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To cite this article: Oliver Springate-Baginski & Mi Kamoon (2021) Defending Shan State's customary tenure systems from below through collective action research, The Journal of Peasant Studies, 48:3, 541-559, DOI: [10.1080/03066150.2021.1887145](https://doi.org/10.1080/03066150.2021.1887145)

To link to this article: <https://doi.org/10.1080/03066150.2021.1887145>



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Published online: 05 Mar 2021.



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Defending Shan State's customary tenure systems from below through collective action research

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ABSTRACT

Much of rural Myanmar remains under local Customary Tenure Systems (CTS), particularly in upland ethnic areas. Yet CTS lack legal recognition and are increasingly vulnerable to appropriation. This paper examines how, since 2016, communities and civil society organisations (CSOs) across Shan State have organised to document their CTS as a basis for advocacy. Findings confirm CTS remain prevalent and valued, but communities are experiencing increasing pressure, through both gradual erosion, and direct appropriation. Communities and CSOs demand statutory recognition and protections. CTS defence is perceived as a priority element of a wider political process against coercive adverse incorporation and for self-determination.


KEYWORDS

Shan; Myanmar; Customary Tenure Systems; land grabbing; ethnic; rights; action research

1. Introduction

Almost two thirds of the earth's land area is estimated to be under some form of local control, management and use through one customary tenure system or another (RRI 2015; RRI forthcoming). CTS comprise: (1) the diverse physical lands and resources in and around settlements; (2) the collective community relying individually and collectively on these for their wellbeing and livelihoods, and (3) the informal institutional authority of the community, through which decisions are made and implemented, and disputes arbitrated around the access and control, management and use of the resources. Community-level customary tenure systems (or CTS) express, order and regulate the local possession, access, use and transfer of lands and the resources in and around a village (or cluster of villages) by its members, primarily for their own use, according to self-government traditions, and expressing their cultural understandings and knowledge. Customary tenure systems are particularly important for communities in forest mosaic landscapes, where livelihoods rely on a combination of resource uses, as they enable flexibility, innovation, and local legitimacy.

CTS are however subject to legal ambiguity as they are rarely recognised in statutory law, and are vulnerable to erosion, in terms of territory, community and power. With

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imperial colonisation and post Independence state-building around the world, statutory legal frameworks have been asserted over customary ones by states 'from above'. This has imposed particular cultural understandings of land and concepts of property rights (Weaver 2003), leaving legacies of legal pluralism and ambiguity, alongside 'perfectly legal' patterns of appropriation of common property (Scoones et al. 2011; Borrás and Franco 2012; Alden Wily 2012; White et al. 2012; Dell'Angelo et al. 2017; Franco and Borrás 2019). And with accelerating global economic activity already vulnerable CTS have come under renewed pressures.

Despite these pressures, customary systems have persisted and continued to evolve, emerge and endure, albeit unevenly over time and across geographic space, in varying states of health and degrees of intactness, amidst war and oppression (including civil war and conflict), economic exploitation and nation-state building, reach of state power and the changing fortunes of non-state authority. In the context of a renewed global land rush, academic and activist attention in the twenty-first century has become focused on lack of legal recognition as a key factor in whether surviving customary tenure systems receive formal validation, rights, and protections.

The prominent encouragement for legal recognition of customary communities and tenure systems in FAO's 2012 'Voluntary Guidelines on Tenure' signalled growing support for this idea, and even among the most ardent neoliberal economics advocates of individual private property rights (e.g. US Govt., World Bank, etc.), as enshrined in the UN Declaration of Human rights, UN DRIP and recent UN Declaration on the Rights of Peasants (2018) which explicitly states:

Article 5.1. Peasants and other people working in rural areas have the right to have access to and to use in a sustainable manner the natural resources present in their communities that are required to enjoy adequate living conditions, in accordance with article 28 of the present Declaration. They also have the right to participate in the management of these resources.

However, legal recognition of CTS may be a double-edged sword, depending on how it is constructed. Recognition is subject to competing cultural interpretations, economic visions and forces, political strategies and dynamics, which may both support and promote, but also risk compromising and undermining, the security aspired for. Where statutory recognition leads to tradability of rights and commodification, evidence suggests that in some cases it can have increased social differentiation and have a contradictory effect on landlessness (e.g. Chimhowu 2019). Thus, how recognition of customary tenure systems is constructed is critical, especially the extent of safeguards and protections, rather than simply statutory recognition *per se*: it is a political process, typically involving social mobilisation deliberation and struggle, with variable outcomes for society in terms of the nature and quality of recognition achieved.

This paper applies this framing to examine a process of constructing customary tenure recognition 'from below' in Shan state. This area characterised by high ethnic diversity and complexity of historical conflict (both armed and unarmed) exacerbated in turn by accelerating political-economic change marked by a combination of expanding capitalist social relations in agriculture, natural resource extraction (e.g. logging, mining), and increasing large infrastructure and development projects. These external changes have been putting new pressures on the highly diverse customary communities, their resources, and their customary tenure systems. Encroachments, enclosures, loss of land,

waters, and territory are eroding their customary systems in large as well as smaller steps including through what elsewhere in Southeast Asia has been described as ‘everyday processes’ of social differentiation (Hall et al. 2011, 145). Communities are mobilising in response; their reactions varied according to their diverse historical experiences, identities, and outcomes of their respective histories of long term contests. Reactions often combine everyday household survival coping mechanisms, with more collective-community level defensive measures, and in some cases strategic propositional collective campaigning.

