Introduction

Communities across Myanmar manage forests under customary tenure systems for their livelihoods, food security, culture and identity. However, currently, neither the Forest Law nor the Forest Rules adequately recognise customary tenure rights. It is essential to recognise customary tenure in the law and on the ground to enable these communities to continue to protect these forests, which are vital for economic development, climate change mitigation and adaptation, and biodiversity conservation.

The 1994 Forest Law was amended in September 2018, and the new draft Forest Rules – which elaborate on how the Law should be implemented – are currently undergoing a revision process through consultations. The Forest Department and its organising team have held consultations in all 14 States and Regions. Civil society organisations have also hosted consultations with communities to review the Law and provide recommendations on the Rules. The recommendations in this document are based on earlier analyses of the Forest Law and Rules, recorded comments from all the State and Regional consultations hosted by the Forest Department, recommendations developed by civil society and communities in Kayah, Chin, Shan, Kayin, and Kachin States and Tanintharyi Region, and interviews with key experts, including members of the Mekong Region Land Governance (MRLG) Customary Tenure Alliance and OneMap Myanmar.

This report summarises some of the key recommendations relating to the Forest Law and Rules that are needed to better recognise customary tenure rights and enact the reforms that have been called for throughout the consultation process.
Pathways for an inclusive Forest Law

Recommendations from the consultations have emphasised a clear need to reform the 2018 Forest Law, not just the Forest Rules, in order to protect Myanmar’s declining forests. Any revision to the draft Forest Rules will make a marginal impact on the recognition of customary forest tenure rights if the Forest Law is not also amended. Revisions should be conducted through an inclusive consultation process that allows ethnic nationalities and local communities to play a role in shaping the Law. Establishing guiding principles and using these to revise the Law is recommended as a more effective approach than discussing the Law and Rules line by line.

Some of the key observations on the Forest Law support suggestions to:

- **Harmonise the Forest Law with the National Land Use Policy (NLUP):** The NLUP, endorsed in 2016, recognises the customary tenure rights of ethnic nationalities but has yet to be incorporated into law. The amended Forest Law requires further revisions so that it is harmonised with the NLUP and the upcoming umbrella National Land Law. The NLUP establishes customary tenure rights, the right to Free, Prior, and Informed Consent (FPIC), and the right for both men and women to participate in land use planning. Recognising customary tenure rights in these laws includes the right of communities to make management decisions in respect of forests, farmland, orchards, waterways and other natural resources as an integrated system, rather than separating land use types between different land titles and Ministries.

- **Centre the perspectives of communities:** The current Law does not reflect an understanding of the lives, values or priorities of ethnic nationalities or of the local communities that manage forests through customary tenure systems.

- **Prioritise sustainable livelihoods:** The Law needs reorientation from prioritising forest management for businesses and commercial extraction to placing the greatest emphasis on sustainable management and the protection of livelihoods, the environment and culture.

- **Strengthen forest governance:** Provisions for sustainable forest management, transparency, oversight and accountability should be included, grievances addressed, and historical injustices redressed.

- **Establish tenure rights in forest estates:** The tenure rights of communities and individuals whose village and agricultural lands, including those under customary tenure management, have been inappropriately included within Reserved Forests (RFs) or Protected Public Forests (PPFs), should be guaranteed.

- **Restore land rights:** The land tenure rights should be restored to communities and individuals who have been denied such rights, and guidance for the return of refugees and internally displaced people (IDP) to their original customary lands should be established. The proper registration and protection of those tenure rights should be ensured.

- **Decentralise:** A more decentralised forest management should be promoted by recognising the roles and the responsibilities of States, Regions, and Self-Administered Zones, as allowed in Schedule Two of the Constitution, and a framework that can be integrated with future State and Regional laws should be provided.

- **Democratise forest management decisions:** Elected representatives should be established with leadership, decision-making, and oversight roles over committees at Township and District levels to increase accountability and transparency.

- **Diversify mechanisms for forest management:** The Law recognises Community Forestry, but diverse models and mechanisms are needed to better enable community-led forest management and recognise customary tenure rights.

