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# The struggle for forest tenure in Myanmar: voices from the 2019 forest rules consultation

Glenn Hunt and Sonia N. Leonard

Centre for Development and Environment, University of Bern, Bern, Switzerland

**ABSTRACT**

This study furthers the literature on forest devolution in authoritarian states where colonial legacies of forest management favour government and commercial extraction over community-based forest tenure rights. The research analyses the 2019 nationwide consultation process for the implementation regulations (or Rules) of the Myanmar Forest Law. It examines the consultation process and how a crucial aspect of the feedback process stymied even a limited devolution of forest access rights to local communities. The study concludes that consultation processes in authoritarian states can result in forest devolution, but careful and strategic attention must be given to how such a process is both structured in wider policy engagement and how documented feedback is incorporated back into the regulatory framework.

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## Introduction

Forest management rights and responsibilities are increasingly devolving from centralised governmental structures to community-based models (Dang, 2020; Magessa et al., 2020; Pulhin & Inoue, 2008; Trejos & Flores, 2021). When we talk of the *devolution* of forest management, we apply the definition used by Trejos and Flores, namely, the shifting of forest management responsibilities from state to community-based organisations. This is distinct from *decentralisation*, characterised as the shifting of management responsibilities from central to local government authorities (Trejos & Flores, 2021). The trend toward devolution of forest management began in the 1980s due to pressures from environmental, indigenous rights, and community-focused development paradigms, and has become a mainstay trend of forest policy in many developing country contexts around the world (Edmunds & Wollenberg, 2003). While community management of forests has been formally recognised in some countries for centuries (Ostrom, 1990), in many post-colonial authoritarian states, the trend toward forest devolution has been more recent (Dang et al., 2018; Karjoko et al., 2021).

Forest devolution in many authoritarian country contexts can be driven by external factors such as the Reducing Emissions from Deforestation and Forest Degradation (REDD) framework or voluntary partnership agreements under the Forest Law Enforcement, Governance and Trade (FLEGT) policy of the European Union (EU) (Cashore & Stone, 2012; Mustalahti et al., 2017; Ramcilovic-Suominen et al., 2021). In other instances, forest devolution results from internal pressures from ethnic, indigenous and civil society movements (Choudhury & Aga, 2020). The devolution of forest management has been found to play a vital role in providing tenure and livelihood security, as well as forest protection/conservation (Miller et al., 2021). However, the devolution of forest management

**CONTACT** Glenn Hunt glenn.hunt@unibe.ch Centre for Development and Environment, University of Bern, Bern, Switzerland

is not a straightforward process, especially where communities and state forest agencies view forest resources from very different, or even opposing viewpoints.

For instance, in colonial and post-colonial Burma, the history of forest management has, at each and every stage, 'been a political process in which resources access and use has been bitterly contested' (Bryant, 1996, p. 194). Where state forest agencies regarded forest resources largely through the lens of commercial timber extraction and conservation measures to facilitate sustainable supply therein, forest-dependent communities desired access to and the right to extract forest resources for their own needs (Ibid). It could be said that these two groups regard forest resource use in diametrically opposing ways. The state sees community extraction and use of forest resources as impacting efforts to provide a sustainable timber industry, while communities see state conservation efforts to protect forests as affecting their livelihood and food security.

Given the differing viewpoints, it is not surprising that the devolution of forest management can be a long process that is often undermined by state agencies both at the policy formation level (Das, 2019; Ramcilovic-Suominen et al., 2021) and in the actual implementation of the policies and laws themselves (Choudhury & Aga, 2020; Sikor & Ngoc Thanh, 2007). While many studies focus on the successes and failures of forest devolution at the community level, relatively few studies examine the process through which devolutionary structures are incorporated into land and forest reforms. However, it is crucial to understand the mechanics of how forest devolution is incorporated into formalised legislative structures.

This article examines the development of the 2018 Forest Law and associated Forest Rules (hereafter referred to as 'The Rules') in Myanmar, which transpired during the National League for Democracy (NLD) government era (2016–2021). Our analysis of the forest policy formulation processes is viewed through Ostrom's Institutional Analysis and Development (IAD) framework and engages with scholarship on consultative authoritarianism, which seeks to explain the apparent contradiction of public consultation in authoritarian regimes.

Following the introduction, we provide a methods section laying out our conceptual framework and research methodology. A contextual framework section then presents a brief historical overview of forest management in Myanmar and a contextual analysis that locates the consultation process in the broader paradigm of the legislative reform processes in Myanmar's land and forest sector before the 2021 military coup. The results are presented in two stages. Firstly, we try to understand the extent to which the newly enacted 2018 Forest Law, and the associated 2019 draft of The Rules, incorporate forest devolution principles. We then analyse the contribution of the national consultation process in devolving forest management. In the discussion and conclusion, we argue that while the consultation process ultimately failed to deliver broad forest devolution and that the authoritarian state's controlling tendencies prevailed, the small successes observed from the consultation highlight that with methodological considerations, far greater successes in terms of forest devolution may have been possible. This research concludes by acknowledging the need for more consideration of the mechanics of consultation processes in authoritarian contexts to enable meaningful community involvement and to ensure that relevant feedback reflecting people's aspirations for forest devolution are incorporated into policy and legislation.

## Examining the forest rules consultation: methodological underpinning

### *Situating the forest rules consultation process*

The case we examine in Myanmar illustrates the legalistic relations between three nested systems of rules that cumulatively affect the actions taken and the outcomes obtained in using common pool resources (Ostrom, 1990). The 1992 and 2018 forest laws work as overarching rules that frame and regulate the governance of forest management in Myanmar, what Ostrom refers to as the constitutional level rules. The Forest Rules are designed to implement the provisions of the Forest Law. As such, we place them at the collective-choice level of Ostrom's rules, bound by the framework of the

Forest Law. Thus, the consultations on the Forest Rules were necessarily limited in that they could not go beyond the framework of the Forest Law. The Forest Rules ultimately have a direct impact on the operational level rules that are the day-to-day experience of forest resource user groups. It is the experience of these user groups that fed into the legislative consultation process.