We discuss in this paper an action research project that became a means for a self-selected group of customary communities and local CSOs close to them to undertake research and documentation and in the process to build individual and collective political claims to their customary tenure systems at different levels (village, sub-region, state, national). This research project became a vehicle for this diverse collection of local groups to explore working together in a context marked by powerful divisive forces, and to some extent, to experience overcoming fragmented patterns of grassroots social mobilisation by uniting diverse ethnic groups into a joint state-level collective campaign aimed at achieving meaningful statutory recognition, sovereignty and self-determination (TNI 2019). This process exemplifies what we may call ‘Collective Action Research’: a process deliberately intended to support and build collective action through research interactions. As such, the call for meaningful recognition of customary systems is a focal issue in a wider political process of building common movement.

The discussion begins with the context behind today’s struggle by Shan’s diverse ethnic communities for recognition of their customary lands and tenure systems. It then explains the process by which groups from these diverse ethnic communities came together to undertake a collective action research and the journey of seeking common ground and constructing recognition ‘from below’. We then share some of the key findings from the research, before concluding with some forward-looking reflections about the process and its significance.

2. Customary tenures under a ‘declaration of war’ on ethnic communities

The emergence of localised movements for recognition of customary tenure systems in Myanmar has taken place during a fraught national transition, after decades of violent authoritarian military rule and kleptocracy. The transition formally began with the imposition of a new national constitution in 2008, intended to provide a legalised basis for the illegal 1988 *coup d’etat*. It created a hybrid regime in which the Myanmar Army retains power through automatic control of 25% of seats in the upper and lower national parliaments and all state parliaments and restricted revision of the constitution. The Myanmar Army retained exclusive control of key ministries, and a firm grip on key business enterprises and companies at the heart of the national economy (Jones 2014). The 2008 constitution designated all land across the country as owned by the state.

Following the controlled 2010 general election, the new military-backed USDP administration passed in 2012 two key pieces of legislation: the 2012 Farmland Law and the 2012 Vacant, Fallow and Virgin Lands Management (VFV) Law together created the basic framework for the tradeable (use-)titling of individual plots of farmland, and, for the long-term leasing of ‘public’ lands to private businesses, respectively. The VFV Law designated as ‘vacant, fallow or virgin’ all land (and associated

resources) across the country that was not registered as 'farmland' under the Farmland Law (or already gazetted as forest land), thereby making it available to investors. The new laws neglect to provide any mechanism for recognising pre-existing customary ownership of lands and resources on them, and therefore enable reallocating communities' resources to commercial elites. Reports from the ground show that individualised land-use certificates (so-called Form 7 set up through the Farmland Law) have been withheld from villagers but have been accorded to non-villagers (or their local proxies); and even when acquired, have not provided the promised tenure security (LIOH 2015). Amongst the few cases of restitution of wrongly appropriated land, there are informal reports from the field of land being 'mis-restituted', transferred on to new favoured beneficiaries, rather than back to the originally wronged owners.

At the time the new laws came into effect, much of the unregistered land that the new quasi-military government and business investors were eager to appropriate was still under village customary use and management or claimed by villagers who had been earlier pushed off it (see *Land In Our Hands* 2015; *Ethnic Community Development Forum* 2016; Springate-Baginski 2018, 2019 local CSO sources). But many of those who were set to be most adversely affected were also increasingly mobilising to try to defend their land, lives and livelihoods. During the 2014–2015 period, many local CSOs channelled their grievances, at least partly, into the official government process of making a new national land use policy, albeit with mixed results. For those seeking effective recognition of customary tenure systems, the resulting National Land Use Policy (NLUP) acknowledged the need in principle for statutory recognition but lacked either legal powers or guarantees that the recommendations would be adopted in the process of making a new national land law.

The 2015 national elections raised hopes, but the victorious NLD has since presided over a significant worsening of tenure security for customary systems, with little sign of the desperately hoped for countervailing pressures 'at the top' that could begin to reverse the deterioration. Instead, as well as an unprecedented wave of human rights abuses (UNHCR 2020) there have been authoritarian reversals of what partial gains had been achieved in key civil and political rights and freedoms (Human Rights Watch 2019), persistent militarisation and a blocked peace process (Lintner 2020), and an accelerated opening up to foreign investment and integration into the global market economy.

The result for villagers has been a rapid deterioration of life, living and livelihood conditions amidst an epidemic of 'asset stripping', the latter frequently involving menace or violence (LIOH 2015). Matters reached a new low when amendments to the VFL extended blanket criminalisation of livelihood resource use across the country, labelled a 'declaration of war' on ethnic communities (TNI 2018).

3. The threat to customary tenure systems in Shan State

Shan State is Myanmar's largest administrative state, at 155,800 km², comprising almost a quarter of its total area. The State contains abundant resources, extensive forests and globally significant wildlife. At an intersection between East, Southeast and South Asia, the lives and livelihoods of people in Shan State have been gradually layered through

in-migration, and now comprise a mix of lowland, traditionally rice-growing Shan ethnic groups (from whom the state takes its name), and a large number of ethnically diverse non-Shan upland communities, (including Akha, Danu, Kachin, Karen, Lahu, Lisu, Shan, Ta-ang (Palaung), Taungyo, Yin-nit Yin-kya and Wa), who have relied for their livelihoods on a combination of sedentary cultivation with agro-forestry (shifting cultivation, tea and orchards), hunting, fishing and other wild food collection.

Village level resource governance systems in Shan State have evolved, based on customary tenure systems in which village-level self-governance authorities allocate rights and regulate the use of village resources according to cultural traditions, often exemplifying aspirations of equity and sustainability, although in some cases maintaining forms of gender and generational discrimination, in other cases adapting to the times. For example, there is a diversity of practise around inheritance: in some systems, female children cannot inherit land; in others, the younger children cannot inherit, in others it is older children who marry first and who cannot inherit.

