concerning customary tenure security following independence. Although it protects individual ownership rights (Articles 35, 356 and 372) and establishes the right to appeal (Articles 11 and 19), the Constitution (2008) simultaneously affirms the state as the ultimate owner of all lands (Article 37). The LNA (1953) re-affirms the state as the ultimate owner of all lands (Burgess 2015). While the LAA (1894) exempted upland ethnic minority groups, the LNA (1953) applies to the uplands as well turning smallholder farmers de facto into ‘state tenants’ unable to mortgage, lease, sell, or exchange lands (Mark 2015; Mark 2016a).

The Forest Law (1992) distinguishes between two categories of forest land: Reserved Forest for commercial production (Articles 2 and 4) and Protected Public Forest for environmental conservation (Articles 2 and 5). Since all forest land is classified under of these two categories, and officially declared state land, this creates a difficult baseline for forest dwelling communities because they are regarded as ‘illegal’ residents on their own lands (FSWG 2011). However, local communities can obtain 30 years subsistence use rights for a pre-defined management area through Community Forestry Certificates (CFC) (FSWG 2011).
3.1.3 Land Tenure Reform Today (2012 – Present)

The *Farmland Law* (2012), the *Vacant, Fallow and Virgin Lands Management* or VFVLM Rules (2012) and the *National Land Use Policy* or NLUP (2016) represent the most important legal documents regarding customary tenure security today.

**Farmland Law (2012)**

The Farmland Law (2012) establishes a land registration and title system for agricultural use that formally recognizes private use rights through the issuance of Land Use Certificates (LUC) granting its holder permission to cultivate agricultural land (USAID Farmland Law Analysis 2017). The widespread distribution of LUC is meant to attract investors through the creation of a land rental market since the certificate provides its holder with the right to sell, exchange, access credit, inherit, and lease land (Mark 2015).

The Farmland Administrative Body (FAB) oversees the land registration process and issues the LUC (Mark 2015). In addition, the FAB has the authority to confiscate farmland, if this is in public interest (Mark 2016a). The Farmland Law (2012) theoretically provides for dispute resolution mechanisms (Articles 9 and 17). However, if unresolved, disputes can only be passed on to another FAB at the next highest level until the Region/State level without external accountability. In other words, the FAB is the administrator and the judge of farmland allocations at the same time (Mark 2015).

The Farmland Law (2012) does strengthen individual tenure security through the issuance of LUC. It also offers communities the opportunity to re-classify forest land into farmland (Boutry, Allaverdian 2017). However, since it neither recognizes customary tenure nor shifting cultivation as a farmland category, locals cannot obtain titles for lands used by the community for shifting cultivation (Boutry, Allaverdian 2017).

**Vacant, Fallow and Virgin Lands Management Rules (2012)**

The VFVLM Rules (2012) regulate use, allocation, and use permissions for lands declared ‘vacant’ under the management of the VFVLM Committee (Mark 2016a; Scurrah et al. 2015).

Nine million LUC have already been handed out since 2012 (Boutry, Allaverdian 2017). However, decisions about allocations of ‘vacant’ lands are often based on outdated information and completely disregard local use (WB 2018). Since shifting cultivation is considered illegal and the VFVLM Rules (2012) fail to recognize fallow lands used for shifting cultivation as communal lands, considering them to be ‘vacant’, this leads to infrequent dispossession without prior consultation on the ground, mis-classifications, and incorrect allocations. This situation causes multiple land conflicts across Myanmar (ERI Farmland Law Analysis 2018; USAID VFVLM Rules Analysis 2017).
The VFVLM Rules (2012) do provide for control and compensation mechanisms (Article 25 (b)). However, until now many smallholder farmers had to pay compensations to big businesses since Article 25 (b) is mostly applied under Section 427 on Trespass and Section 447 on Damage to Private Property (ERI Farmland Law Analysis 2018). The inflicted punishment is disproportionate and consists of high fines (MMK 500,000 or USD 375) and imprisonment of up to two years. In other words, the VFVLM Rules (2012) criminalize farmers on their own lands (ERI Farmland Law Analysis 2018).

