



Promotion Of Indigenous and Nature Together

POINT: Policy Summary 2014-2021

Written By:

Jonathan Liljeblad, PhD, JD

Senior Lecturer, Australian National University College of Law

jonathanliljeblad@gmail.com



POINT: Policy Summary 2014-2021

Contents

| | | |
|-------|---------------------------|----|
| (I) | Introduction | 1 |
| (II) | POINT Report Findings | 2 |
| (III) | Summary of POINT Findings | 8 |
| (IV) | Mapping & Gap Analysis | 11 |
| (V) | Additional comments | 23 |
| (VI) | Conclusion | 24 |

I

Introduction

This document provides a summary of policy recommendations on indigenous land rights issued by POINT over the years 2014-2021. The summary has two purposes: 1) assemble and distill the policy reforms recommended by POINT policy briefs published during 2014-2021 into a single body of recommendations to be fulfilled by Myanmar laws, and 2) conduct a mapping & gap analysis identifying the deviations between the recommendations and existing Myanmar land laws. The value of such purposes is to highlight the types of changes that need to be made to Myanmar land laws to satisfy POINT policy recommendations for indigenous land rights.

To fulfil the above purposes, the sections below proceed along the following steps:

- Present the findings of individual POINT policy briefs regarding indigenous land rights,
- Summarize the policy findings of the disparate POINT policy briefs as a single set of recommendations to protect indigenous land rights in Myanmar, and
- Provide a mapping of the deviations between the above recommendations and existing Myanmar land laws, with gap analysis identifying the changes that need to be made to each law to satisfy POINT recommendations.

II

POINT Report Findings

In terms of reports with policy recommendations, during the period 2014-2021 POINT issued five policy briefs issuing recommendations for reforms in Myanmar laws affecting indigenous rights towards land. In reverse chronological order, the five policy briefs had the following titles:

- Indigenous Peoples’ Rights to Customary Land in Myanmar (2019)
- The Necessity: Collaboration for Coherence in Myanmar Climate Change Response (2018)
- How Can REDD+ Support Climate Change Adaptation of Indigenous Peoples? (2018)
- Customary Land Tenure: Case Study in Sar Pauk Village (2016)
- Customary Land Tenure: Case Study in Myay Latt Village (2016)

The recommendations of each report are summarized in the following subsections.

Indigenous Peoples’ Rights to Customary Land in Myanmar (2019)

The report reviews the status of land rights for indigenous peoples in Myanmar, identifying the issues of various Myanmar laws affecting land rights. To resolve the issues regarding indigenous rights to land, the report presents the following recommendations to be included in a new National Land Law:

- **Recognize pre-existing indigenous rights**—Recognize pre-existing indigenous rights for indigenous lands, territories, and resources. This is possible by introducing a legal concept of “Native Title,” which refers to the pre-existing rights of indigenous peoples to lands, territories, and resources prior to government action or private sector claims.

- **Follow ICESCR and UNDRIP**—Reference the rights specified in the ICESCR and UNDRIP. Myanmar is a state party to the ICESCR and hence has obligations to implement the treaty into domestic law. Myanmar voted in favour of UNDRIP, and while UNDRIP is a voluntary instrument it serves as a statement of aspirations in terms of international norms that all states should try to meet.
- **Recognize complexity of indigenous customary land tenure**—Allow flexibility for indigenous peoples to use their own customary systems to govern their land, territory, and resources. Different indigenous peoples have different customary tenure systems, and a single area of land, territory, or resources may have multiple indigenous peoples with multiple layers of customary systems. This makes customary tenure a complex subject, and so it is necessary for the new National Land Law to have enough flexibility to deal with such complexity.
- **Full protection**—to protect indigenous rights, the new National Land Law should recognize that indigenous people have:
 - › Right of ownership of their territories
 - › Right to manage and develop their lands and natural resources based on their own customary land tenure systems
 - › Right to regulate entry of outsiders
 - › Right to regulate and negotiate terms and conditions for exploration and exploitation of natural resources
 - › Right to Free Prior Informed Consent (FPIC) in relation to all interventions on indigenous peoples' lands
- **Collaborative management & conservation**—Recognition of Native Title means that indigenous lands are not affected by government zoning or land classification, and are not affected by government or private sector claims. In situations where national laws and zoning overlap with areas under Native Title, the national laws and zoning must be harmonized with state-level laws and zoning and with indigenous land governance systems. In addition, there should be collaboration between national and state government agencies with indigenous land governance systems with respect to indigenous areas. Finally, land, territory, or resources that are under Native Title should be under one single government administration.
- **Burden of proof**—Under law, there should be a presumption of indigenous customary land tenure rights, and so anyone who disputes the existence of indigenous customary land tenure rights will have burden of proof.
- **Diversity**—The new National Land Law should recognize diversity of indigenous customary land tenure systems in different states, self-administered areas, and non-ethnic regions. In addition, the law should address rights at different scales (e.g., territories vs.