- **Establish rights and responsibilities:** The Law should establish the rights and responsibilities of local communities to participate in forest management, protect forests from threats, register grievances - and have them addressed - and independently observe and monitor forest management.

- **Separate regulations:** Commercial and non-commercial use regulations should be separated in the Law; regulations for timber and for non-timber forest products (NTFPs) should appear in separate chapters.

Much of the remaining forested areas that are not within Reserved Forests (RFs) or Protected Public Forests (PPFs) are already in areas that are affected by conflict, and subject to the Nationwide Ceasefire Agreement (NCA). This Agreement directs coordination between its signatories to support environmental conservation and socio-economic development. The Forest Law should not be implemented in areas where there is the potential for conflict or a breach of the NCA, and the full consent of NCA signatories and local communities should be obtained in advance, particularly when RFs or PPFs are being demarcated, or when concessions for logging or plantations are being approved.
The concept of free, prior and informed consent (FPIC) is an internationally recognised standard applicable to consultations with ethnic nationalities and Indigenous Peoples (IPs), as well as to local communities. It is recognised in the UN Declaration on the Rights of Indigenous Peoples. It is widely viewed as the best practice to ensure that the views of ethnic nationalities, Indigenous Peoples and local people are taken into account in relation to activities that affect them and the lands they manage under customary tenure. This includes logging and plantations.

Integrating FPIC and participatory land use planning throughout the Forest Law and Rules is necessary to align them with the National Land Use Policy (NLUP). The Ethnic Rights Protection Law, Environmental Impact Assessment (EIA) Procedures, Strategic Framework for National Environmental Policy, and the National Biodiversity Strategy and Action Plan (NBSAP) all contain aspects of FPIC, notably the rights of the public to information, consultation and participation in decision-making.

FPIC is a continuous process that has no deadline and uses locally legitimate decision-making processes defined by communities, including customary institutions and systems where appropriate. Information should be shared and decisions reached through inclusive and accessible discussions between the government and communities. The burden of submitting and proving land claims should not rest solely on the community members, but instead the boundaries should be determined through inclusive, participatory mapping with communities as directed by the NLUP.

FPIC must be incorporated within the Forest Rules for the establishment of Reserved Forests (RFs), Protected Public Forests (PPFs) (Chapter II), Forest Plantations (Chapter V Rule 47), Private Plantations (Chapter VI) and the granting of permits for commercial logging (Chapter VII). It must also be reflected in activities or projects where development work or economic activity exerts an impact on communities or on the land, they manage under customary tenure systems (Rule 27).

The current draft Rules already direct the government to exclude land under customary tenure from RF and PPF boundaries. To achieve this aim, it is necessary to thoroughly revise the process to fulfil the principles of FPIC, with further elaboration and integration in each of its sections, or develop a new section where FPIC is the focus. The level of detail in respect of what specific steps the government should take in the Law, Rules, procedures, and instructions should be considered. The Rules should specify where and how information must be distributed, including within village administration offices, who must be informed (e.g. village heads, Members of Parliament (MPs), or the public), what local languages should be used, and whose responsibility it is to provide this information (e.g. the Township Forest Officer). Notifications relating to the establishment of RFs or PPFs (Rule 3) should include a list of villages that might be affected to clearly establish who the Ministry of Natural Resources and Environmental Conservation (MONREC) must inform.

The Village, Ward and Village Tract Administration Law (2012) allocates a role for village tract and village level administration in the protection of the rights of the people within their jurisdiction, but this role is not reflected in the Forest Law or Rules.

Some existing mechanisms could be considered in guiding the incorporation of FPIC and oversight for establishing logging concessions, economic projects and plantations. For example, under Presidential Orders covering infrastructure projects, companies applying for road construction or other tenders using national public funds must receive a letter of recommendation from a village tract administrator and a Member of Parliament (MP) when they place a bid for the tender. The tender process for...
logging, plantations and economic projects in forests could emulate this by including evidence of FPIC before they are granted approval.