Finally, the amount of use permissions that investors can obtain are disproportionately higher than those of smallholder farmers (Mark 2015). While local communities can apply for agricultural use of ‘vacant’ lands one time only for no more than 50 acres (Article 10 (a) (iv)), investors can apply as much as ten times for 5000 acres each time, totaling 50,000 acres (Article 10 (a) (iii)). In other words, the amount of ‘vacant’ lands that can be allocated to investors is (at least) 1000 times higher than the amount of ‘vacant’ lands that can be allocated to local communities.4

National Land Use Policy (2016)

In 2016, the newly elected democratic government, the National League for Democracy (NLD), launched the NLUP (2016) as a guide to develop a National Land Law with the intention to combine all previous land laws under one umbrella (Scurrah et al. 2015; USAID Farmland Law Analysis 2017). The NLUP (2016) represents the beginning of a convergence between international standards on longstanding land issues and the national legal framework (Leckie, Arraiza 2017; Mark 2015).

The NLUP (2016) is very different in character from the 2012 laws (which is largely attributable to the fact that the 2012 laws have been established by the military regime and the NLUP (2016) by the NLD). Although their terms are not clearly defined, the NLUP (2016) does recognize both customary tenure and shifting cultivation in several provisions (Andersen 2016). Through the NLUP (2016), the government intends to (i) legally recognize and protect customary lands; (ii) prepare customary land use maps; (iii) reclassify customary lands; (iv) register customary use rights, including shifting cultivation; (v) monitor recognition and protection of customary lands; and (vi) facilitate research for formal recognition of customary lands (Andersen 2016). It also offers smallholder farmers more freedom of crop choice, and to voluntarily transfer or sell their lands without undergoing complicated processes, when they desire to change their land uses (USAID Farmland Law Analysis 2017).

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4 During an informal discussion with an international expert on land issues in Myanmar, I was told that influential individuals have created a mechanism through which they can increase the land area for which they apply even further by dividing their own company into multiple branches.
Despite important progress for customary tenure security in comparison to previous land laws, the NLUP (2016) is criticized by civil society actors because (i) public consultations have until now remained limited and opposed to by most government officials, afraid to expose the policy too much to the public; (ii) the overall content of the policy still prioritizes investment and business interests over those of local communities; (iii) little attention is paid to the fundamental link between land use and administration and nationwide peace; and (iv) the protection of customary rights is not yet strong enough and not aligned with international standards (Burgess 2015; Namati 2016).

All laws introduced in this section, from the (almost) 125-year old LAA (1894) to the recent VFVLM Rules (2012), are still in use. This creates a complex legal framework of land governance where multiple laws operate simultaneously at a horizontal level. This is the focus of the next section.

### 3.2 Land Governance Institutions

"[M]yanmar's land laws are the most convoluted in all of Asia. They are a puzzle where all the pieces don’t fit together."

*Source: As cited in Mark 2015, p. 4*

**‘Stacked’ Laws**

The current legal framework of land governance is a patchwork of 70 laws and regulations that are often described as ‘stacked’ (MCRB 2015). This means multiple layers of laws exist simultaneously because new laws have not replaced old ones, but instead been ‘stacked’ on top of one another, creating conflicts and legal contradictions (Mark 2016a).

**‘Fragmented’ Sovereignty**

The decision-making authority over land and natural resources is ‘fragmented’ (Mark 2016b). Responsibilities are hierarchically dispersed across ten different government agencies (Burgess 2015). The most important departments are (i) the Forest Department of the Ministry of Natural Resources and Environmental Conservation, managing forest land; (ii) the Department of Agricultural Land Management and Statistics of the Ministry of Agriculture, Livestock and Irrigation, managing farmland; and (iii) the General Administration Department (GAD) of the Ministry of Home Affairs, which is under the control of the military and holds administrative responsibilities (USAID LTP Toolkit 2018).

These three departments operate at (almost) all administrative levels from the Union to the village tract, except for decisions concerning the VFVLM Rules (2012) and the LAA (1894), which are exclusively managed by the President’s Office at the Union level (USAID LAA Analysis 2017).
The ‘fragmentated’ sovereignty and consequent confusion becomes even more apparent through the multiple committees regulating land laws and policies:

1. Farmland Law (2012) = Farmland Administrative Body (FAB)
2. VFVLM Rules (2012) = VFVLM Committee
4. Committee for Reviewing Confiscated Farmlands and other Lands
5. Special Committee for Land and Conflict Resolution

The committees operate at (almost) all administrative levels from the State/Region to the village tract. Due to the lack of transparency, it is often unclear on which level decisions are made and by whom (Leckie, Arraiza 2017). The committees under point 4 and 5 have multiple names and are often incorrectly translated into English, which leads to further confusion what committee to approach and when (Mark 2015).