villages vs. parts of villages), separated areas (i.e., not contiguous), times (e.g., customary rights can arise over recent areas as well as ancestral lands), and access (e.g., an indigenous group may have full customary land tenure rights over one area along with customary access rights over another area). In addition, the law should allow different mechanisms to address the diversity of types of indigenous claims.

- **Communal and individual rights**—The new National Land Law should recognize communal land rights and individual land rights.
- **Self-determination**—Indigenous customary land tenure should be part of legal recognition of the indigenous right to self-determination.
- **Interim protection**—Identification and recognition of indigenous lands requires time. To prevent land grabbing during the time needed for identification and recognition, the law should have measures to stop activities such as moratoriums.
- **Rights-holders**—The new National Land Law should recognize communities, parts of communities, and individuals as being legal entities capable of holding legal rights. In addition, different communities should be able to form alliances that can also hold legal rights.
- **Federalism**—Land governance should follow principles of self-determination and subsidiarity, which means that land governance is exercised at lowest possible local level (i.e., communities). In addition, procedures should be simple and participatory, with joint involvement of rights-holders and government office at the lowest level of government.
- **Checks-and-balances**—The law should have system of checks-and-balances to ensure participation, transparency, and accountability in land governance.
- **Inclusion**—All indigenous and non-indigenous groups within indigenous areas should be included in land governance systems for indigenous areas.
- **Existing land claims in indigenous areas**—Land claims by individuals and private sector actors in indigenous areas should be re-assessed.
- **Restitution**—The law should provide restoration of rights and livelihoods to indigenous communities, families, & individuals displaced by armed conflict, natural disaster, or land grabbing
- **Land appropriation**—Appropriation of indigenous land, territory, or resources in the national interest must be done with Full Prior Informed Consent (FPIC) of affected communities, families & individuals.
- **Harmonization**—all laws must be harmonized with the new National Land Law

The Necessity:

Collaboration for Coherence in Myanmar Climate Change Response (2018)

The report presents the results of a 2018 workshop on Myanmar climate change policies and indigenous peoples. The report identifies actions that can recognize and promote contributions of indigenous communities to Myanmar's climate change policies under the UNFCCC. The report presents the following recommendations:

- **Indigenous participation**—Indigenous peoples & local communities should have full & effective participation in the implementation of policies, laws, & action plans to address climate change.
- **FPIC**—climate-related activities must have Free Prior Informed Consent (FPIC) of affected indigenous communities.
- **Illegal logging & anti-corruption**—efforts to stop illegal logging and combat corruption should be done with coordination & collaboration of indigenous peoples & local communities.
- **ICCAs**—there should be recognition of Indigenous Community Conserved Areas (ICCAs) to protect & manage forests.
- **Traditional knowledge**—it is important to record, document, & share traditional knowledge (TK) of indigenous peoples to help advocate for indigenous rights in policy-making & implementation.

How Can REDD+ Support Climate Change Adaptation of Indigenous Peoples? (2018)

The report presents findings of a study on community forestry in Myanmar relevant for REDD+. The findings are intended to help the design of climate change policies, particularly REDD+ policies, that are responsive to the needs of indigenous and forest communities and can strengthen their capacity to adapt to climate change.

Recommendations from the report call for Myanmar REDD+ Strategy follow the safeguards regarding land tenure, forest governance, and gender proposed by the 16th Conference of the Parties (CoP) of the United Nations Framework Convention on Climate Change (UNFCCC) in 2010 (Cancun Safeguards). In addition, the recommendations align with a goal of harmonizing Myanmar laws with UNDRIP, particularly regarding indigenous land rights. Specifically, the recommendations are

- In order to fulfil Myanmar obligations to UN (including REDD+) and achieve the goals of UNDRIP, the provisions under the National Land Use Policy (NLUP) 2016 should recognize indigenous customary land rights of all indigenous communities.