Shan State has played a key role in Myanmar's wider politics. The pre-independence 'Panglong Agreement' (1947), in which the principle of federal self-government was agreed, takes its name from the Shan town where the meeting was held (TNI 2017). Despite the agreement being quickly forgotten by the new leadership, Shan leaders repeatedly proposed national reconciliation based on federal autonomy. With the army *coup d'état* in 1962, many in Shan State were forced to take up arms to defend their communities from Tatmadaw aggression, and a mosaic of armed groups emerged across the state, in a spectrum of legitimacy, which began to include self-serving warlords and mafias with fluid loyalties, some of who have not hesitated to enrich themselves at the expense of villagers when an opportunity arose. Shan State's resource endowment has partly contributed to the erosion of governance institutions in what appears a textbook case of a 'resource curse', where opportunities to derive benefits from resources incentivise the erosion of institutional norms and also fund the perpetuation of lawlessness.

During the Chinese revolution, refugee communities flowed in, and after Mao prevailed in 1949, defeated anti-communist armed groups also sought refuge. China has since continued in its attempts to influence its neighbour's politics, both through proxies, and most recently its rapid economic expansion (Smith 2011; Olinga-Shannon et al. 2019), directly, through a wide variety of Chinese investors in the context of the so-called Belt and Road Initiative (TNI 2019).

We can discern three important impacts from Shan State's history of widespread conflict and militarisation relevant to the action research agenda. First, there has been a widespread dislocation of communities. Many have been forced to move, involving over 300,000 civilians in central Shan State in the end of the 1990s (Amnesty International 1998), and more recently involving an estimated 9,754 internally displaced persons (IDP) in northern Shan alone (UNOCHA 2020) as well as numerous 'informal' refugees residing in temporary camps or other areas (UNHCR 2020). There are also increasing numbers of migrant workers, many of who also fled from conflict. Many communities have been traumatised by violence and so are cautious about political assertion.

A second major effect, and linked to the first, is the widespread dispossession from traditional lands and resources and their degradation. This has occurred in many different processes including enclosure, breaking up and erosion of customary lands, spread of large-scale capitalist as well as state enterprise resource exploitation (agricultural commodity

production, logging, extraction/mining) along side, big infrastructure projects including dams and major roads. An additional consequence has been the alteration of previously intact local ecosystems and landscapes, and decline of native seeds and biodiversity in general, and erosion of agro-ecological, agroforestry land use and management practices.

Thirdly, conflict and militarisation have led to high degrees of division, conflict, and mistrust between ethnic groups. The consequences of state intervention have gone beyond militarisation to the divisive imposition of statutory law – particularly the 2012 land laws. Intra and inter-community strife has arisen from different perceptions of how to respond to challenges, and where it is essential to compromise, for instance in relation to the offer of statutory title through the Form 7 format or of Community Forestry rights.

There is little or no reliable data on these patterns, beyond some useful recent local studies (Woods 2020). The Union Government 'National Action Plan for Poverty Alleviation and Rural Development Through Agriculture' (NAPA) document 2016 is sometimes referred to as the least incomplete source, but the data is dated from 2013 and is too partial to be helpful.

4. The emergence of a collective action research initiative

In this context of growing threats and the need to build collective action to address them, ethnic CSOs across Shan felt compelled to act. The authors have been working with this movement of ethnic civil society groups through a long-term process, which emerged from the engagement by the Transnational Institute (TNI) with ethnic land policies, to be used in a political dialogue with the government as part of a peace process. It had become clear in that process that it was essential to understand the nature and state of CTS 'from below' as it were, as a basis to enable state-level policy to be facilitated. Thus the sense that a CTS learning process was needed led to the coalescence of CSO concerned over CTS/Form 7, in 2016. At that stage, there were already diverse responses over how the platform could be developed, but there was the basic agreement over needs so building common ground became the initial aim. The CSOs organised together to document their prevailing land and resource tenure systems, analyse the patterns of threats and actual grabbing, and to develop policy proposals that would protect villages and their embedded customary tenure systems, thereby contributing to negotiations on state- and national-level policy development and constitutional decentralisation.

Bringing different ethnic-based CSOs together to document and promote customary land, was initially part of this larger activity intended to build trust and mutual understanding across the different CSOs. Decades of conflict and 'divide and rule' repression has left deep marks on society and mistrust between ethnic groups. All those involved understood that the problems could not be easily solved and building trust could not be rushed, and therefore it is important to keep paying attention to the situation and tensions on the ground, while at the same time identifying and working on issues that can bring people together (such as common interests on defending customary land rights), while also refraining from activities and interventions that could further divide people.

For rural communities in Shan State and their supporting civil society organisations, clarifying and raising awareness over the very existence of customary tenure systems became an increasingly urgent priority, both to understand them, and also to some extent to provide an evidence basis that could be used to help 'ratchet' political

negotiations over federal decentralisation, and the so-called Peace Process, hopefully making it more difficult to reverse.

An action research process in support of their customary systems was initiated in 2016 in Shan State by local CSOs and NGOs. Two key factors made this a fortuitous moment. On the one hand, the recognition that the resource grabbing logic at play in post-2010 Myanmar and its effects was becoming an existential threat to customary systems across the country, and an accelerating crisis of 'epidemic' proportions for those living in them. On the other hand, there was an anticipation that 'ethnic land policies' (that is, principles and rules formulated and agreed through an inclusive and participatory grassroots process of research, consultation, visioning, discussion and debate, toward rule-making) could be used, once developed, to contribute to the development of specific laws appropriate for each ethnic area, as well as to the national peace/democratisation processes. This anticipation was based in part on the relatively encouraging experience of even just partially deliberative processes that had unexpectedly sprung up around the development of the aforementioned National Land Use Policy (NLUP) in 2014–2016, and the anticipation that the outcome of those proceedings would be developed into a new set of laws. One of the strongest advocacies made by different actors in that process had been for the recognition of customary land ownership of villagers including recognition of their customary systems of use and management of their lands.