II. Decentralisation

The Forest Law is overly centralised, which hinders communication between communities and the government, impedes transparency in government decision-making, and prevents grievances from being meaningfully addressed.

In contrast to Schedule Two of the Constitution, which places environmental protection and conservation under the responsibility of States and Regions, the Forest Law and draft Rules continue to centralise most decision-making power. The Law and Rules should be revised with an eye to supporting decentralisation to States and Regions. In multiple parts of the Law and Rules, powers are granted to Union government officials, inviting comments or remarks from State or Regional governments. It is recommended that, when appropriate, Self-Administered Zones (SAZs) should be added, and that the Law and Rules should require agreement rather than just comments from States, Regions and SAZs. The Forest Law should acknowledge the responsibility of national, State and Regional parliaments to monitor the implementation of the Forest Law.

III. Public participation in land use planning

In the National Land Use Policy, public consultation and an inclusive, participatory approach to land use planning and decision-making are basic principles. Customary tenure rights are also recognised. However, the Forest Law and Rules do not yet include participatory land use and forest management planning. The forthcoming umbrella National Land Law should elaborate on how to implement the NLUP’s participatory land use planning processes.

Land use planning can have a positive effect on forest management and protection, and provide a process through which communities may grant FPIC, and hold discussions among themselves and with their government about economic development and how land should be used in the future. The Biodiversity Conservation and Protected Area (BCPA) Rules under the BCPA Law already mention the role of participatory mapping but the Forest Law and draft Rules do not. Increasing public participation could be achieved by including MPs, and local community and civil society representatives in drafting the ten-year district forest management plans, for example under Rule 25.

IV. Customary tenure and traditionally protected forests

The legal recognition of customary tenure, including over forests, is a priority of civil society and communities throughout Myanmar. Section 7(d) in the 2018 Forest Law now allows MONREC to recognise natural forest and mangroves that are customarily conserved by local communities. Section 7(d) is paired with Rule 21 which allows the Ministry to issue procedures for recognising natural forests and mangroves conserved by local communities according to customary practice, rather than being designated as RFs or PPFs.

While the idea of legally recognising traditionally conserved forests in the Law was welcomed in the consultations, the related provisions are neither effective nor sufficient. Communities manage forests, agriculture, waters and other natural resources together in integrated systems. Full recognition of customary tenure systems includes customary institutions and decision-making rights across all land uses. Dividing customary land between different Ministries, with different land categories for forests and other land types under customary management, could disrupt effective customary forest and land governance and undermine sustainable management. It also risks increasing land conflict and deforestation.

The role of local communities in protecting the environment through ‘territories and areas conserved by Indigenous Peoples and local communities’ (more commonly referred to as ICCAs) that are managed on a landscape or territorial basis, often through customary tenure, should be recognised.

It is still unclear whether the many types of forest that communities manage and use can be recognised under Section 7(d) as Conserved Forests, or if that section refers only to Protected Forests. A list of examples of the types of forests that could be recognised under 7(d) could be added to the Rules. For example, communities in Kayah State listed ‘township reserved forest’, ‘family reserved forest’, ‘village reserved forest’, and ‘religious and spiritual forest’ as specific types to be listed in the Rules. This example is not exhaustive but provides an indication of the diversity of forest categories defined by local communities of different cultures. The Law should clarify the differences between recognition under Section 7(d) compared with arrangements recognised under the heading of ‘Community Forestry’ (Chapter IV). Any procedure to recognise customary forests under Section 7(d) should be developed with local communities and civil society, and should be compatible with customary laws and practices.

V. Reserved Forest and Protected Public Forest establishment

Communities across Myanmar have discovered that their orchards, customary forests and shifting cultivation areas have been included in RFs and PPFs without their knowledge or consent.

The stated goals of RF and PPF establishment, as specified in the Forest Rules, are to define their boundaries after excluding land on which land use rights were obtained traditionally/where the customary rights may be applied. To fulfil this goal and accurately identify customary land, a thorough revision of the process is necessary, as described in previous sections on FPIC and participatory land use planning, in order to ensure broader participatory processes in alignment with the NLUP.