- Myanmar provisions for REDD+ should treat shifting cultivation as a form of agroforestry, and the Myanmar National REDD+ Strategy should help shifting cultivators develop their land use systems.
- Myanmar REDD+ provisions should promote community-based forestry and explore the potential establishment of Indigenous Community Conserved Areas (ICCAs) to strengthen biodiversity conservation by indigenous communities.

Community Forestry:

What Benefits for Forests & Indigenous Peoples? (2017)

.....

The report summarizes findings of a study of community forestry in Myanmar indigenous areas. The study investigates whether community forestry has provided more secure land tenure for indigenous peoples in Sar Pauk and Myay Latt communities in Magwe. The report makes separate recommendations for customary land governance, community forestry

- Customary land governance
 - Recognize customary land governance systems of indigenous communities
 - Recognize shifting cultivation as an indigenous agroforestry system
 - Support efforts of indigenous farmers to cope with climate change
 - Support experimentation by indigenous peoples to increase productivity of fallow land
 - Recognize value of customary land governance for biodiversity conservation, with potential of Indigenous Community Conserved Areas (ICCAs)
- Community forestry
 - Raise awareness of the Community Forestry Instruction 2016
 - Explore how CFI 2016 can be applied to maximize benefits and land tenure security for indigenous peoples
- Land tenure security
 - Raise awareness of awareness of laws affecting land tenure and international indigenous laws among Myanmar communities, government, CSOs, international NGOs, and donors
 - Support indigenous communities in mapping their territories and strengthening the customary laws on resource management and conservation
 - Increase advocacy for recognition of customary tenure, land use, implementation of the NLUP, and harmonization of all laws with the NLUP

- ▶ Support representatives of ethnic nationalities in negotiating for decentralized land governance in Myanmar's peace process

Customary Land Tenure: Case Study in Sar Pauk Village (2016)

The report presents the results of a case study of customary land tenure in Myay Latt village in Magwe. The report finds that a lack of recognition for customary land tenure systems challenges community livelihoods and frustrates community efforts to maintain customary practices of land and forest management. The report recommends:

- **Good practices**—promote good practices of customary land management to ensure food security, with collective activities and sharing within the community
- **Community-led forestry**—promoting community forestry management improves environmental conservation
- **Basic needs**—support basic needs (e.g., transportation & cultivation) of community way of life to improve livelihoods & opportunities
- **Right to remedy**—laws should provide legal rights to remedy loss of land and cash crops
- **Customary land tenure**—laws should recognize customary land tenure to ensure food security, forest management, and values of indigenous communities

Customary Land Tenure: Case Study in Myay Latt Village (2016)

The report presents the results of a case study of customary land tenure in Sar Pauk village in Magwe. The report finds that a lack of recognition for customary land tenure systems allows outsiders to violate community lands and harm community livelihoods. The report recommends:

- **Sustainability**—recognition of customary land tenure is important to ensure sustainability of community society, culture, livelihoods, and environment
- **Customary forestry**—promotion of customary forest management practices supports environmental sustainability
- **Women's land rights**—recognition of customary land tenure should include recognition of the right to land for women

III

Summary of POINT Findings

The disparate recommendations of the above reports can be synthesized into a single body of policy recommendations reflecting the work of POINT from 2016-2021. In brief, the above reports provide recommendations that fall into general thematic categories of indigenous rights, governance, customary land tenure, and community forestry. Within each category are specific recommendations on the types of provisions that should be enacted into Myanmar laws.