Despite the collective efforts in engaging in the NLUP formulation process, and despite the gains (relative to the 2012 land laws), powerful actors were determined to rollback these gains and return to letter of the 2012 land laws in order to extend access and control of the country's remaining natural resource wealth, which by this time was significantly located in and around villages collectively inhabited, owned and managed by non-Bamar ethnic nationalities. With greater urgency, documenting the specific tenures and tenure systems village by village became imperative in order to document the rights the government, despite the existence of the NLUP, was busy overriding.

At the same time, ethnic societies have sought to complement and consolidate this documentation work, with broader efforts to formulate and propose alternate legal frameworks that would protect (and restore and reinvigorate) Customary Tenure Systems and which could be recognised in a due federal decentralisation process, and could therefore be put on the table in peace process talks, as the condition of ethnic society. Two ethnic armed organisations (EAOs) have already issued their own land policies: the Karen National Union (KNU) updating a policy from 1974 to 2015, and it is understood the Kachin Independence Organisation (KIO) has also drafted its land policy and is close to being published. The Karennis (at the time of writing) developed a Karenni land policy after completing wide consultations with different groups united in the aspiration of co-existing peacefully together. Similarly, the Mon Region Land policy is in near completion, which has been based on Mon customary research and community consultations including with political parties, lawyers, and local CSOs. Other ethnic groups such as Rakhine and Chin have started to discuss their own land policies based on their own customary systems and local contexts. These initiatives were emerging amongst various ethnic societies that are relatively cohesive and homogeneous and in states where one main ethnic group is relatively concentrated, compared to the situation in Shan State.

In Shan State, the challenge of making land policy 'from below' is very complex, with multiple ethnic armed groups, also military-backed militia groups, and with CSOs

operating in both EAO-controlled areas and non-EAO controlled areas – and with no Shan State-wide CSO network.

5. Land policy from below: tools and processes for finding common ground

This section discusses the action research process, which was launched with an initial workshop was held in early 2016, which led on to a series of regular workshops, rotating between southern Shan State (Taunggyi), northern Shan State (Lashio), and eastern Shan State (Kengtung). The early workshops had no specific prior agenda beyond the agreed intention to explore ways to cooperate and work together to strengthen efforts around protecting tenure rights. In light of the diverse group of people brought together and the highly emotive issues being discussed – with the very ‘meaning of land’ at stake (Franco et al. 2016) – meetings were typically energetic and enthusiastic, with at times intense argument and at other times more gentle dialogue and consensus building. For instance, contributors interjected:

We do not agree with the 2008 Constitution, which says the state owns all the land. Land must be for the people, people must own the land. The [Myanmar Governments’] SRLD are corrupt and biased. They take the land and sell it to companies.

Land is not a commodity, it is more than a market price.

If you have land you can earn from it and live from it your whole life. If only stick to market price, it will allow only the rich people to accumulate land.

The issues that emerged in these meetings reflected broader contemporary debates around land in Myanmar: the compounding of injustices on different ethnic groups through successive rounds of dispossession, shifting relations between villagers, EAOs and the state, disagreements around which forms of tenure would provide the most security for people and which practices can rightly be considered ‘customary tenure’.

As an example of compounding injustices in the same geographical space complicating questions of management and ownership, representatives of both Lahu and Shan people had experienced displacement by the Myanmar army, but Lahu groups were displaced and then resettled to a village from which the Shan representatives had earlier been displaced. A Lahu representative explained:

We were relocated to a place where Shan people formerly lived, who had been removed by the military. The Lahu were unaware of this. Our community has now lived there for 20 years. So you cannot just move them away, and put the Shan back.

In such situations, which are mirrored across Myanmar, but particularly in non-Bamar areas, who are the rightful owners of the land? In such situations, resolution mechanisms currently do not exist, but are needed to resolve these highly contentious issues in order to redress past and contemporary processes of dispossession and displacement.

With multiple EAOs active in the state, Shan State is a microcosm of the challenges that CSOs face elsewhere in the country: which actors (state and non-state) should be engaged with and how in questions around land policy? Some CSOs faced challenges in dealing with EAOs while some prefer to work through political parties due to the fact that they

have no EAO representing their issues (e.g. the Ahka ethnic group has no armed group) or the leverage their armed groups have in formal political spaces is negligible (e.g. Lahu have small militias so they work mainly through political parties).

A key issue for Myanmar's land movement today is what position to take on the role of 'Form 7' – the individually assigned land-use certificates that allow for selling, exchange, inheriting, etc. of land plots thereby formalising and institutionalising a land market. For groups particularly from Eastern and Northern Shan, there was heated debate as to the effectiveness of Form 7 for protecting customary lands. Where some argued that Form 7 provides an opportunity for recognition and protection of lands – particularly for those engaged in low-land farming, where 'vernacular markets' (Bernstein 2010) for land already exist anyway – others argued that by focusing on and registering individual plots of land, they give up their rights to the broader landscape upon which some upland lives and livelihoods are based, as these lands then become potential targets for the government to claim through the VFV-law. Different CSO participants expressed varying perspectives and grievances in the workshops:

We have two policies in our region: the government policy and our customary system.