### *Consultative authoritarianism*

The terms 'consultative authoritarianism' or 'authoritarian deliberation' have been coined by scholars to explain what appears to be the contradiction of oppressive authoritarian states allowing citizen voice and input into policy and law reform processes (He & Thøgersen, 2010; Jiang, 2008). Far from a trend of authoritarian states moving to democratic transition, scholars have shown that consultative processes allow authoritarian states to reduce and control social conflicts allowing for more durable regimes (He & Wagenaar, 2018; Zhang et al., 2021). On the other hand, Truex writes that there are limitations with consultative processes under the control of authoritarian regimes where more educated citizens ultimately remain sceptical of such processes (Truex, 2017). However, at the same time, it is also noted that civil society groups can successfully utilise such processes to achieve at least limited reforms that benefit local people (Froissart, 2019).

Recent experiences, both regionally and globally, have shown that reform processes in land and forest governance can also lead to important changes in policy and legislative frameworks that devolve power to communities, even in authoritarian governance contexts (Ayana et al., 2018; Forbes, 2017; LEI, 2020). Influencing such a process remains challenging however, particularly where a history of oppression leaves civil society weak and fractured (Jayasuriya & Rodan, 2007). In a recent study of civil society mobilisation around land reform in Senegal, it was noted that for civil society groups to succeed in consultative processes, there needs to be agreement over the analysis of issues and on the direction in which civil society seeks to push reform processes (Lavigne Delville et al., 2021).

In Myanmar, the decade to 2020 saw the emergence of a kind of democratic authoritarianism where, despite the appearance of democratic transition, violence and civil war continued and expanded in what has been described as 'neither war, nor peace' (Kramer, 2021). A 2008 military-drafted constitution left the military in a position of control while simultaneously allowing for the implementation of democratic elections and an opening up of space for civil society (Croissant & Kamerling, 2013). Legislative reforms undertaken by the NLD administration in the land and forest sector have been critiqued as reinforcing existing authoritarian governance structures while failing to bring any fundamental change (Ra et al., 2021). While such an analysis fits the classic narrative of authoritarian consultation processes that seek to reinforce state power and control, this paper shows that consultative processes, even under an authoritarian state, can offer opportunities to strengthen community control of forest resources given the right circumstances, strategy and planning. This paper contributes to the scholarship of consultative authoritarianism through an analysis of one specific legislative reform process in Myanmar, namely the Forest Law and the associated consultation process organised for the Forest Rules in 2019.

## Methods

This paper draws on ethnographic research and contextual legislative review carried out in Myanmar between 2017–2020. The study was carried out as part of ongoing assessments of legal reform in the land and natural resource management sector in Myanmar conducted in partnership with Land Core Group and the Centre for Development and Environment, University of Bern. Through the research period, the first author was employed as an advisor supporting a prominent local Myanmar civil society organisation working on land and forest governance issues and related policy reform processes and then at a Swiss research institute in support of different land and forest tenure reform processes. This enabled a first-hand account and analysis of different land and forest reform

processes in Myanmar and close and regular interaction with various civil society and activist groups working on land and forest tenure issues throughout the research period.

The second author, who has worked extensively on the environmental and customary tenure issues with civil society groups in Myanmar, primarily supported this paper through support with conceptual framing at the analysis and writing stage of the research.

The research took a two-part approach. First, we assessed the evolution of Myanmar's forest policy and legislation. Specifically, we compared the 1992 Forest Law and associated implementation Rules to the 2018 amendment to the Forest Law and Rules to understand the extent to which the new forest legislation incorporates forest devolution principles. This analysis was conducted using official English translations of the laws and associated rules. While recognising the limitations of this approach, a Burmese language analysis was beyond the scope of this study. In one instance, where only a Burmese language version of an advanced copy of the draft rules was available, the author enlisted a native Burmese-speaking expert in forest policy who could support translation where changes had been observed from earlier versions of The Rules.

The second stage of the research employed a narrative inquiry during participation in five of the 17 national-level Forest Rules consultation workshops conducted by the Forest Department from May until June 2019. The Forest Department organised consultations over these two months in the capital city of every state and region to seek public comment on the draft Rules developed and released for public feedback earlier in 2019. The first author attended five of these consultation processes as a representative of one of the many financial supporters of the broader consultation process and through the author's role on the broader external organising committee behind the consultation process. This participation was ostensibly to understand the process, provide feedback to the organising committee, and help drive the process forward. As an expatriate 'expert' on the inside of the process, the author was able to join as an observer in both public consultations and closed government expert roundtable workshops. For attendance at the five state and regional workshops, the author hired a private interpreter experienced in simultaneous interpretation to provide personal translation during the workshops allowing detailed clarification on language points when necessary. The first author was additionally able to conduct informal interviews with different civil society participants at the different localities to understand how they had prepared for the consultations and their thoughts regarding interactions with the consultation process.

The selection of the location of the five consultations (see Figure 1) was determined through a mixture of conditions, primarily that there should be a relatively high concentration of forest cover and associated upland ethnic minority and indigenous communities. Such communities typically have a higher level of forest dependency, not just in terms of access to forest resources but also through agroforestry systems such as shifting cultivation that form the basis of agricultural production in many upland areas. Myitkyina, Loikaw and Dawei consultations thus represent a sample of states and regions with such characteristics, while Yangon and Mandalay were added as cities that contained a high level of advocacy and rights-based civil society groups.

Our analytical focus was directed to the methodologies employed by the Forest Department to undertake the consultation processes and how participants navigated these methodologies. During the consultation, discussions were transcribed, and participant interactions were written down, with institutional or community affiliation noted.

## An overview of past and current forest management in Myanmar

Myanmar is a geopolitically important country bordering China, India, Thailand, Bangladesh and Laos, endowed with valuable natural resources. An ethnically diverse country, Myanmar has 135 officially recognised ethnic groups, although this figure is readily disputed by scholars (J. M. Ferguson, 2015; Kramer, 2015). Civil war between ethnic armed groups and the Union government has been more or less constant since the country gained independence in 1948 (Kipgen, 2011). In