Elected representatives should have leadership and/or oversight roles on the committees that establish RF and PPF boundaries.

Under FPIC procedures, communities use their own decision-making processes, often including discussions at public village meetings, to grant or withhold consent. The current process for RF and PPF establishment and the deadlines imposed are too rigid and do not include community decision-making processes.
VI. Restitution of customary tenure rights in existing RFs and PPFs

Existing RFs and PPFs are currently established on land that is under customary tenure, including both forests and agricultural land. Forest Law and Rules should include guidance on restoring customary tenure rights that were improperly included within RFs and PPFs in the past, and allow the restoration of rights to returning IDPs and refugees in the future. The Government of Myanmar has acknowledged the need to restore the land rights of farmers and forest users, starting with the 2013 Presidential Decree, which states that areas of permanent agriculture and house plots for villages containing more than 50 households should be removed from the boundaries of RFs and PPFs. In contrast, upland cultivation and orchards are being offered Community Forestry certificates and 30-year leases rather than being removed from the associated RFs or PPFs and given land titles.

According to the current draft Rules 13(a) and 19(a), if the Ministry cancels the ‘ whole or a part of the reserved forest (...) the rights of the people to extract forest-produce and land use which are void at the time of constitution shall not be resumed’. These Rules should be revised to explicitly allow the restitution of customary land and the return of land to IDPs and refugees. A process for revising and updating RFs and PPFs, as mentioned in the previous section on establishment, could help to address this issue. Rules about the process for review could be added to ensure transparency and accountability.

VII. Reserved Forest and Protected Public Forest management

RFs and PPFs are ostensibly different, but in practice they are similarly managed from the perspective of local communities. When an RF or PPF is declared, the Ministry may prohibit any of the activities listed in Rule 6, from trespasing to the collection of timber and other forest products. Instead of prohibiting all activities, the Ministry should prohibit only those required to fulfil the management objectives of the forest and allow the other uses to continue sustainably. Civil society organisations (CSOs) in Kayah State, for example, recommended that activities listed in Rule 6, such as walking through the forest or extracting forest products that are not explicitly banned, should be deleted. Section 6 grants the Ministry discretion in what it prohibits when issuing the notification to declare the establishment of a PPF or RF: while this discretionary power should not be used to prohibit established livelihood activities in PPFs, it should protect them from being converted to agriculture or other land uses.

VIII. Shifting cultivation in Reserved Forest and Protected Public Forests

The current definition of shifting cultivation in Chapter I of the Forest Law should be revised. It should, for example, be defined as a rotational agroforestry system to more accurately describe its nature.

Rule 12(b) and Rule 18(b) state that rights to engage in shifting cultivation within RFs and PPFs are terminated if they have not been ‘ enjoyed’ for three consecutive years. This hinders sustainable rotational agroforestry, in which it is considered important in respect of sustainability and biodiversity for areas to lie fallow for longer than three years. The right to protect or conserve an area may similarly be undermined if it is not considered to have been ‘ enjoyed’ with active use. While shifting cultivation areas in principle should not be included in the boundaries of RFs or PPFs, revising 12(b) to distinguish between customary tenure and/or shifting cultivation and other types of use would protect customary land under shifting cultivation. This could prevent farmers from having to shorten fallow periods to establish tenure rights if their land is included within an RF or PPF.

There is no credible justification for singling out rotational agroforestry, or shifting cultivation (shwe pyaung taungya), to be banned on land at the disposal of the government in accordance with Rule 32. This Rule represents a direct threat to the livelihoods of local communities and should be deleted.

Similarly, Rule 29 covering the regulation of fire on land should be deleted as it could be used as a way to ban or fine people for shifting cultivation, as communities often use fire to clear secondary forest growth in fallow areas after the soil has regenerated from previous cultivation periods.