Land registration is a controversial issue among CSOs. Some promote it, other don't. We registered under the law, but then the other lands became illegal, only the registered land became legal. All common lands became illegal –

In one case, one person had Form 1 & 5, and the other group had Form 7, on the same land ... These Forms ... are useless when there is conflict... we focused too much on this registration of land with the government, but it does not give us any protection. We forget to focus on our customary land system. We[now] need to focus on this.

Form 7 is useless, any form is useless. It is just used to exploit local people. The government needs to respect local people, and their customary practices. If there is no social justice, Form 7 is useless.

Some people tried to register land with the government. But ethnic people ... think it is expensive to register, and not necessary.

It is very difficult for us to get forms, [there are] many difficult forms and processes. This discourages farmers to register their land.

Whenever there is a problem, the government asked us for documents, Form 7, land tax slip. [But] there is no legal agency to inform farmers how to register their land. Farmers ... do not know the law.

Lahu living in the mountains ... have little contact with the government, there is a language barrier, it is very difficult for them to get Form 7.

Pa-O man: In our area, whether you have Form 7 or not, they are extracting coal. It does not matter ...

The government department have difficulty to issue Form 7 to local people, but give it easily to company ... The local community has no idea about this. The government mainly protects the cronies and business people.

These different perspectives partly reflect the different farming systems particularly between southern and northern Shan State, which furthermore leads to different

perceptions on what is considered customary lands and customary tenure systems more broadly. For historically nomadic people like Lahu, customary lands have no boundary villages and were accustomed to shift location every 5–6 years. For them, their living spaces are shifting spaces. However, this practice was banned and they were forced into permanent settlement. By contrast, other groups were of the perception that if you have customary land, you have territory and that you need to map it. As part of these differing perceptions, the question of whether customary land even still exists or not also came up. Some Shan groups did not identify their practice as entailing a customary tenure system, understanding CTS more narrowly as consisting of the practice of shifting cultivation – another hot issue in nationwide politics.

We have a very good shifting cultivation system, that is why is land use policy should recognize it.

There is no vacant, fallow and virgin land in our area. We need to validate shifting cultivation.

The customary system is very good and beautiful, We inherited it from our forefathers. It is a farming system that respects and protect the eco system that is why the policy and law should be based on it.

Government should consider and reflect shifting cultivation in the law.

Throughout these discussions, with no pre-existing cross Shan CSO platform, the role of TNI as facilitator remained important. There are many different ethnic groups in Shan State with different languages, cultures and agricultural practices, and this diversity is also reflected in the large number of different, mostly ethnic-based CSOs in Shan State. Despite some efforts, cooperation and coordination among them remain limited and challenging. In some meetings tensions were evident between the local CSOs, somehow also reflecting ethnic differences; these had to be managed so that they would not grow bigger and undermine the cooperation.

Through these deliberations, an initial position paper was agreed, with 117 CSO signatories (TNI 2016). This policy paper in turn led the focus to evolve through collective mobilisation and lobbying on policy processes, generating several contribution papers (Oo and Kaung 2017). It was during these meetings too, by all accounts the first of their kind in Shan state, that some participants began to come together on the idea of developing a joint action research on their customary tenure systems as a core activity. The idea was exciting but also daunting. The ensuing customary research process involved a broad spectrum of CSOs of various sizes, covering different ethnic groups including majority groups like Kachin and Shan and small minority groups like Lahu, Danu and Ahka¹ hence representing a multi-ethnic cross-section of Shan civil society across the three main sub-regions: Northern, Eastern and Southern Shan.

¹These include Mong Pan Youth Association; Metta Foundation; Ywa Ngan Community-based Foundation; 1000 Islands Foundation; Pao Youth Organization, Lahu Women's Power Organization; Lahu Development Network, Environmental Conservation and Farmer Development Union; Salween Thitsa; Farmer and Labour Union; Myanmar Agriculture Farmers and Food Manufacturing Labour Union; Ta'ang Student and Youth Union; Lahu National Development Party, Mong Pan Youth Organization; Tai Youth Network; Kachin Baptist Convention; Nyein Salween; Heart Land; Justice Society; and Green Land.

6. Collective action research: toward collective advocacy for the protection of customary tenure systems

Follow-up workshops were held to find agreement on the purpose of the research: to document customary land practices and shifting cultivation in the CSO's respective areas, in order to at a later stage formulate common positions on land, to and make a joint report to be used for advocacy. These workshops also set up the methodology, work plan and schedule for the entire project. CSOs from northern, eastern and southern Shan State carried out pilot studies on customary land research and used the outcomes and experience to adapt and finalise the design of the research methodology. The research eventually ended up covering customary tenure systems in 42 villages in 20 townships across Shan State.

As a next step, an exercise in field resource tenure documentation was agreed and towards this, a field documentation and research training was held for a week in the Spring of 2017, near Taunggyi, the capital of Shan State and also its largest city. Some CSOs with well-established capacity were already active in working with villages to document their customary systems and to help villagers in revitalising and strengthening their customary capacities. In pursuit of mutual capacity building and people-to-people sharing, those who were more experienced shared their knowledge and skills with those less experienced and who sought to work in just one or two communities to develop their methodological skills and rapport. A third category of NGOs was already supporting villagers with ongoing conflicts against outside grabbers, including some villages on the western edges of Shan which had been subject to large-scale Burmese army land grabs and were contesting them.