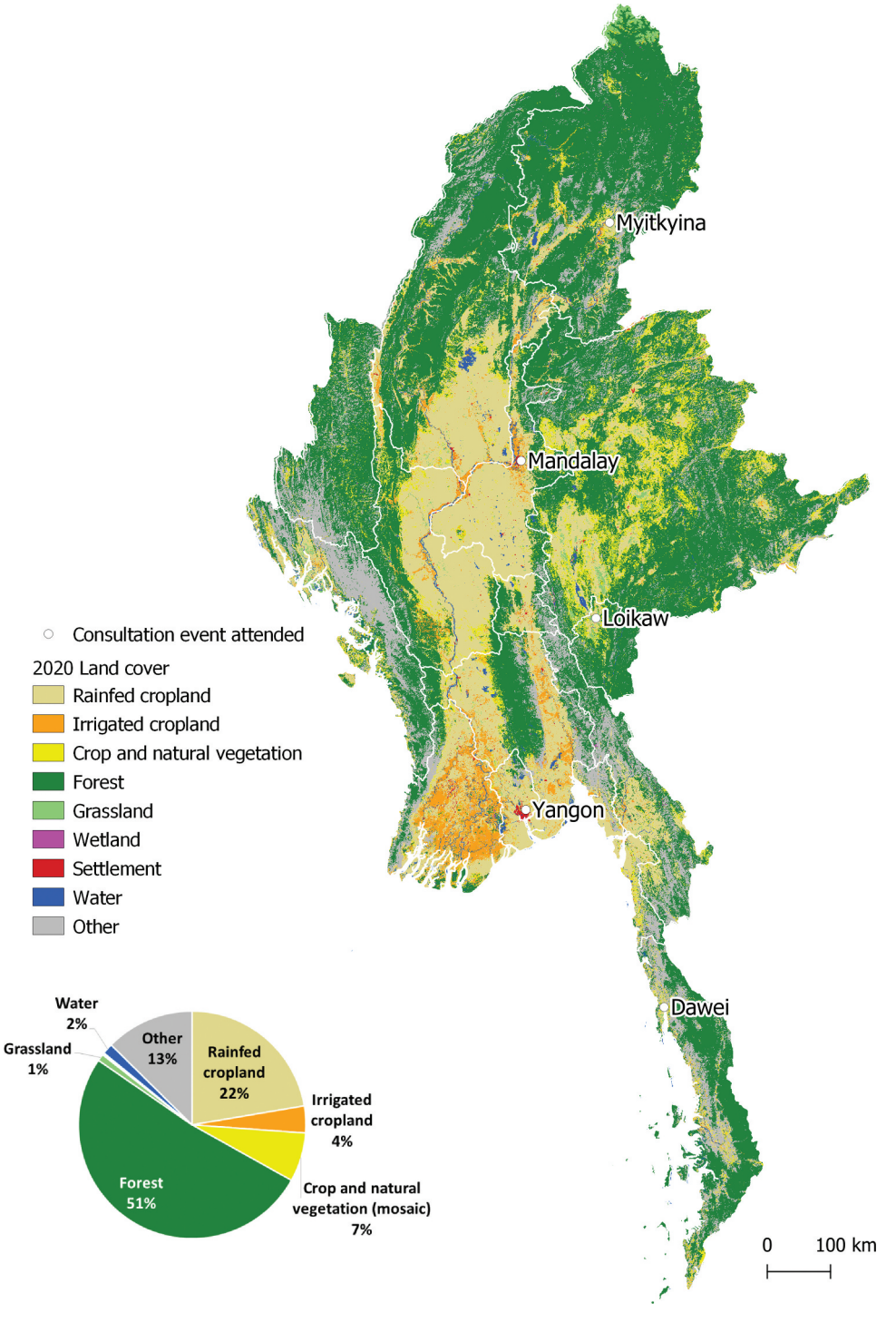


**Figure 1.** Map highlighting the location of consultations attended by the first author against national forest coverage. Data source: ESA-CCI Land cover: http://maps.elie.ucl.ac.be/CCI/viewer/index.php

2011 a quasi-civilian government ushered in a new democratic era following 50 years of military rule. Following this, land and forest reform quickly emerged as a critical point of contention between the Government, smallholder farmers and forest-dependent people.

Since colonial times forests have remained synonymous with Myanmar, and today forest cover remains one of the highest in Asia at 42.9% (FAO, 2020; MONREC, 2020). Administratively, State Forest areas represent 31.34% of Myanmar's total land area and consist of Reserved Forest (RF), Public Protected Forest (PPF) and Protected Areas (PA). As shown in Table 1, RF and PPF together comprise what is known as the Permanent Forest Estate (PFE), regulated under the Forest Law. Protected Areas fall under the Conservation of Biodiversity and Protected Area Law.

**Table 1.** Permanent Forest Estate and Protected Areas in Myanmar as of Dec 2019.

| Forest Classification | | Area (Acres) | % of total land area |
|---|---|---|---|
| Permanent Forest Estate (RF/PPF) | Reserved Forest (RF) | 29,702,095.99 | 17.77% |
| | Protected Public Forest (PPF) | 12,909,460.99 | 7.72% |
| | Total RF/PPF | 42,611,556.98 | 25.49% |
| Protected Areas (PA) | | 9,783,684.42 | 5.85% |

Source: Adapted from (MONREC, 2020).

The evolution of Burmese/Myanmar forest legislation since colonial times has been characterised by the clash between the commercial extractive interests of the state on the one hand and the livelihood demands of smallholder farmers, shifting cultivators, and forest-dependent peoples on the other. Bryant (1996) documents this clash from the development of the first forest regulations in 1854 until the development of the 1992 Forest Law and the 1995 Forest Rules and Forest Policy under the State Law and Order Restoration Council (SLORC) era. This contestation continued into the democratic reforms in Myanmar that lasted from 2011 until the military coup of 1st February 2021.

After decades of military rule, the land governance situation in Myanmar suffered from multiple legacy issues. These include forced displacement and land alienation through policies that undermined individual and community ownership rights (Mark, 2016). Beginning with a National Dialogue on Land Tenure and Land Use Rights in November 2012, the then Government started developing a National Land Use Policy (NLUP) to guide the land governance reform processes in the country (LCG-FSWG, 2012; Oberndorf et al., 2017). The development of the NLUP and the unprecedented consultation process has been well documented (Forbes, 2017; Jansen et al., 2021; Kenney-Lazar et al., 2022). However, there has been less exploration of the divergent processes behind forest reform in Myanmar, particularly concerning forest tenure rights.

In Myanmar, issues of forest governance are closely linked with issues of ethnicity, as it is typically ethnic minority and indigenous communities located in the forested uplands who remain more dependent on forest resources and access to forest land for rotational farming systems such as shifting cultivation. Forest-dependent people have long complained about evictions and harassment by forest department staff in communities where villagers' livelihoods depend on access to forest resources. Several civil society groups in Myanmar have begun to document harassment, fining, and arrest of communities living inside protected areas and state forest areas (CAT, 2017; HRW, 2016; Saray, 2019; Spectrum, 2015). Similarly, there have been calls for rethinking conservation based on respect for community rights and allowing communities to remain custodians of their traditional lands (CAT, 2018; Saray, 2019).