■ Indigenous rights

- ▶ Recognize & support legal personality for indigenous peoples, collectively or individually, consistent with international law
- ▶ Recognize & support legal rights to protect indigenous rights, communal & individual, consistent with international law
- ▶ Recognize & support legal rights of indigenous peoples to own their territories, both communal & individual, consistent with international law
- ▶ Recognize & support legal rights of indigenous peoples to regulate entry of outsiders to indigenous lands, territories, & resources, consistent with international law
- ▶ Recognize & support legal rights of indigenous peoples as pre-existing prior to government action or private sector claims
- ▶ Recognize & support legal rights of indigenous traditional knowledge (TK)
- ▶ Support recording, documenting, & sharing traditional knowledge of indigenous peoples
- ▶ Provide legal remedies for restoration of rights and livelihoods to indigenous communities, families, & individuals for violations of indigenous rights, loss of land, cash crops, or displacement due to armed conflict, natural disaster, or land grabbing
- ▶ Recognize & support legal rights promoting gender rights

■ Self-determination

- ▶ Provide legal rights for self-determination of indigenous peoples, consistent with international law
- ▶ Provide legal recognition & enforcement of Free Prior Informed Consent (FPIC) for any government or private sector actions that affect indigenous communities, consistent with international law

- ▶ Provide legal rights to regulate & negotiate terms & conditions regarding exploration or exploitation of natural resources on indigenous lands
- ▶ Provide legal rights for full & effective participation of indigenous communities in government activities that affect indigenous communities, lands, territories, & resources (including, but not limited to, climate change, logging, anti-corruption, etc.)
- ▶ Provide collaboration between national and state government agencies with indigenous land governance systems with respect to indigenous areas.
- ▶ Follow principles of decentralization & subsidiarity in governance, which means that governance is exercised at lowest possible local level (i.e., communities) between government offices & indigenous communities.
- ▶ Harmonize national, state, and local laws with indigenous governance systems
- ▶ Recognize & support legal rights for Native Title, where Native Title protects indigenous lands, territories, & resources from legal claims of government or outsiders
- ▶ Use single government administration in relation to governance of areas under Native Title
- ▶ Implement & support system of checks-and-balances to ensure participation, transparency, and accountability in land governance.
- ▶ Promote & ensure inclusion of all indigenous and non-indigenous groups within indigenous areas should be included in land governance systems for indigenous areas
- ▶ Recognize & support diverse indigenous governance systems
- Customary land tenure
 - ▶ Recognize & support legal rights of indigenous peoples to apply customary land tenure systems to develop indigenous lands, territories, & resources without need for legal title
 - ▶ Provide legal rights & support for customary land governance systems of indigenous communities without need for legal title
 - ▶ Support identification & mapping of indigenous lands, territories, & resources
 - ▶ Enforce interim measures to suspend all activities on lands until identification & mapping of indigenous lands, territories, & resources are completed
 - ▶ Re-assess all land claims by individuals and private sector actors in indigenous areas
 - ▶ Support experimentation by indigenous peoples to increase productivity of fallow land
 - ▶ Support food security, basic needs, livelihoods of indigenous peoples
 - ▶ Raise awareness of awareness of laws affecting land tenure and international

indigenous laws among Myanmar communities, government, CSOs, international NGOs, and donors

- ▶ Increase advocacy for recognition of customary tenure, land use, implementation of the NLUP, and harmonization of all laws with the NLUP
 - ▶ Support representatives of ethnic nationalities in negotiating for decentralized land governance in Myanmar's peace process
 - ▶ Under law, there should be a presumption of indigenous customary land tenure rights, and so anyone who disputes the existence of indigenous customary land tenure rights will have burden of proof.
- Community forestry
- ▶ Recognize shifting cultivation as a form of agroforestry
 - ▶ Recognize under law the existence of community forests & legal protection for community forests
 - ▶ Provide legal rights & support for customary forest management practices of indigenous communities without need for legal title
 - ▶ Raise awareness of awareness of laws affecting community forestry and international indigenous laws among Myanmar communities, government, CSOs, international NGOs, and donors
 - ▶ Increase advocacy for recognition of customary forestry
 - ▶ Under law, there should be a presumption of indigenous community forestry rights, and so anyone who disputes the existence of indigenous community forestry rights will have burden of proof.
- Indigenous Community Conserved Areas (ICCAs)
- ▶ Recognize under law the existence of ICCAs & legal protections for ICCAs
 - ▶ Recognize & support legal rights of indigenous peoples for ICCAs
 - ▶ Provide legal rights & support for customary ICCA governance systems of indigenous communities
 - ▶ Raise awareness of awareness of laws affecting ICCAs and international indigenous laws among Myanmar communities, government, CSOs, international NGOs, and donors
 - ▶ Increase advocacy for recognition of ICCAs
 - ▶ Under law, there should be a presumption of indigenous rights in ICCAs, and so anyone who disputes the existence of ICCAs & indigenous rights in ICCAs will have burden of proof.