Overall, the process seems to have been valued by the participants, partly as it led to both capacity building for CSOs in terms of policy orientation and methods for documentation, as well as building consensus around shared values and aspirations. Each CSO then selected some field locations for further study, in order to contribute these into an eventual overall state-wide assessment. Sites were selected on a purposive basis to exemplify cases of customary systems and actual threats to them. The CSOs were looking for typical villages where the customary systems are in reasonable status, and where there may be serious threats to them and the nature could be assessed. Extensive field data collection was then conducted across Shan State by the network participants leading to extensive documentation of both the prevalent customary systems and the very grave threats to them. Each CSO then contributed at least one representative case study into the state wide assessment. In this way, across 14 constituent cases, we could begin to build a picture of both the prevalence and popularity of customary systems and the threats to them. Numerous abuses also came to light, including environmental degradation and environmental crimes, often including criminal violence and human rights abuses perpetrated by armed groups including the Burmese military (Figure 1).

7. Results and findings emerging from the field

The teams were able to complete a dataset of results from the 14 main case studies. This is summarised in Table 1.

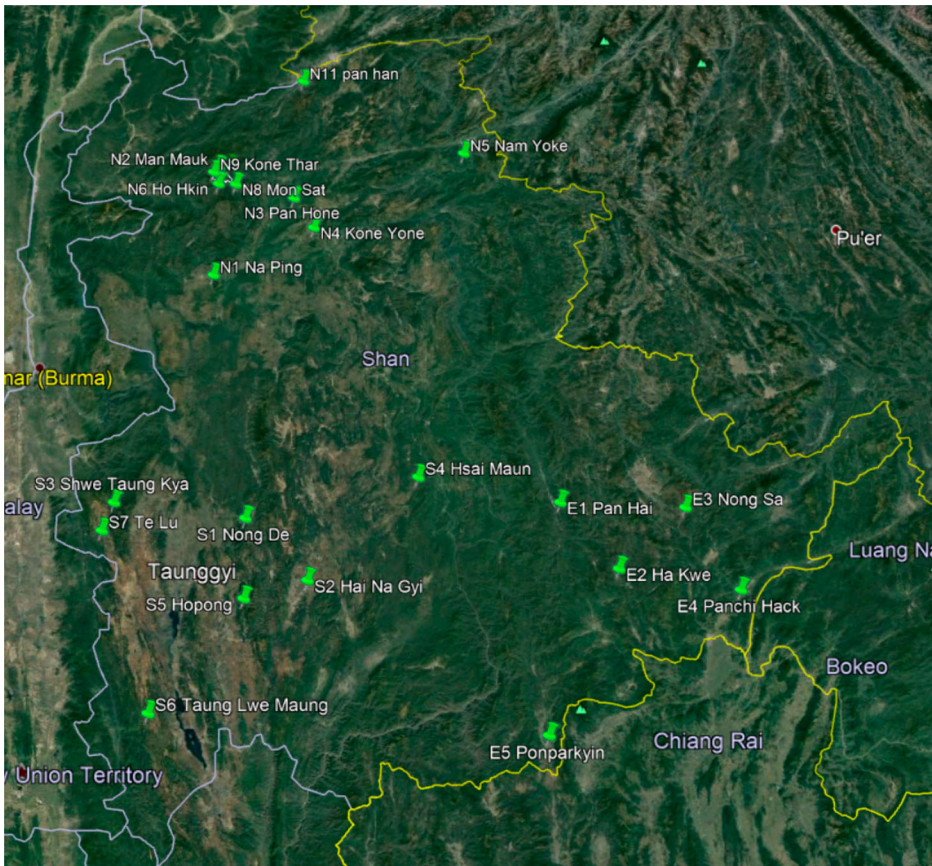


Figure 1. Selected village sites.

Three main findings emerged from these case studies is as follows:

(1) The prevalence of customary tenure systems

The first finding that emerged concerns the importance of CTS. Shan State CSOs were able to confirm that customary tenure systems remain ubiquitous across the rural areas of the state. Away from urban areas, customary systems form the basis for village level food security, socio-cultural cohesion and poverty alleviation. Although wet rice plots are generally treated as private property and outside customary systems, the rest of village lands and resources are largely managed and used under CTS to a great extent. Their subtlety, and location-specific complexity, reflect Shan State's own physical, social, and governance diversity. CTS are flexible, dynamic, resilient and adaptive to change. Most remain relatively strong (10 of 14 considered themselves as such), despite growing problems, and communities value them and want to protect and maintain them.

(2) The threats to customary tenure systems

The second finding concerns what are the main threats to CTS. Threats to CTS from outside are becoming much more serious than in the past. A combination of factors

Table 1. Summary of results from selected study sites.

Study site code	S1	S2	S3	S4	S5	S6	S7	E1	E2	E3	E4	N1	N2	N3	N = 14
Estimated strength of Customary Tenure System (Strong, Medium, Weak, Unclear) ^a	S	M	M	W	S	S	S	S	S	S	U	S	S	S	
CTS Grabs and threats at village level:	x	x	x	x		x		x			x	x	x	x	10/14
(a) Militarised 'grab' (Burmese, other EAO)	x	x		x		x		x				x	x		7/14
(b) Legalised grab – Use of 2012 laws (F7, VFV lease)		x		x		x								x	4/14
(c) Corrupt grab (e.g. SLRD)		x													1/14
(d) Other (neighbouring village encroachment, expanding PA, deceptive land purchase)			x			x					x				3/14

^aEstimated strength of the CTS was subjectively identified by the communities themselves.