There is no comprehensive data on the number of forest-dependent people in Myanmar (World Bank, 2019). Nevertheless, it is without a doubt that in some areas, particularly in the poorer remote ethnic uplands, there are high levels of forest dependence. Rotational

agroforestry practices such as shifting cultivation are still widely practised in the remote uplands of the country, where customary management of forest areas is still practised, albeit without official government recognition (Boutry et al., 2018; Erni, 2021; RRtIP, 2018). Across Myanmar, numerous researchers and groups have documented in detail how the forested areas surrounding villages are essential to meet the livelihoods of the communities (Erni, 2021; Feurer et al., 2018). Forests provide food security, ecosystem services, and economic security to the people (Boutry et al., 2018; TRIPNET, 2018). A presentation at a National Dialogue on strengthening Forest Tenure rights in 2017 by a Naga Youth Federation representative summarised the ethnic Naga peoples' situation succinctly: 'For the Naga, forests are our market, our hospital, our everything' (MONREC, & LCG, 2018).

## The Forest Rules consultation and legislative reform processes

In February 2016, approximately three months after the 2015 election, the NLD began to assume control of the institutions of power in government. During the 2015 election campaign, the NLD issued an election manifesto that talked about changing inappropriate laws for the wellbeing of farmers (NLD, 2015, sec. ii. 1.f.), and not long after assuming power, the NLD identified five major land and forest-related laws as priority for revision: namely the 2012 Farmland Law; the 2012 Vacant Fallow and Virgin Land Management Law; the 1894 Land Acquisition Act; the 1994 Protection of Wildlife and Conservation of Natural Areas Law, as well as the 1992 Forest Law. By late 2016, however, there was already a sense that the proposed amendments to such laws were to take the form of limited 'tweaks' rather than fundamental reforms to address the critical issues of community control.

Despite the hope that the unprecedented consultations seen in the NLUP drafting process might be replicated, the parliamentary committees overseeing different legislative revisions were unwilling to countenance broader consultative processes. As such, local and international civil society groups soon began to navigate the formal process of submitting written legislative reform recommendations, occasionally even arranging personal meetings with committee members to lobby for certain amendments to specific laws.

While not wanting to speculate on the relatively closed parliamentary drafting processes that took place in Myanmar, it is clear that Forest Department officials met regularly with the relevant members of parliament to guide the changes to the Forest Law (intereview notes. Anonymous, 2022). The Forest Law was passed by parliament and subsequently signed into law by the president on the 20$^{th}$ of September 2018.

Discussions on forest reform then moved to the Forest Rules and the proposed consultation process. Interviews with former Forest Department staff and persons close to the department reveal that the motivation for the consultation on the rules came directly from within the Ministry of Natural Resources and Environmental Conservation (MONREC) and the Forest Department. In understanding such a motivation, it is necessary to consider the broader democratic transition taking place at that time in Myanmar and that The Forest Department was perhaps one of the more progressive and confident agencies within the executive branch of government, having been widely praised for overseeing the public consultation process for the development of the NLUP between 2014 and 2015. Interviews with the former department officials and those close to the department revealed that there was an assumption, within at least certain sections of the department, that a public consultation process would not only support the prestige of the department and ministry, but that this would also give the department a chance to gauge public experience with departmental policy and help the department to be more responsive (Interview notes. Anonymous, 2023). At the local level, the forest department organised the consultations collaboratively, often with the support of locally influential international and local civil society groups. The consultations were funded through an ad-hoc funding

scheme arranged with the key donors working in Myanmar on land and natural resource management, including international INGOs and UN agencies.

Discussions of Union law on sensitive topics such as land and forest tenure rights often raise questions about the issue of federalism and the rights of ethnic states or ethnic armed groups to implement their own policies and laws. However, the consultation on The Rules took place in an entirely state-centric political environment where issues of federalism were largely left to the side as CSO representatives and activists dealt with the realpolitik of the broader forest governance environment as it exists in a very top-down and state-centric model. Although there was no noticeable boycott or campaign against the consultation process, at least some groups likely saw the process as irrelevant given the limited changes contained in the newly enacted Forest Law.

Despite this, the stakeholders mobilised during the consultation processes were very diverse, ranging from forest users and their support groups, INGOs, local CSOs, commercial industry groups, and conservation organisations to members of parliament and state and regional Forest Department and other related line departments. Each group attended the consultations with different norms and values towards forest management, access and use. Some groups approached forest management through the lens of conservation or sustainability of forest and forest resources. In contrast, community rights groups approached the consultation focusing on local community access to forest resources, food security and cultural and spiritual connection to forests.

The first author witnessed key regional activists and civil society actors actively participating in the consultation process, making impassioned presentations during plenary sessions and engaging in heated discussions in all five pre-arranged thematic breakout groups. Breakout groups were structured as follows; Constitution of RF/PPF; Forest management; Community forestry and private plantations; Extraction of forest produce; and Punishments. The first author participated as an observer in the extraction of forest produce breakout group in all five consultations. Access to resources represents the principle right of resource control under Schlager and Ostrom's bundles of rights (Schlager & Ostrom, 1992), and as mentioned above, the lack of legal access to forest resources represents a key grievance of forest-dependent communities.

## Results

### *Contextual assessment of the amended Law (2018) and 2019 rules*

A comparative assessment of the 1992 Forest Law with the 2018 amendments revealed that the overall structure and wording of the 1992 law remain largely unchanged. A total of 58 articles across 13 chapters remain the same in both versions. Amendments to specific articles in the law are mostly centred around increasing penalties, updating terminologies or names, and a variety of small wording edits. The Law and the Rules continue to be centred around defining the powers of the Ministry and subordinate officials with very little consideration of the forest-dependent people impacted by the law. Unlike the law, however, the changes to the 2019 Rules draft were extensive, far beyond the semantic changes in the law. As highlighted in Table 2, the 2019 Rules have expanded from 13 to 15 chapters and 108 to 136 articles.

Nevertheless, the Rules, like the Law, keep commercial timber extraction at its core. A quick look at the chapter headings of The Rules reveals the degree to which the legislation is structured around regulating a commercial timber industry. To the extent that 'Forest Produce' largely relates to timber in the Rules, Chapters 5–12 are devoted to the governance of the timber industry.