3 Shwe pyaung taungya maintains higher carbon stocks and biodiversity than other types of agriculture, preserves diverse landscapes and agricultural biodiversity, and is the foundation of the livelihoods and food security of upland farmers across Myanmar. See, for example, the Special Issue on Swidden Agriculture in Southeast Asia 2009. Human Ecology. Vol 37 and multiple publications on shifting cultivation by TRIP NET, POINT, KMSS, RRTIP, among others. For recent research in Myanmar.
Rule 12 (b) and Rule 18 (b) could also negatively affect refugees and Internally Displaced Persons (IDPs), and therefore should not be used to prevent them from returning to home, particularly if their land has been included in a RF or PPF during their absence.

IX. Development projects and economic schemes, plantations and timber

The Rules should prevent development projects, plantations or timber concessions from being established on customary land. The relevant chapters covering these activities should require: a) FPIC of affected local communities and customary rights holders; b) social and environmental impact assessments in accordance with the Environmental Conservation Law (2012) and EIA procedures; and c) mechanisms for transparency and oversight.

Rule 27 grants power to the MONREC to allow ‘any development work or economic scheme’ on forest land and forest-covered land to be at the disposal of the government. The draft Rules rightly require that these projects must comply with the Environmental Conservation Law (2012) and follow Environment Impact Assessment (EIA) procedures. However, they do not include any criteria for determining what kind of projects might be allowed, and why. Under the draft Rules, the government could use the Land Acquisition Act to seize land as an RF or PPF, then transfer that land to private companies for economic projects under Rule 27. The EIA procedures are important but not sufficient to ensure that these projects do not cause avoidable deforestation or provide a legal pathway to privatise forests at the expense of the public.

In Rule 27 any ‘development work or economic scheme’ that requires an environmental assessment report should specify that this also embraces timber concessions, forest and private plantations. Criteria to be met by development and economic projects should be added to ensure that natural forests are not cleared or that community and customary forests and land is not transferred to private companies (this means that it must be used only for public purposes). Independent monitoring should be included to ensure that the plans developed through the EIA procedure are carried out.

X. Non-Timber Forest Products (NTFPs) and reserved trees

Customary tenure systems often provide a traditional local model for regulating and managing NTFP use and harvesting practices. The Forest Law and Rules do not provide accessible regulations for the non-commercial and small-scale use of NTFPs, or for small-scale commercial trade.

Under the Forest Law, reserved trees are species that cannot be cut or used unless this has the approval of the Forest Department. The reserved tree list comprises around one hundred species - including teak, valuable hardwoods, pine trees, and multiple mangrove species - and has not been revised in decades. Teak is nationalised and therefore it all belongs to the State. In the amended 2018 Law and draft Rules, teak trees can be registered with the Forest Department in plantations or community forests. The reserved trees list and nationalisation of teak create obstacles for recognising customary tenure rights for communities living in forests with these species.

Details about NTFP regulations are outside of the scope of this review. However, changes to these are essential to support and incentivise the sustainable use of forests and forest products. The Rules should define criteria and processes for listing reserved tree species, and a critical revision of the reserved tree list should be conducted using these criteria. Many of these species are not threatened and are important for livelihoods, so they should be removed from the list. Revising the Forest Law will be necessary to change the status of teak on the reserved species list and to reform NTFP regulations.

Conclusion

This report has reviewed and summarised key recommendations for revisions to the Forest Law and Forest Rules to better protect and recognise customary tenure rights for local communities. A previous version of this document has been shared and reviewed as part of the Expert Roundtable Discussions on the Forest Law and Forest Rules that is ongoing. It is important to note that this document pertains specifically to the implications of the Forest Law and draft Forest Rules on customary tenure and is, therefore, not exhaustive in respect of all the recommendations made.

The consultation process has provided an opportunity for government, civil society and communities to discuss the details of the Law and the reality on the ground in all States and Regions and to identify the reforms to forest governance that are needed. There are concrete changes that can be made to improve the Rules that would reduce the risks that they pose to customary tenure rights and would add positive processes for FPIC, regulation and oversight.

At the time of publication, the results of this review process are unknown as are possible changes to the Forest Law and draft Forest Rules. The potential revisions are dependent on various government processes, and the consultation process thus far has resulted in dialogue between government and communities which provides a strong basis for further reform of forest governance.