IV

Mapping & Gap Analysis

Fulfilment of the above recommendations requires either new laws or revisions of existing laws. Both actions require prior steps in terms of 1) mapping the Myanmar laws that are relevant to the above recommendations and then 2) conducting gap analysis that identifies the deviations in the aforementioned Myanmar laws from the recommendations. Completion of both steps will help to formulate actions to reform Myanmar laws to achieve the recommendations.

With respect to mapping, there are multiple Myanmar laws that affect indigenous rights, self-determination, customary land tenure, community forestry, and ICCAs. For purposes of the current analysis, the major laws for discussion are those directed are reforms regarding land & natural resources:

- National Land Law (NLL)
- Farmland Law 2012 & Amendment 2020
- Myanmar Climate Change Policy 2019
- Myanmar Sustainable Development Policy 2018-2030
- National Environmental Policy 2019
- Conservation of Biodiversity & Protected Areas (CBPA) 2018
- Forest Law 2018
- Vacant Fallow Virgin Lands Law 2012 & Amendment 2018
- Ethnic Rights Protection Law 2015

It should be noted that the National Land Law is pending, but because it is in draft phase and undergoing debate it is included here because it represents a present opportunity to resolve the gaps between the other laws listed above and the identified recommendations.

With respect to gap analysis, each of the above laws contain deviations from the desired recommendations. The resulting gaps are identified for each of the laws below.

National Land Law (NLL)

The NLL is currently in draft phase, and so does not have finalized language allowing gap analysis against POINT policy recommendations given in the previous section. There are general recommendations about what the NLL needs to do:

- Provide legal definitions for indigenous people, indigenous rights, customary land, customary land tenure, customary governance, ownership rights, usufructuary (use) rights, access rights, TK, FPIC, community forestry, ICCAs
- Be flexible enough to address the existence of legal personality & legal rights at different scales of indigenous groups (large ethnic groups, smaller sub-groups, groups of villages, individual villages, parts of villages, etc.)
- Recognize indigenous rights over land that may be ancestral or settled
- Distinguish ownership rights, usufructuary (use) rights, & access rights
- Recognize authority of indigenous governance over land (e.g., ethnic nationality states, self-administered zones, indigenous zones, etc.)
- Recognize customary land tenure & customary governance without need for title, where different systems of customary land tenure & customary governance can exist at different scales of indigenous groups
- Recognize customary dispute resolution procedures
- Recognize collective land rights & commons
- Adhere to international standards of indigenous rights as expressed by international treaties & declarations (e.g., ICESCR, for which Myanmar is a state party with legal obligations to implement, & UNDRIP, which Myanmar voted in support)
- Provide impartial dispute resolution mechanisms
- Provide harmonization between indigenous customary governance & other governance systems
- Provide institutions with technical, financial, & infrastructure support to ensure land tenure security, support & strengthen indigenous agricultural practices, & support customary governance & customary dispute resolution procedures

The above recommendations are in addition to the recommendations drawn from POINT policy briefs. Hence, the NLL must also fulfil the POINT policy recommendations presented in the previous section:

- Guarantee legal protections of indigenous rights listed under POINT recommendations category of indigenous rights;
- Guarantee legal protections of indigenous rights listed under POINT recommendations category of self-determination;

- Guarantee legal protections of indigenous rights listed under POINT recommendations category of community forestry; and
- Guarantee legal protections of indigenous rights listed under POINT recommendations category of ICCAs