The village headman is another important stakeholder acting as a political broker between villagers and government officials for land registrations and tax revenues (Boutry, Allaverdian 2017). Land registration is a 10-step lengthy and complex process wherein administrators often use outdated cadastral maps with limited local administrative capacity across the whole country (Mark 2016a; USAID LTP Toolkit 2018).

To make matters more complex, some ethnic armed organisations have developed their own land policies for the territory under their administrative control like the National Land Use Policy of the Karen National Union (2015). These policies are not aligned with statutory law (Leckie, Arraiza 2017).

‘Ambiguous’ Legal Framework
Because of ‘stacked’ laws and ‘fragmented’ decision-making authority over these laws, Myanmar’s legal framework of land governance can be considered ‘ambiguous’. For example, regarding land confiscations in the uplands, it is unclear whether ethnic minority groups are exempted from land concessions through the LAA (1894) or whether self-autonomous status has been overruled through the LNA (1953). Those in power, and with the means to interpret the legal framework, can use its ambiguity to legally confiscate lands (Mark 2016a). There are numerous examples of arbitrary concessions and enduring land conflicts on an almost daily basis. Farming communities neither have the same access to information nor the means to interpret the respective laws, and are further deterred from taking legal actions by the high costs of court litigation (Mark 2016a). In short, in the absence of adequate protection and control and compensation mechanisms, land grabs are being facilitated, and customary tenure security of ethnic minority groups in the uplands negatively impacted by the ambiguity of the legal framework (Mark 2016a).
4 DISCUSSION

4.1 Research Findings

Research Question 1: Why is Myanmar’s legal framework of land governance considered ‘ambiguous’; and what are the consequences of this ambiguity for customary tenure security of upland ethnic minority groups?

The first research question addresses the problem of the ‘ambiguity’ of Myanmar’s legal framework of land governance, and its consequences for upland ethnic minority groups. In Land Governance Institutions (previous chapter), I have shown that land laws have been ‘stacked’ onto each other for (almost) 125 years ever since the British colonial regime introduced the Land Acquisition Act (LAA) in 1894. Outdated land laws have neither been updated nor replaced by new laws. Many laws like the LAA (1894) are not appropriate for the current context. ‘Fragmented’ sovereignty is the outcome of multiple land governance actors and committees operating simultaneously at (almost) all administrative levels – from the Union to the village tract (Mark 2016b). Figure 7 depicts the complexity of ‘stacked’ laws and ‘fragmented’ sovereignty leading to ambiguous interpretations of the law.

![Figure 7: Myanmar’s ‘Ambiguous’ Legal Framework of Land Governance](source: Original figure, partly created by Lundsgaard-Hansen (2018))

This situation – ‘stacked’ laws and ‘fragmented’ decision-making authority – results in an overall ‘ambiguous’ legal framework in which multiple laws operate simultaneously at a horizontal level where it is unclear which law takes precedence over another, who is responsible for what, and at what level (Mark 2016b).

The corresponding complexity is utilized by influential actors with the financial resources and ability to interpret the framework to their advantage (Mark 2016a). The consequences of this ambiguity for ethnic minority groups are arbitrary land concessions, and, in the absence of customary tenure recognition, limited means to protest. Thus, the Burmese land laws principally act in favour of the powerful, while people residing on communal lands are vulnerable to involuntary land loss (Mark 2016a).
Research Question 2: How does Myanmar’s land tenure reform process impact on customary tenure security of upland ethnic minority groups?

The second research question is concerned with the impacts of Myanmar’s land tenure reform on customary tenure. I interpret the findings of Land Tenure Reforms and Their Impacts on Customary Tenure (previous chapter) in table 2. The table shows whether the respective land laws facilitate or restrict large-scale land acquisitions (LSLA), and whether this strengthens or weakens customary tenure security.