**Table 2.** Chapter structure of the 2019 Forest Rules.

| Chpt | Chapter Title | Article number (#) |
|---|---|---|
| 1 | Title and Definition | 1–2 (2) |
| 2 | Constitution of Reserved Forest and Declaration of Protected Public Forest | 3–23 (21) |
| 3 | Management of Forest Land | 24–36 (13) |
| 4 | Community Forestry (New) | 37–40 (4) |
| 5 | Establishment of Forest Plantation | 41–52 (12) |
| 6 | Establishment of Private Plantation (New) | 53–58 (6) |
| 7 | Permission for extraction of Forest Produce | 59–71 (13) |
| 8 | Removal of Forest Produce | 72–90 (19) |
| 9 | Disposal of Drift and Standard Timber | 91–96 (6) |
| 10 | Registration of private marking hammers and Affixing marks on the log | 97–108 (12) |
| 11 | Timber Depots | 109–115 (7) |
| 12 | Establishment of the Wood-based Industry | 116–121 (6) |
| 13 | Search, Arrest and Administrative Action | 122–134 (13) |
| 14 | Taking administrative action | 135 (1) (Contains 36 rules) |
| 15 | Miscellaneous | 136 (1) |

Source: Forest Rules 2019 draft.
Note: # indicates the total number of articles contained in that chapter.

### *Recognition of customary tenure in forest legislation*

Customary tenure is not entirely absent from either the 1995 Forest Rules nor the 2019 amended Rules. In constituting RF and PPF, both versions of the Rules state that the forest settlement officer shall exclude the land where customary rights are applied (Art. 7a(i)/8a(i)). Customary rights are not defined in the legal framework, nor is there guidance on how this should be applied. In practice, community access to forest resources remains dependent on the ability of communities to convince state forest officials to keep their customary areas outside of formal forest classification. The new Law and Rules brought some positive checks and balances around the constitution process of RF/PPF through the mandated formation of a scrutiny body, formed with community and ethnic representation, to oversee the process of PFE constitution and represent community interests. The contradiction is that as communities succeed in exclude customary forests outside of the PFE, such areas remain outside the legal forest classification. In doing so, the forested lands are considered 'Virgin Land' and are subject to the provisions of the controversial Vacant, Fallow and Virgin Land Management Law that puts farmers at risk of disposition (J. Ferguson, 2014; Htoo & Scott, 2018).

An important inclusion in the Law and Rules is the formal recognition of community forestry (CF), a formal forest tenure mechanism developed in 1995 under the Community Forestry Instructions (CFI), but until the 2018 amendment, not formally recognised in legislation. CF now has a dedicated chapter in the Rules (albeit with only four articles), and CF is defined under the amended law as 'any operation carried out according to the CFI issued under the law' (Art.2(u)). Local communities living in forested lands (be they PFE or VFV lands) may apply for a 30-year lease through the formal establishment of a CF area. However, this entails undertaking a formalised registration process. CSO comments at the Loikaw consultation highlight that this process can be burdensome and difficult for communities to navigate without external support.

A notable revision incorporated into the 2018 Law is the inclusion of the new article 8(b) with five sub-clauses, allowing the Ministry to grant permission to individuals or organisations to establish plantations, including teak plantations. Before and during the colonial era, teak was a restricted species that could only be owned by the king/state[1] (Bryant, 1996). This small but significant change in the 2018 Law resulted in many new articles in the Rules due to the need to create mechanisms to authorise the commercial extraction of timber from the new private plantations and community forest areas.

Newly added article 7(d) in the Law states that the Ministry 'may recognise natural forest and mangroves customarily or traditionally managed by local people'. This small but significant wording would appear to offer the possibility of allowing the expansion of the recognition of customary tenure. However, neither the amended law nor the Rules define customarily or traditionally managed forests. Unlike the small change on the private ownership of plantations, this amendment has not led to the development of a series of new articles in the Rules. Article 21 of The Rules only repeats the same terminology, stating that the ministry may 'issue procedures for the recognition of natural forest and mangrove conserved by the local communities according to their customary practise'. No 'customary practise' definition is provided, nor is further instruction provided on how such areas could be designated. The expansion of forest tenure rights in article 7(d) is passed to an as yet unformulated instruction or procedure.

Outside these limited realms, customary forest tenure is not explicitly addressed in the amended Law or Rules. A legal gap remains for communities living in or adjacent to RF/PPF, who, without any clarity around their rights to utilise forest, depend on the goodwill of local forest officers to access resources. Government officials even acknowledged the Law and Rules' failure to adequately recognise customary forest tenure rights as a key weakness in legislation on multiple occasions during the Rules consultations.

### *Forest devolution in new legislation*

Access to timber and non-timber forest products (NTFP) for subsistence purposes is not explicitly guaranteed in the 2018 amended Law nor The Rules. A notable change in the Rules from 1992 is the removal of article 19, which details automatic restrictions applied to all PPF, including trespassing and encroaching (clause b). However, an expanded article 6 of the Rules grants authority to the Ministry to expressly prohibit trespassing and encroaching (Art. 6b), cutting trees (Art. 6c), extraction of forest produce (Art. 6d), and the grazing of animals (Art. 6 g) in PFE, all common customary land uses in forest areas.

An important article and subject of much discussion at the consultations, Article 17 of the 1992 and amended Forest Law states that forest produce may only be removed from forest areas after obtaining a permit or not beyond a 'stipulated amount' in the case of subsistence use:

> Forest produce may only be extracted after obtaining a permit. However, if it is for personal use such as domestic use or for use in agricultural or piscatorial use not on a commercial scale, forest produce may be extracted in an amount not exceeding the quantity stipulated by the Ministry, without obtaining a permit. (Forest Law, 2018)[2]

While the personal use caveat is offered, the wording stipulates that extraction should 'not be on a commercial scale' and 'not exceeding the quantity stipulated by the Ministry'. Neither is defined in the Law or Rules. Instead of providing clarity on the stipulated amounts of forest resources that could be extracted, the Rules state only that the district forest officer has the power to authorise the extraction of forest produce (Art. 31). Hence, the extraction of even minor resources remains at the discretion of local forest officials and guarantees of access do not exist.

### *Commercial extractive industry vs Community-based forest management*

The Law and Rules are formulated around a legislative framework that authorises the Forest Department to oversee forest management with the principal aim of regulating the commercial timber trade. The rights of communities are of secondary importance to the timber trade, and legislation is structured so that areas of customary rights are intended to be excised from the PFE. There is a failure in the Law and the Rules to differentiate between subsistence and commercial extraction of resources, with legislation continually switching between the two resulting in a confusing legal framework.