Farmland Law 2012 & Amendment 2020

- The Farmland Law 2012, with its Amendment 2020, follows some of the POINT policy recommendations. Chapter V of the Farmland Law 2012 provides a Central Administrative Body with lower level region & state, district, & township administrative bodies for registration and management of farm land, and so to some degree follows the principles of subsidiarity & decentralization. Chapter VII of the Farmland Law 2012 provides a dispute settlement process in the ward-level administrative bodies. Chapter IX provides indemnities for violations of the rights of owners or users of land. However, there are no additional terms that fulfil the other POINT policy recommendations listed under categories of indigenous rights, self-determination, customary land tenure, community forestry, or ICCAs. For example, there is no recognition of legal recognition or legal protection for legal personality of indigenous groups, compliance with international standards of indigenous rights, legal remedies for violation of indigenous rights, inclusive or participatory management, priority for indigenous rights over other rights or government actions, transparency or awareness-raising, Native Title, TK, shifting cultivation, FPIC, or checks-and-balances. As a result, the Farmland Law 2012 & Amendment 2020 require the following:
 - Guarantee legal protections of indigenous rights listed under POINT recommendations category of indigenous rights;
 - Guarantee legal protections of indigenous rights listed under POINT recommendations category of self-determination;
 - Guarantee legal protections of indigenous rights listed under POINT recommendations category of community forestry; and
 - Guarantee legal protections of indigenous rights listed under POINT recommendations category of ICCAs

Myanmar Climate Change Policy 2019

The Myanmar Climate Change Policy 2019 (CCP 2019) presents principles representing a framework to guide the formulation of laws. Because it only contains principles, it does not have the specific provisions expected for laws and so does not provide a similar basis for gap analysis against the POINT policy recommendations. A gap analysis is possibly only to

POINT: Policy Summary 2014-2021

the degree that the contents of the CCP 2019 relate to subject areas that involve the POINT policy recommendations.

To a degree, the principles within the CCP 2019 align with some aspects of the POINT policy recommendations, with guiding principles for inclusiveness & good governance involving transparent, participatory, inclusive, equitable, & accountable decision-making at all levels; climate justice including promotion & protection of indigenous peoples, ethnic groups, local communities, & women; & gender equality with full & equal participation of women (CCP 2019: 15-16). In addition, it makes recommendations that including involvement of stakeholders at multiple levels of government in assessment & planning (CCP 2019: 23). It also calls for awareness-raising and equitable access to knowledge (CCP 2019: 26). Further, it requires coordination of existing & future policies & laws with the CCP 2019; the establishment, strengthening, & coordination of necessary institutions; & capacity-building for stakeholders (CCP 2019: 27-29). Attendant with such recommendations, it also requires transparency, accountability, & monitoring (CCP 2019: 31).

The inclusion of indigenous peoples within the guiding principles of CCP 2019 imply that the above provisions also provide rights to indigenous groups. But without explicit language, they do not serve to guarantee indigenous rights, and instead leave the existence of indigenous rights for interpretation & debate. In particular, the language of CCP 2019 does not assure legal protection for the POINT recommendations in previous sections under categories of indigenous rights, self-determination, customary land tenure, community forestry, or ICCAs. As a result, the CCP 2019 needs to do ALL of the following:

- Guarantee legal protections of indigenous rights listed under POINT recommendations category of indigenous rights;
- Guarantee legal protections of indigenous rights listed under POINT recommendations category of self-determination;
- Guarantee legal protections of indigenous rights listed under POINT recommendations category of community forestry; and
- Guarantee legal protections of indigenous rights listed under POINT recommendations category of ICCAs

Myanmar Sustainable Development Plan 2018-2030

The Myanmar Sustainable Development Plan 2018-2030 (MSDP 2018) is not a law but is instead a policy document outlining Myanmar's strategies to align with the United Nations (UN) Sustainable Development Goals (SDG) for the UN SDG Agenda 2030. As a policy document, the MSDP 2018 presents a framework identifying the national goals, the action plan implementing each goal, the institutions responsible fulfilling each action plan, and the UN SDG that correlates to each action plan. As a result, there is no individual law with specific provisions to allow a gap analysis against POINT policy recommendations.

However, it is possible to identify areas that call for clarification with respect to POINT policy recommendations. To begin, the MSDP 2018 does not explicitly mention indigenous peoples. It is possible to interpret the MSDP 2018 as involving indigenous rights, in that the MSDP 2018 represents Myanmar's commitments to the UN SDG Agenda 2030. UN General Assembly (UNGA) Resolution A/RES/70/1 regarding the SDGs explicitly mentions indigenous peoples within its language for SDG goals 1.4 and 5.a.1 on land tenure, 2.3 on hunger and small-scale farm income, 4.5 for education, and 10.3 and 16.b.1 on human rights (UNGA 2015; UN 2018). There are, however, gaps between the SDGs (and hence MSDP 2018) versus the recommendations of POINT policy briefs. To a degree, the SDGs encompass the POINT policy recommendations, with indigenous rights and self-determination falling under SDGs on human rights, and customary land tenure correlated directly to SDGs on land tenure and small-scale farms. But the POINT policy recommendations on TK, FPIC, community forestry, & ICCAs are not within the SDGs, and so lie outside the MSDP 2018.