This review has demonstrated the clear need to revise both the draft Forest Rules, and, more importantly, the Forest Law, and has highlighted the fact that local communities must be placed at the centre of forest policy in Myanmar, particularly in light of the upcoming National Land Law.
References and Notes


iii  The National Land Use Council, formed in 2018, is currently in charge of implementing the NLUP and drafting an umbrella National Land Law that should incorporate into law the principles developed in the policy.

iv  Similarly, in the 1995 Forest Policy there are specific policy imperatives for sustainable management, public participation and the need to provide for the needs of local communities.

v  In the Ethnic Rights Protection Law, FPIC is clearly stipulated within Chapter 4 Article 5 wherein it states that “[t]he matters of projects shall completely be informed, coordinated and performed with the relevant local ethnic groups in the case of development works, major projects, businesses and; extraction of natural resources will be implemented within the area [where there are] ethnic groups.”

vi  Rules 8(a)(i) and 15(a)(i) describe amending proposed RF and PPF boundaries to exclude land where customary land rights have been obtained traditionally during the scrutiny process to establish RFs and PPFs.

vii  In reference to Parts III and IV of the NLUP.

viii  Customary tenure is specifically referred to in Chapter VIII of the NLUP.

ix  In the draft Forest Rules, Section 21 states, “The Ministry may, under sub-section (d) of section 7 of the Forest Law, issue procedures for the recognition of natural forest and mangrove conserved by the local communities according to their customary practice.”

x  ICCAs are recognised under the Convention on Biological Diversity (CBD) as an effective type of conservation where communities are the primary decision-makers. More information on ICCAs is available at: https://www.iucn.org/concerpt/indigenous-and-community-conserved-areas-bold-new-frontier-conservation).


xii  In correlation with Sections 8(a)(i) and 15 of the Forest Law.

xiii  The relevant sections for RF and PPF establishment are in the Forest Law Chapter III and the draft Forest Rules Chapter II Sections 3-12 for RF and Sections 14-18 for PPF.

xiv  See Part III Chapter I in the NLUP.

xv  More specific suggestions related to specific sections of the draft Forest Rules were as follows. Add Rule 9(a)(iv) “having been granted the FPIC of local communities” as a requirement, add the same text as Rule 14(g)(iii) for PPFs; add a Member of Parliament as the chair of the preliminary scrutiny bodies formed in Rules 7 and 14; revise the mentions of the Land Acquisition Act in Rules 8 and 15 (multiple consultations included recommendations to delete references to this Act, as it does not provide a suitable framework for land confiscation for only the public good).

xvi  In the draft Forest Rules, Rule 6 details that the State can claim any land as reserve and protected public forest and can “express […] prohibitions relating to any of the following matters except the rights [that] existed on the day of declaration: (a) constructing the new building; (b) trespassing and encroaching; (c) cutting trees; (d) extracting forest-produce; e) clearing land; (f) establishing a new crop or forest plantation; (g) nature based tourism business; (h) establishing a botanical garden or zoological garden; (i) extraction of below ground and above ground natural resources; (g) using as grazing ground; (h) setting a forest fire.”

xvii  The current definition, roughly translated to English, reads “shifting cultivation (taungya) means an agricultural practice by felling and burning the trees and [an area that does not have] established farming [tied to one] place”.

xviii  After establishment of an RF (Rule 12(b)) or PPF (Rule 18(b)), the draft Rules state that “if the rights allowed are not enjoyed within (3) consecutive years from the date of declaration, such right shall be deemed terminated”.

xix  Rule 32 states that “The Forest Department may, by notification, determine any part of the forest-covered land at the disposal of the government with the approval of Naypyidaw Council or State/Region Government as an area where the shifting cultivation (taungya) is not allowed.”

xx  In particular see Rule 27(c) in the draft Forest Rules.

xxi  Rules should include a statement that reserved trees should be declared for conservation purposes, based on data and consultation with local communities, and that the list should be periodically revised.
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