<table>
<thead>
<tr>
<th>Land Law</th>
<th>Facilitates/restricts LSLA</th>
<th>Strengthens/weakens Customary Tenure Security</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Land Tenure Reform Before Independence (Prior to 1947)</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| Land Acquisition Act (1894) | Facilitates | Weakens – Lowlands
| | | Strengthens – Uplands |
| **Land Tenure Reform After Independence (1947 – 2012)** |
| Constitution (1947/2008) | Facilitates | Weakens |
| Land Nationalization Act (1953) | Facilitates | Weakens |
| Forest Law (1992) | Facilitates | Weakens
| | | Strengthens – CFC |
| **Land Tenure Reform Today (2012 – Present)** |
| Farmland Law (2012) | Facilitates – Common property
| | | Restricts – Individual property |
| | | Weakens |
| VFVLM Rules (2012) | Facilitates | Weakens |
| NLUP (2016) | Restricts | Strengthens |

Source: Original table

The LAA (1894) provides the basis for land acquisitions in the name of public interest without providing adequate control or compensation mechanisms. The government can relatively easy claim lands in the name of public interest and grant use permissions (Ferguson 2014). During colonialism, the LAA (1894) converted common into private property regimes on a large scale in Myanmar’s lowlands. At the same time, it upland ethnic minority groups from the law (Ferguson 2014). With the implementation of the Land Nationalization Act or LNA (1953), it has become unclear whether the LAA (1894) has been overruled and extended to Myanmar’s hills. The LNA (1953) thus facilitates LSLA and weakens customary tenure security of local hill communities. The Constitution (2008) affirms both laws by turning the state into the ultimate owner of all lands (Article 37). Customary tenure is weakened because it is not recognized.

The Forest Law (1992) has been passed along the same lines as the previous land laws since it grants ownership of ALL forest land to the state. It therefore facilitates LSLA. At the same time, the Community Forestry Certificates (CFC) provide a means for local communities to gain official use rights for community forests; and this strengthens customary tenure security (FSWG 2011).
The recent 2012 reforms have significant adverse impacts on the lives of local communities. On the one hand, the Farmland Law (2012) restricts LSLA of private property regimes through the issuance of individual Land Use Certificates (LUC). On the other hand, it facilitates LSLA of lands held under common property regimes without the ability to apply for communally held LUC (USAID Farmland Law Analysis 2017). Similarly, the Vacant, Fallow and Virgin Lands Management or VFVLM Rules (2012) facilitate LSLA in various ways. First, lands are often mis-classified as ‘vacant’ without cross-checking the actual uses on the ground. The VFVLM Rules (2012) further increase inequality by the enormous differences in the amount of so-called ‘vacant’ lands for which investors can apply, compared to those of local communities (USAID VFVLM Rules Analysis 2017). The VFVLM Rules (2012) also de-recognize shifting cultivation. In consequence, lands left fallow for several years, but used for shifting cultivation, are classified as ‘vacant’ and can hence be easily allocated. The law then criminalizes smallholder farmers, if they protest confiscations (ERI Farmland Law Analysis 2018; Oxfam Legal Comments 2018).

Compared with the 2012 laws, the National Land Use Policy or NLUP (2016) restricts LSLA by officially recognizing customary tenure, thus placing an obstacle to land confiscations of the commons. The NLUP (2016) is still biased towards ‘big business’ and it is also not a law; but it represents a guiding framework towards inclusive land governance in the future (Vicol et al. 2018).

4.2 Policy Recommendations

“[U]nless indigenous peoples can reassert their rights to control their own development and future and win back sufficient lands and resources, there can be no real progress in their standards of living.”

Source: As cited in Xanthaki 2007, p.238

Acemoglu and Robinson (2013) trace the origins of inequality back to extractive political and economic institutions. Myanmar’s current legal framework of land governance is the outcome of more than sixty years of exploitation under extractive institutions by the previous military regime. Its economic institutions have become more inclusive since Myanmar has begun to shift from a centrally controlled to a market economy. However, its political institutions are still largely extractive (Acemoglu, Robinson 2013).\(^5\) Myanmar is economically growing under predominantly extractive political institutions. Growth under extractive political institutions is possible for a limited time; but cannot be sustained and will eventually collapse (Acemoglu, Robinson 2013).