Throughout the Rules, reference to 'forest produce' continually confuses timber extraction with the subsistence needs of communities. 'forest produce' is defined so broadly in article 2(L) of the Law that it encompasses all living flora and fauna found in forest land, including trees and timber. Chapters 6 and 7 in the 2018 Forest Law refer to the 'Permission for the Extraction of Forest Produce' and 'Removal of Forest Produce', and Forest Law Articles 17 to 26 use the same terminology. As such, when regulatory frameworks attempt to control timber extraction using the terminology of 'forest produce', the same framework inadvertently applies to all flora and fauna in the forest, thereby limiting subsistence use of NTFP under the law.

Other comments from the consultation underscore the contested visions of forests held by the Forest Department and civil society stakeholders. At the Myitkyina consultation, the Director General of the Forest Department in Kachin State exclaimed that forest loss was occurring at an alarming rate and that the Government needed to take 'necessary measures'. He appealed for relevant stakeholders to 'come together' to work on the Rules to prevent forest degradation. Everyone has legal rights, he stated, but we have to be 'fair and equal', to 'bring equal rights to all citizens'. Conversely, civil society groups argued that the law should protect local indigenous people who depend on the forests and have different needs from new economic migrant populations (Myitkyina consultation). The discussion highlights the contestation between forests as a resource separate from the people and managed by the state (but for which equal rights exist over all citizens) and forest as an essential component of local community livelihoods.

## Analysis of the effectiveness of the forest rules consultation process

The following section analyses the effectiveness of the Forest Rules consultation process in facilitating and capturing multi-stakeholder dialogues within the legislative reform process. This study found that the drafting process did not capture the desires and concerns of smallholder farming communities and forest-dependent peoples and that their aspirations were not incorporated into the final 2020 draft Rules.

2,687 recommendations were recorded across all 17 workshops by the Forest Department (MONREC, 2019). Each recommendation was assigned to one of the five thematic topics that formed the structure of breakout group sessions. Two additions to the categorisation were also included: General Comments and a Law Related Comments. The law category designation was assigned to comments when organisers felt that a comment went above the context of the rules and could only be addressed through an amendment to the law. Decisions about whether to include a specific recommendation in the law grouping were often ad-hoc and taken without a broader discussion on the suitability of such decisions. In total, a consolidated list of 1,872 recommendations was developed, assigning recommendations into one of the seven categories, as shown in Table 3.

**Table 3.** Table of summarised results of the consultation process.

| | Subject | Number |
|---|---|---|
| 1 | Constitution of RF/PPF | 459 |
| 2 | Forest Management | 312 |
| 3 | Community Forestry and private Plantations | 260 |
| 4 | Extraction of Forest Produce | 359 |
| 5 | Others/Punishments | 211 |
| 6 | General Comments | 254 |
| 7 | Law related comments | 17 |
| Total | | 1,872 |

Source: MONREC., (2019); Tabular summary of Forest Rules consultation.

### *Capturing diverse stakeholder views and needs*

A key challenge throughout the consultation process was how to capture the diverse views raised by different stakeholders. Typically, recommendations were documented through the prism of the 2019 draft Rules and then presented in a way that put the focus on amending the existing wording of a specific article. This had a profound effect on how the needs of different stakeholders were captured through the consultation process. A mixture of plenary and breakout sessions allowed various issues to be raised by multiple stakeholders. However, the broader needs and desires of forest-dependent peoples, while stated, failed to find their way into the final draft.

Panel style discussion, often with multiple presentations from civil society groups working with communities, ethnic representatives and different trade associations or business groups, facilitated animated discussion of broader issues. Several presentations addressed specific articles in the Rules, but many focused on community forest tenure rights and more general forest governance issues. Communities unequivocally stated their need to access timber and non-timber forest resources for livelihoods and food security. In the Dawei consultation, a CSO representative discussed the need for strategies that 'work for local people' who live inside forest reserves (Dawei consultation).

Across all consultations, multiple demands were made for broadening the rights of communities to collectively manage their forests and associated resources, with clear rights of access and exclusion. The challenge with a consultation process designed to amend the implementation regulations or Rules is that they are nested in an existing Law. While substantial rights-based issues are identified, many are beyond the scope of the existing law and hence cannot be incorporated. At the end of the Myitkyina consultation, a government official, after listening to the small groups' feedback and recommendations, stated that perhaps only 20% of proposals might be considered because they go beyond the extent of the law. This immediately led to a heated exchange with CSOs and farmers expressing their dismay.

> Now we are discussing respectfully and honestly, but now you mention that no matter how we discuss, our discussions will not even be considered. Now you come and blow up all our discussions today … (Farmer representative, Myitkyina consultation)

### *Building shared platforms of understanding*

Plenary sessions provided for conversations that identified common platforms of understanding. Community representatives typically discussed the immediate issues they faced and their vision for forest management. A broad range of issues were identified, from how to recognise customary tenure, where and how to allow shifting cultivation and how communities could be allowed to extract small amounts of timber for personal use. During a plenary question and answer session in the Myitkyina consultation, a farmer from Waymo pleaded:

> We, the farmers, still need to rely on the forest to build our house, and for many other reasons, we depend on the forest. We cannot build a house by buying bricks and iron. We log the trees and use a hand saw to make lumber. I extracted a post for my house, but all my effort was finally destroyed after it was confiscated …

Similar themes of the illegality of farmers' actions to extract timber and forest produce were mentioned in all five consultations. In Yangon, an NLD member of parliament and member of the Environmental Conservation Affairs committee of the Pyithu Huttlaw succinctly summarised the need to consider forest tenure outside of formalised CF.

> How to consider informal forest users. Some can get CF, but what about people living in the forest with their families and who are really poor? We need to consider their rights under non-CF. (NLD Member of Parliament, Yangon consultation)

In many other statements, communities, CSOs and government representatives agreed that much needed to be done to address the current legislative shortcomings regarding the recognition and

protection of community customary forest tenure rights. The consultation process successfully built platforms of mutual understanding in this regard. However, the challenge around the consultation process was how to manoeuvre these platforms of mutual understanding into actionable changes in the legislative framework. In many cases, such agreements of understanding were not recorded as an official recommendation because such comments failed to highlight a particular article or wording within the Rules.