have contrived to undermine CTS, and 11 out of 14 study villages were suffering from serious problems threatening their CTS. There are three main types of threat, and then an assortment of other problems. Firstly, the main threat villagers report is abusive, coercive 'grabbing' by armed groups, both the Myanmar army, allied militia, and others. This is by far the most commonly occurring problem for our study villages. Some of these groups are grabbing communities' lands and resources using intimidation, molesting and in some cases actually murdering villagers. In two reported cases, entire villages had been massacred. Of 14 villages we had studied, half (7) were affected by militarisation, intimidation or actual violence. Furthermore, in three of these, there was ongoing violent conflict in or around the village areas affecting the villagers' physical safety. Secondly, new threats have emerged from the 2012 Farmland and VFV laws, both of which fail to recognise prior CTS based rights and instead treat the land and resources as if unencumbered with rights in order to reallocate these 'freely' (e.g. with no technical-legal strings attached). In this way, the true right holders' exercise of their rights becomes a crime, and so the livelihoods of millions of rural communities have become criminalised by the 2012 Farmland and VFV laws which effectively cancel any customary rights. Thirdly, legislative threats were further compounded by irregularities in land administration under the Settlements and Land Records Department (SLRD)/ Department of Agricultural Land Management and Statistics (DALMS). Some individuals were acting in concert with government SLRD offices in ways which were widely described in our study as 'corrupt' and demonstrating 'malpractice'. In one case in particular, the study process revealed a village headman had, during a period of conflict, abused his position to privatise extensive common village land into his name. Although there is now an Anti-Corruption Commission in Yangon, it does not yet seem possible to discern a change in conduct of field offices. The case reflects that social differentiation and economic individualisation processes present new and ever more serious challenges for the resilience of CTS.

(3) The need for support

A third area of findings relates to what needs to be done to assure community tenure rights. CTS appear robust but not indestructible. For CTS and the livelihoods which depend on them to endure, communities identified two key supports needed – firstly, credible and legitimate outside enforcement support to stop 'grabbing' and abuse, and secondly, a policy framework to recognise and endorse CTS, based on a socially legitimate, decentralised 'bottom-up' democratic development process, rather than top-down and coercive 'rule by law'. The legal ambiguity and outright ignoring of CTS must end, through statutory recognition of their legal validity as a rights allocation system. This has been indicated in the NLUP 2016, and one may hope that the National land law currently under development may reflect this. But this cannot be left to chance in some remote office discussions with preferred technical advisers. A Shan State land policy is essential and at its centre should be the recognition of CTS, which is the basis for livelihood security of most rural communities in the state. Furthermore, it must block grabbing of CTS and punish punitively the grabbing or undermining of CTS, and corruption in government offices.

(4) CTS are a key issue in political negotiations

A final and overriding issue which emerged was how central CTS recognition was perceived by communities and CSOs as a critical and top priority issue that must be addressed in the wider political negotiations over terms for peace, federal decentralisation and reconciliation. The platform demanded that a new National Land Law is promulgated that recognises CTS, and revokes the detested VFV law (TNI 2019).

Following up on the documentation process, a final consultation around the Shan customary research report took place in Taunggyi, Shan State on 25–27 September 2018. During this meeting, the representatives of the participating CSOs listened to field reports, agreed on a common analysis, main findings and overall recommendations, drafted the text of a joint report, and decided on a publication strategy. This was a difficult process as the group is quite diverse and has different ideas about how best to fulfil the right to land for ethnic communities. However, after negotiations and give and take from all sides, agreement was reached. The groups also agreed on a joint advocacy strategy to launch the joint report (TNI 2019). Findings were presented in Yangon on 11 March 2019 ('Our Customary: Our Life' – The Customary Land and Resource Systems of the Ethnic Peoples of Shan State - by Shan State Ethnic Right to Land Platform).

Since the presentation in early 2019, CSO participants have been occupied in different ways: many have been busy with field-level documentation, several with state and national level advocacy. The spread of COVID and 'lock-down' policies have been a major obstruction to continuing the momentum. Three CSO's comments illustrate the on-going importance of the issues, despite the COVID-related disruptions. The Pa'O Youth Organisation representative gave the following update for activities:

Due to covid-19 we haven't done much activities on the ground, but still have online discussions ... we want our self-determination, not just a piece of paper, we want clear central constitutional recognition including (management right, ownership right, decision right) on our land. Currently the National land law was adopted since 2016 January but none of the customary practice are recognized by the government. The peace processes are ongoing but we don't know how can they solve the land confiscation problem that are happening right now. The peace process should have clear agreement on land and natural resources.

The Thousands Islands Foundation representative also provided an update reflecting on the ongoing processes around CTS:

We continue working on documentation and awareness raising for customary tenure systems. We are sharing the customary joint report that we produced together to other communities, [and] ... have conducted workshops with other farmers [to] share our report. We are also involved on the National land law working committee for customary.

The Lahu Development Network also remains actively engaged in Southern Shan:

We are still in communication with the Southern Shan CSO [partners] ... We have shared the report to other communities within Lahu community because we don't have budget to document all the Lahu community customary systems. We translated the report into our Lahu language and every time we have a workshop with the community or community leader we encourage them to protect their land and document it as much as they can ... During covid-19 some companies come to our area. They told us that they got the permission to work on this land as VFV land. We the owner of the land know nothing [about this] ... the government thinks it ... can sell [our] land and Natural Resources.