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\(^5\) Myanmar is officially governed by only one party, the National League for Democracy (NLD), under the leadership of State Counselor Aung San Suu Kyi, who acts as de facto President. Aung San Suu Kyi is constitutionally refrained from Presidency. The Constitution (2008) also guarantees the military 25% of seats in Parliament, regardless of election outcomes. The military still controls important ministries, such as the Ministry of Home Affairs.
To achieve nationwide peace, prevent societal collapse and a fall-back into military rule, it must be in the interest of the democratically elected government to recognize common property regimes (Mark 2015). The current land tenure reform process anticipates a dismal future for customary tenure and the livelihoods of the most vulnerable. Without statutory protection of customary tenure, displacement becomes inevitable (Mark 2016b). Amendments to existing laws on the roadmap to a new National Land Law are indispensable to achieve long-lasting peace throughout Myanmar.

Research Question 3: How must Myanmar’s land laws be amended to increase customary tenure security for upland ethnic minority groups?

The third and final research question addresses amendments that the government must take to legally strengthen customary tenure and protect the livelihoods of upland ethnic minority groups. The amendments that have been proposed to the 2012 laws until now have been fruitless, as they have not touched the substance of the law, but only dealt with terminology (Vicol et al. 2018; Boutry, Allaverdian 2017).

Farmland Law (2012)
The Farmland Law (2012) must be amended to provide smallholder farmers with the opportunity to apply for LUC and register their lands regardless of the property regime (common or private) (USAID Farmland Law Analysis 2017). Legal barriers must be removed to facilitate the registration process. No further LUC must be handed out without cross-checking land uses on the ground using up-to-date technology and maps to avoid further land conflicts (Boutry, Allaverdian 2017).

The Farmland Law (2012) must further be amended to re-classify all farmland categories and to include shifting cultivation as a legitimate land use. The law must also be amended to remove crop limits and give smallholder farmers the freedom to choose and easily change the crops that they desire since crop restrictions coerce smallholder farmers to change their land uses (USAID Farmland Law Analysis 2017). Finally, the lack of oversight of the Farmland Administrative Body (FAB) has even been termed unconstitutional. It is therefore crucial to establish checks and balanced through an independent review body of land confiscations (USAID Farmland Law Analysis 2017).

Vacant, Fallow and Virgin Lands Management Rules (2012)
The VFVLM Rules (2012) must clearly define the meaning of ‘vacant’ lands and re-classify those lands that have been classified under this category with cross-checks on the ground using the latest technology (USAID VFVLM Rules Analysis 2017). It is equally important to recognize fallow lands used for shifting cultivation and stop mis-classifying them as ‘vacant’ (USAID VFVLM Rules Analysis 2017).
The VFVLM Rules (2012) must define a proportionate punishment for Trespass and Damage to Private Property for smallholder farmers protesting eviction and allow for dispute resolution mechanisms (Boutry, Allaverdian 2017). The government must revise the law to protect customary tenure and follow international best practices of Free, Prior and Informed Consent (FPIC) as well as Social and Environmental Impact Assessment (SEIA). Evictions should be the last resort. If inevitable, the law must provide compensations to a standard of living at least as high as before the eviction and make return a possible option (Leckie, Arraiza 2017). Finally, the VFVLM Rules (2012) must provide equal opportunities for businesses and investors on the one hand and local communities on the other hand to apply for the same land size area.

**National Land Use Policy (2016)**

The NLUP (2016) is a positive development for land rights of indigenous peoples and local communities compared with the 2012 laws. Nevertheless, it still contains important shortcomings that need to be addressed (Namati 2016). First, the amount of public consultations about the NLUP (2016) and the aspired National Land Law should be increased (Namati 2016). The focus of the NLUP (2016) must also be more balanced between community and economic development interests. Policy makers should reconsider the often underestimated contribution of smallholder farmers to economic development (LCG). The NLUP (2016) needs to clearly establish a link between sustainable land use and administration and nationwide peace (Mark 2015). Moreover, the policy must protect customary tenure in accordance with international law (Namati 2016). Finally, all land laws must be aligned with the NLUP (2016) on its road to the National Land Law. The National Land Law can only be a success, if there are no more legal contradictions (USAID VFVLM Rules Analysis 2017).

**Other Land Laws**

Although completely outdated, the *Land Acquisition Act* (1894) still regulates land concessions in Myanmar today. A new law is required to replace the LAA (1894) (USAID LAA Analysis 2017). In the meantime, the LAA (1894) must be aligned with international standards of FPIC and SEIA to allow for control and dispute resolution mechanisms. Policy makers should apply resettlement as a last resort, after duly weighing alternative options (Leckie, Arraiza 2017). In case of resettlement, they must calculate compensations and restore the standard of living to at least the same level as it was before resettlement (USAID LAA Analysis 2017).