### *Conversations of customary ownership and management rights*

The desire to recognise customary tenure rights in forest areas was a clear point raised across presentations and discussions in all consultations attended by the author. The closing remarks of a presentation from the Conservation Alliance of Tanintharyi (CAT) summarised this sentiment, 'Give local people the opportunity to manage the lands that they use and have historically owned.' In Mandalay, a presentation by an environmental CSO, Green Institute, unequivocally stated that The Rules should represent a rights-based approach, ensuring that people don't lose their rights and customary rights are protected. In summarising the plenary discussions in Loikaw, an official from the Forest Department stated, 'although the Rules have covered customary rights, it isn't sufficient and more needs to be done.'

Many participants shared their knowledge of traditional forest and resource management systems through the plenary discussion process and asked for the recognition of these systems in the legal framework. Among such issues raised, a representative from a Kachin CSO shared their understanding of the complex management systems of the Kachin people in managing land and forest. A CSO representative in the Dawei consultation commented on how communities form committees to manage land and forest with their own rules and regulations.

However, the recording process failed to capture many such discussions. An example of one such case from the small group discussions on Forest Produce in Myitkyina, a farmer group representative spoke up regarding article 22 of The Rules. The article directs the Ministry the power to issue notifications around the extraction, transportation and selling of 'lawfully owned teak'. A seemingly minor issue in the larger scheme of forest reforms, the farmer representative explained that he wanted to change the wording from 'lawfully owned' teak to 'freely owned' teak. A heated debate ensued with considerable disagreement among CSO representatives about the usage of the word 'free' in this context. This discussion went on for some time, where finally, the man explained his sentiment behind the wording;

> I want to say that I own the forest, so I have the right to extract the resources freely. That's why I want to add the word 'free'.

Following this admission, a representative from the Forest Department explained:

> How can we control the extracted logs if you say freely? Is it legal or illegal? How do we know? How can you use free extraction? There need to be some controls. You need to look at the legal impact of what you propose.

Faced with such rationale, the farmer's group representative finally relented, 'OK, don't worry then. Take it out.' It was in countless such ways that the genuine sentiments and desire of individuals to express aspirations to 'own' and 'freely access' 'their forest' was lost in the legalistic reasonings behind individual articles of law. The example was emblematic of multiple different encounters throughout the consultation process. Such examples highlight the aspirations of forest-dependent peoples and the challenge faced by communities with limited legal knowledge in successfully advocating their aspirations in restrictive legalistic structures.

### *The inclusion of stakeholder narratives in the final draft of the Rules*

Several key themes emerge from the narratives and discussions at the consultations. Principally, forest-dependent communities want a law that protects their livelihoods, culture and identity, not just the commercial viability of forest resources. The first author of this paper made a presentation at an internal workshop of the Forest Department following the completion of the consultations, highlighting numerous statements and discussions advocating the various aspirations for forest devolution that emerged from the consultations. However, many of these themes were deemed beyond the scope of the current law. As the post-consultation analysis continued in a series of technical expert round table meetings, many comments were rejected or considered by the Forest Department to be beyond the scope of the law and moved to a section of the recommendations related to legal amendments. One of the recommendations followed by this author from the Dawei consultation asked how the Rules should manage the subsistence extraction of 'forest produce' by indigenous people. Finally, even such questions ended up in the section related to questions currently beyond the scope of the law.

Although the final 2020 version of the Forest Rules that went to the Attorney General's Office and the Pyidaungsu Huttlaw Joint Parliamentary Committee on Law Drafting was never made public, a copy of the document was shared with the authors. An analysis of that 2020 revised draft shows that the 2020 version offers almost no alteration in the regulations related to recognising customary forest tenure rights, nor even in community access to forest produce. That's not to say there are no changes. Various checks and balances are introduced into the process of constituting reserve forests, including translating notifications into ethnic languages to provide information to communities.

On rights to access forest resources, there is one change related to the access of firewood from firewood plantations. Article 51(d) (now 47(d) in the 2020 draft) was amended to remove the previous requirements for community members to 1) pay royalties for firewood extraction and 2) conduct such extraction only at a time stipulated by the Forest Department. The new article now reads:

> (d) at the harvesting time, the villagers may extract the firewood free of charge for their own use by their own community arrangement.

Article 47, along with article 69, which through the addition of the word 'commercially' has effectively made a distinction between commercial and subsistence-based charcoal production, are the only examples of amended articles potentially furthering subsistence access to Forest Resources. Article 55a (previously 33 in 2019 draft) continues to use the caveat 'not more than the stipulated quantity' when referring to private use of timber resources without defining the quantity. Chapters 7 and 8 of the Rules that address extraction and removal of Forest Produce, comprising 37 articles of law, fail to distinguish subsistence use of minor forest produce from commercial extraction of timber and other commercially valuable produce.

## Discussion

The Forest Rules consultation represented a unique opportunity for public input through a genuine multi-stakeholder process. The results of this study clearly demonstrate the desire from participants for community-based management of forests and the recognition and protection of forest-based community access and withdrawal rights. However, the consultation took place at the collective choice level with The Rules nestled in the Forest Law, severely curtailing the level to which the recommendations toward forest devolution could be realised. This imperilled the process from the beginning as there was a lack of common understanding as to the purpose of the consultation (Kronk Warner et al., 2020; Lavigne Delville et al., 2021). As observed in the Myitkyina consultation, when an official made a frank assessment of the limited extent to which recommendations would and could likely be incorporated into the rules, there was an immediate destruction of the trust and common understanding, key aspects also identified by Kronk Warner et al. as necessary components for effective consultations. Opportunities were missed to effectively communicate such limitations and consider strategies around the consultation process and ways

that broader grievances and recommendations could be formally incorporated into future law reform. Addressing these issues transparently and honestly earlier in the consultation would help to build trust in a polarised policy arena where trust is already lacking (Suhardiman et al., 2019).

Faysse (2006) identifies the capacity of stakeholders to meaningfully participate in debates as one of the five challenges faced by multi-stakeholder platforms implemented in unfavourable contexts. Although meaningful stakeholder participation could be witnessed in plenary discussions the results show that the principal structure to obtain recommendations through wording suggestions around specific articles of law became a limiting factor in the design of the consultations and became an impediment to meaningful participation. Significantly, however, the outcomes from the consultation process do demonstrate that reforms were possible. Articles relating to firewood extraction and charcoal production were both amended to provide stronger legal clarity in differentiating between commercial and subsistence use of forest resources. The difference between these and other subsistence forest use issues is that these two aspects were already existing articles in The Rules. As such, the process of recording recommendations to existing articles enabled a successful amendment in support of community access to areas of forest. The challenge in a multi-stakeholder consultation process is how to take these broader issues and feelings of injustice, and overwhelming desire for forest devolution that come out of a nation-wide consultation, analyse these statements against the current legislative framework, and then look for ways in which these grievances could be addressed in proposing legislative reform.