8. Critical reflections and looking ahead

Overcoming divisions and mistrust and building collective understanding based on respecting diversity takes work over the long term. The so-called Collective Action Research process described here enabled a valuable co-learning process to be facilitated, although it is an ongoing process. Taking a step back to reflect on the overall experience to date, even as the joint engagement continues, we can say that the CSO mobilisation process seems to have had four main outcomes so far. Firstly, the networking across the diverse Shan State CSOs seems to have been very fruitful in building mutual trust relationships and understanding across the diverse communities and regions of Shan State. If Shan State society is to be reconciled and united peacefully this sort of rapport building is an essential foundation. We may speculate that it may have also had benefits across villages through helping CSOs to be more effective in their engagement strategies. A second main outcome has been self-documentation of village-level field realities. The exercise has helped CSOs to develop and share understandings and skills and use them to reveal actual tenure systems and the erosion of these. Key problems identified include:

- (1) Criminalisation of normal livelihood activities – especially shifting cultivation and hunting, but also under the 2018 amendment any resource use in ‘VFV’ areas, which for many villages means all areas.
- (2) Grabbing of resources by armed group and cronies. This occurs in various ways and affects various resources: land, water/dams, subsoil through mining, wildlife through illegal wildlife trade, timber through illegal logging without community permission. The armed groups include the Tatmadaw / ‘U Paing’ (Tatmadaw owned Union of Myanmar Economic Holdings), militias under formal control of the Tatmadaw, Ethnic Armed Groups (EAG) and cronies, Chinese companies in some cases. In some field case studies the hidden practises of title grabbing came to light through the data collection process, and it became possible for villagers to challenge them.
- (3) Bad relations between village authorities, union government administration and ethnic armed groups including violence, abuse, and grabbing.

A third benefit has been the Shan statewide clarification of variations in the situation across areas. There are significant variations in patterns of grabbing: the south and centre appears to suffer most from the problems, whereas the east has not yet come under such pressures to the same extent. To the north, the ongoing conflict has created a more dangerous and fluid environment both for communities but also to an extent for ‘grabbers’. Fourthly, the development of findings has gradually led to the emergence of a mandate for policy development. The exercise has so far helped clarify that customary tenure systems are a central issue. All studied villages had forms of the customary tenure system, but no aspect of customary resource governance is protected in laws and policies, and all are threatened in various ways, especially through the overlaying of Land and VFV laws, as well as other forms of Union jurisdiction and grabbing.

Looking ahead Myanmar’s 2020 elections represent another critical juncture in Myanmar society’s prolonged struggle. The elections offer both hopes for improvement, as well as the threat of a further deteriorating spiral of abusive mis-government. In rural Shan State and across ethnic areas, the NLD and its leader have largely lost whatever

credibility they may once have had, due to a great degree to their failure to protect land and resources, as well as their apparent affinity with the oppressive Myanmar military, and lack of effective criticism of its excesses. Political parties that wish to protect human rights, including property rights, will need to endorse CTS in some basic ways.

Civil society groups have been developing the outlines of a legal framework, which will actually recognise and protect Shan State communities' customary rights and livelihoods. To keep pushing towards this goal, CSOs and ethnic communities are making their voices heard, sharing their situations at international and local forums and to the local members of parliament. Particularly, ethnic groups are sharing their findings and updates with each other to consolidate a CTS advocacy platform.

Myanmar's forthcoming national and state regional elections and the formation of new national and state-level governments offers a moment of hope to those who are genuinely committed to the protection of basic human rights in Shan State and other ethnic areas, for a change of direction, towards real support for rural communities' aspirations for tenure security against theft, illegal and legal. The political reform agenda in support of CTS, which is emerging from CSO mobilisation, includes amongst other things:

Firstly, political leadership and legislative processes that support and prioritise CTS protection, for cultural survival and rural development.

Secondly, federal decentralisation to enable state governments to develop state-appropriate land and resource polices, for example, endorsing and adapting what is already coming from ethnic policies.

Thirdly, some alternative to the Union land administration bureaucracy, which is widely perceived as a routinely corrupt and predatory agent of the self-aggrandising military/crony nexus.

Fourthly, some mechanisms for restitution: an official Inquiry to investigate grabs and prosecute grabbers. Punitive punishments are needed for corruption and abuse of power in the government office.

For ethnic communities across Shan State, direct local democracy and peaceful coexistence are often recalled by older community members as vanishing memories, whilst Myanmar's much-hyped 'transition' has often amounted for them to increasingly violent threats of eviction against customary tenure systems. If the forthcoming elections and formation of a new government could lead to protection of customary tenures, it will be a welcome relief to the current 'state of strife'. There may be no 'going back' to a past age, and with growing forces of economic compulsion as well as inter-generational cultural changes, economic individualisation and social differentiation are becoming inevitably more pronounced. Nevertheless, in all the villages we studied CTS was perceived to be a valued stabilising institution in uncertain times.

Acknowledgments

This paper summarises the process and findings of a collaborative research project on land and resource rights in Shan State. It has involved a wide range of individuals, civil society organisations, and analysts and academics over several years. Numerous individuals and organisations have contributed very significantly in many different ways and capacities during the project. First and foremost, we wish to express our sincere gratitude to the numerous community members across Shan state who have worked with the team so patiently and helpfully. We also wish to recognise the energetic inputs of the many civil society organisation workers across the state: Environmental Conservation and Farmer Development Organisation, FLU, Lahu National Development party, Thousand

Islands Foundation, Mong Pan Youth Organization, Ywa Ngan, Lahu Youth Development Network, Ta'ang Students and Youth Union, Lahu Women Empowerment Organisation, Thanlwin Thitsa, Metta Foundation, Northern Shan Joint Group, Pa'O Youth Organisation, Agriculture & Farmer Federation of Myanmar and the Eastern Shan Kachin Baptist Convention. Here we particularly wish to acknowledge the invaluable support of the Metta Foundation, and the kind support of its inspirational leader Sai Sam Kham.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Funding

Trans National Institute (TNI) helped facilitate the customary research activities discussed in this paper with financial support from SIDA and SDC. The authors also thank their TNI team collaborators on the project, particularly Khu Khu Ju, Jenny Franco, Pietje Vervest, Tom Kramer and Shadan.

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