The *Land Nationalization Act* or LNA (1953) is equally outdated. Policy makers must also avoid to blindly apply the LNA (1953) to the uplands in the same way as the LAA (1894) has been applied in the lowlands (FSWG 2011). The *Constitution* (2008) must be amended to limit the scope of opportunities for LSLA in the name of public interest and clearly define what this means (USAID LAA Analysis 2017).
The *Forest Law* (1992) must recognize customary tenure for communities to obtain use rights for their forest lands. It is important to acknowledge forest dwellers’ existence and enable them to participate in decisions that concern their own lands (Burgess 2015). This requires widening the scope of forest land categories allowing for more than just two categories as well as use rights flexibility. Finally, issuance of CFC should be facilitated to promote community-based natural resource management on a large scale (FSWG 2011).

5 CONCLUSION

5.1 Idea Behind the Research

Through this research, I have addressed the problem of insecurity of common property regimes in upland Myanmar, home to many of the country’s 135 officially recognized ethnic minority groups. Customary systems have recently come under threat since Myanmar prioritizes investments on a large scale without simultaneously protecting land rights of the most vulnerable. Coercing a shift from common to individual property regimes ignores rural livelihoods and increases inequality within communities. I have analyzed the land governance framework of Myanmar to understand and tackle the land question. I have drawn upon three research questions to address the problem, regarding (i) the ‘ambiguity’ of the land governance framework and its consequences for tenure security of ethnic minorities; (ii) how land redistribution impacts on customary tenure security; and (iii) how respective laws must be amended to increase security of tenure.

5.2 Main Findings and Policy Recommendations

In addressing the first research question, I have shown that ‘stacked’ laws and ‘fragmented’ sovereignty result in an ‘ambiguous’ legal framework allowing for multiple interpretations. This ambiguity is used by influential individuals, who can interpret the framework, for arbitrary land concessions. In its current state, Myanmar’s land governance framework acts to the disadvantage of tenure security of ethnic hill minorities.

In addressing the second research question, I concluded that large-scale land acquisitions (LSLA) are being facilitated and customary tenure systems weakened through nearly all relevant laws. The National Land Use Policy or NLUP (2016) is more hopeful for smallholder farmers’ land rights, as it acknowledges the existence of their governance systems (customary tenure) and livelihoods (shifting cultivation). However, the NLUP (2016) only provides a guiding framework; and there is still a long way to go towards an all-encompassing National Land Law.

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6 In comparison, ethnic minority groups like the Naga distinguish in their own customary tenure systems among multiple categories of forest land. For more information, please consult Case Study: Nagaland (ANNEX).
In addressing the third and final research question, I have given policy recommendations in the form of amendments to existing land laws. The government should, *inter alia*, re-classify farmland categories to include shifting cultivation (Farmland Law), and clearly define ‘vacant’ lands, excluding lands left fallow by shifting cultivators from this category (Vacant, Fallow and Virgin Lands Management or VFVLM Rules). Amendments are also needed for largely outdated laws like the Land Acquisition act of 1894 or the Land Nationalization Act of 1953 to clearly define the conditions under which the state claim land ownership in the name of public interest and what this entails. Equally important, all land laws need to be aligned with the NLUP (2016).

Unless the government implements these reforms, the fate of customary tenure systems is uncertain. In the interest of long-lasting peace, customary tenure systems must be protected, and Myanmar’s land governance institutions shift from extraction to inclusion. The NLUP (2016) provides the foundation for reform that must now be put into action. Only when the land rights of upland ethnic minority groups are protected, will Myanmar’s triple transition – from an authoritarian military regime to democratic governance; from a centrally controlled to a market economy; and from more than sixty years of armed conflict to peace in its border areas – be successful.

### 5.3 Research Limitations and Further Studies

The research topic at hand is very complex, but its scope limited; the paper can thus only scratch the surface of Myanmar’s land issues. Further studies could conduct a more comprehensive analysis of the ongoing land tenure reform process. In addition to an analysis of the national legal framework, this requires analyzing the international legal framework of indigenous peoples’ rights to land to compare shortcomings in national law with international standards.