The decade to 2020 saw profound changes in Myanmar as the country opened and began an ultimately short-lived transition toward a system of democratic governance. The National Land Use Policy (NLUP) represented one of the more progressive land governance reforms of the transitional decade in Myanmar (Forbes, 2017; Jansen et al., 2021; Oberndorf et al., 2017). The development and consultation process of the NLUP offers an interesting comparison to that of the Forest Rules reforms. Unlike The Rules, the NLUP sat at the constitutional rules level under Ostrom's institutional analysis and development framework. The policy still faced many challenges, but as the consultations on the policy moved forward numerous progressive reforms were adopted. Reflecting on the successful adoption of these reforms, Oberndorf et al. (2017) conclude that informal donor coordination at the level of leadership played a key role in ensuring that critical gaps did not emerge in the government run consultation and redrafting processes. Other authors document the presence of change agents working inside the NLUP process as facilitating the establishment of different mechanisms that helped lead to desired outcomes (Jansen et al., 2021).

In the Forest Rules consultation, a stronger and more strategic leadership of the entire process, a closer consideration of the internal mechanisms by which feedback was given, documented and incorporated in the updated draft, could have facilitated the opportunity for greater recognition of access and withdrawal rights for forest-dependent peoples without going beyond the extent of the Forest Law. The diminished presence of such strategic leadership and the overall lack of internal change agents managing the mechanisms by which the consultation operated, allowed the long-standing tendencies and prejudices of the Forest Department to favour commercial timber extraction over efforts to realise forest devolution.

The Myanmar Forest Rules consultations bear a striking resemblance to a donor-sponsored workshop to review forest policy in Indonesia documented by Li (2007). She describes how initial heated debate on the big-picture issues on the first day was followed by tedious breakout sessions that failed to find a way to navigate these big issues and resulted in a series of banal recommendations (Li, 2007). Similarly, the Forest Rules consultation opened with plenary sessions which provided a unique venue for discussing broader issues around the need to safeguard customary forest tenure rights, community forest management, and rights to access and withdraw timber and non-timber forest products. However, the common platforms developed at the beginning of the day became diluted in the technical framing of the legal wording of the rules that communities and civil society were unable to navigate successfully.

The forest reform process described above could be readily criticised as petty reform incrementalism (Borras, 2020), bound by reform assemblages that ultimately depoliticise and undermine radical reform movements (Li, 2021). However, in authoritarian states, reform processes occur under highly constrained political contexts with civil society actors that can be both weak and fragmented (Jayasuriya & Rodan,

2007), significantly inhibiting radical reform. Nevertheless, scholars have documented how successful policy reforms in such contexts are able to manage reform processes strategically (Ayana et al., 2018), engage in collaborative governance with the state (Bruun & Rubin, 2022) and opportunistically take advantage of political openings (Froissart, 2019). As Lavigne (2021) observes, such processes are a battle of ideas where civil society stakeholders need to not only agree on where they want to go and how to get there but also have the ability to challenge the state when proposed frameworks are unacceptable. In this sense, the Forest Rules consultations represented an opportunity for civil society and community representatives to address critical issues related to forest governance and access to natural resources. This paper highlights that although the conservative elements of the Forest Department were able to stymy radical reform, the consultations did result in some limited increase in the legal rights of communities to access certain resources. We conclude that it was the framework of the consultations themselves, and in particular the focus on pre-defined legal wordings, that ultimately hindered the consultations to enact a broader legislative reform. This is particularly relevant to the civil society partners that helped facilitate and drive the Forest Departments consultation process. Given an opening such as the desire on the part of the Forest Department to undertake a consultation, an opportunity could have been used to assert more control over the consultation process. As Lavigne writes on the Senegalese engagement in land policy reform processes;

> Actors who know where they want to go and why, have a stronger hand in negotiations and participatory processes. The more civil society organisations are able to frame problems … determine the policy objectives they want … and make specific, shared proposals on how to achieve them, the better equipped they will be … (Lavigne Delville et al., 2021., p.38)

While the natural tendencies of the authoritarian state to stymy reforms can always be anticipated, a coordinated and unified civil society, opportunistically enmeshed with the Forest Department to design and lead a consultation process, also has the opportunity to manage a process that will enable a higher chance in the delivery of their own policy objectives. In the case of the Forest Rules consultation all stakeholders could have benefited from a more coordinated and unified approach with regard to the setting of methodological processes for the consultations with a clear vision of their own policy objectives, and what approaches could be utilised to best achieve these objectives.

## Conclusion

Discussions around the experience of communities and their broad aspirations for forest devolution, and the mutual understandings and shared platforms forged in plenary discussions, represented a critical component of the Forest Rules consultation process that should be documented and reviewed as a vital aspect of the legislative reform process. Such documentation can help all stakeholders, including those ultimately tasked with revising a piece of legislation, to appreciate the elements of law that currently fail to meet or otherwise undermine agreed reforms.

Consultation processes need to be sufficiently structured to allow for the documentation of stakeholder aspirations through processes that are not primarily focused on recommendations based on changes to wording in individual articles of law. Such methods confuse and frustrate non-legal stakeholders and do not allow a broader analysis of the more problematic impacts resulting from legislation. Although it would take considerably more time, and possibly greater legal expertise to implement, government-run and donor-supported consultation processes would do well to have a longer process to gain feedback from civil society and communities lived experiences before beginning the law drafting process. Broad findings could then be incorporated into a legislative review process that looks for ways to address these findings through legislative reform.

Nevertheless, the 2019 consultation process on the Forest Rules in Myanmar also represent a unique opportunity. While many of the discussions in plenary sessions could not be incorporated into the final wording of the 2020 draft of the Rules, these discussions represent a comprehensive snapshot of the challenges faced by communities in the period immediately preceding the 2021 military coup. Insights

from this extensive consultation process can ultimately be fed into a law reform process when the current political crisis ends, and a new reformist government comes to power. While the prospect of a return to civilian rule currently appears limited, the findings and recommendations documented through the Forest Rules consultation process warrant further investigation, analysis and publication.

## Notes

1. In pre-colonial times teak trees were considered a royal species, and the property of the king. Under the 1902 Forest Act promulgated by the Colonial Government of Burma, article 30(1) deemed all teak as the property of the state.
2. Text newly added to the 2018 law is underlined.

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