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

Finally, customary tenure systems are weakened not only through shortcomings in legal provisions. This is also the outcome of widescale societal exclusion. Civil society in Myanmar is still relatively new and weak. Future studies could thus investigate LSLA as an outcome of exclusion beyond the legal framework.
6 ACKNOWLEDGMENTS

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ANNEX

Case Study: Nagaland

Notification: For the case study at hand, I have additionally drawn upon primary data collected during a related research in Layshi Township, Nagaland in September 2017 and March 2018.

A People Left Untouched
We can distinguish four types of human societies: Hunting and gathering, tribal, peasant, and industrial. For most of human history, only hunting and gathering societies existed alongside tribal social organisations. Today, only few such societies remain; most have been destroyed during the past centuries (MacFarlane in: Saul 2005). The mountain ranges between Northern India and Myanmar, where the people collectively referred to as ‘Naga’ reside, is one of the few places in the world where tribal societies are still in existence. The Naga, who number 4.5 million people, are representative of forest dwelling communities, who once roamed large parts of our planet (MacFarlane in: Saul 2005).

On the Lives of the Naga

Geographic Location
The Naga live high up in the mountainous border area between Myanmar and India. On the Myanmar side, Nagaland lies within the Sagaing Division, one of the country’s largest administrative areas. (Saul 2005). The border line follows the Patkoi, an easterly extension of the Himalayas, which have formed a physical barrier for outsiders due to their rugged nature, infrequent passes, and previously hostile peoples (Saul 2005). The Naga build their villages on hill tops for strategic (rather than comfort) reasons. In the past, these hills provided the villagers with an early warning system from approaching enemy tribes (Saul 2005).

Headhunting
The Naga are famous for their past head hunting practices. In the absence of contact with the outside world, the Naga developed their own belief systems in the realm of spirits (Saul 2005; Führer-Haimendorf 1970). It was believed that the human skull was the biggest sacrifice for the spirits. For centuries, the Naga cut off the heads of their enemies and brought them back to their home villages. In addition to spiritual sacrifice, the head was believed to offer strength to the village, and prestige to the warrior. The last official record of head hunting dates to 1983 (Saul 2005).
The integration into state administration has brought previously inexistent public services and basic infrastructure to Nagaland. However, contact with the outer world and lack of sovereignty granted to the Naga have created new tensions at the border areas (Saul 2005). Fragmented Naga armies fight the Burmese respectively Indian military at these frontiers. Additionally, while still largely left untouched, land grabbing has become a perceived imminent threat for many local communities (research results).

The Transformation of an Agrarian Subsistence Society

The Naga are representative of an agricultural subsistence society. The entire societal structure is build around subsistence farming and minor trade among neighbouring villages (research results). The Naga have preserved their lands for centuries through village-based natural resource management systems. Outsiders and residents of neighbouring villages are prohibited from extracting any resources without prior permission from village chief, council, or elders. While village residents do not require a permission to collect sufficient resources for their own household needs, collecting additional resources for business purposes does require prior agreement from all villagers. If someone does not follow these rules, the products unwittingly collected will be seized and a fine applied (research results).

The diversity of land uses encountered provides the villagers with many livelihood products. According to preliminary research results, a total of 19 different land use classes could be identified with an average 6.23 classes per village; and 86 different crops with an average 14.05 crops per land use class per village (research results). In response to broader political economic processes, many Naga are transitioning towards terrace farming, orchards, and animal husbandry. This transition provides the first step towards private property regimes although the lands are still considered village territory (Andersen 2016).

Nevertheless, shifting cultivation remains the most important farming practice in Nagaland. It constitutes an integral livelihood component, and, in particularly remote villages, often the only means of food production (research results). In Nagaland, with an average fallow length between 10 and 15 years, rotational farming contributes to a high level of biodiversity, forest re-generation, medicinal plants, a social safety net, and an income source. Shifting cultivation is the backbone of the Naga culture (research results).

Recognizing customary tenure systems alongside the public land governance system and shifting cultivation as an official farmland category is therefore key for a sustainable future of the Naga (research results). A critical tenure reform blind to the realities on the ground increases uneven distribution of livelihood assets and opportunities and will eventually lead to the loss of Naga identity (research results).
Declaration of Originality

The signed declaration of originality is a component of every semester paper, Bachelor’s thesis, Master’s thesis and any other degree paper undertaken during the course of studies, including the respective electronic versions.

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