In addition, there are parts of the MSDP 2018 that align with the POINT policy recommendations regarding decentralization in terms of inclusive and participatory decision-making at national and sub-national levels (MSDP 2018: 14-16). But the MSDP 2018 nor the SDGs provide guidance on legal protection for the other rights specified by the POINT recommendations for categories of indigenous rights, self-determination, customary land tenure, community forestry, & ICCAs. In particular, there is no indication of principles to guide laws with respect to legal remedies for violations of indigenous rights, the status of indigenous rights relative to other rights or government actions, Native Title, subsidiarity or decentralization; transparency or awareness-raising, TK, FPIC, or checks-and-balances. As a result, there continue to be issues with the MSDP 2018, in that it needs to do ALL of the following:

- Guarantee legal protections of indigenous rights listed under POINT recommendations category of indigenous rights;
- Guarantee legal protections of indigenous rights listed under POINT recommendations category of self-determination;
- Guarantee legal protections of indigenous rights listed under POINT recommendations category of community forestry; and
- Guarantee legal protections of indigenous rights listed under POINT recommendations category of ICCAs

National Environmental Policy 2019

The National Environmental Policy 2019 (NEP 2019) is intended to be consistent with the MSDP 2018's 2030 Agenda for Sustainable Development (see previous subsection). As a policy statement, the NEP 2019 constitutes a general framework for environmental conservation in the form of principles to guide the formulation of Myanmar laws. Hence, it is not a law that can be evaluated against the POINT policy recommendations for a gap analysis.

POINT: Policy Summary 2014-2021

The NEP 2019 includes indigenous peoples as Principle 7, which provides recognition and protection for “rights of indigenous people and ethnic nationalities to their lands, territories, resources and cultural heritage, and their roles in environmental conservation and natural resources management” (NEP 2019: 7). This implies that indigenous rights are inherent to the other principles within the NEP 2019, including Principle 2 on spiritual and cultural heritage, Principle 8 on sustainable development with partnerships via private sector and civil society, Principle 9 on people-centered development, Principle 17 on inclusive, transparent, and accountable decision-making for stakeholders; Principle 18 on gender equality, Principle 19 on awareness-raising, & Principle 20 on governance (NEP 2019).

The general nature of principles are broad, and so the language of the NEP 2019 on indigenous peoples can be interpreted as extending to those raised by POINT policy briefs in terms of indigenous rights, self-determination, customary land tenure, community forestry, & ICCAs. However, the lack of specificity does not provide explicit legal guarantees of the rights recommended by the POINT policy briefs regarding legal remedies for violations of indigenous rights, status of indigenous rights relative to other rights or government action, Native Title, subsidiarity or decentralization, TK, FPIC, community forestry, ICCAs, or checks-and-balances. To make the guarantees clear, it would be helpful if the NEP 2019 language did ALL of the following:

- Link NEP 2019 principles to the UN SDGs, since the UN explicitly connected the SDGs to indigenous peoples (see previous subsection on MSDP 2018); and
- Because the UN SDGs do not address the POINT policy recommendations regarding community forestry and ICCAs, clarify that the NEP 2019 principles also call for legal recognition and protection of indigenous rights identified by POINT recommendations for categories of indigenous rights, self-determination, customary land tenure, community forestry, & ICCAs.

Forest Law 2018

The Forest Law 2018 involves a measure of participation, with Section 6 explicitly including local (ethnic) communities in decisions designating public forests and addressing rights of the public. Section 9(h) places a duty of the Forest Department to support & supervise community forestry. Section 12(c) also harmonizes the Forest Law 2018 with existing laws by requiring that decisions regarding forests need to abide by the Environmental Conservation Law and other relevant laws. There are, however, issues with the law:

- Section 2 distinguishes between reserved forests and public protected forests, but does not define them in terms of the activities or rights within either type of forest
- Section 3(g) uses the term “natural forest” but provides no definition
- Section 4 identifies categories of reserved forests, but does not define their differences

- Section 6 includes local (ethnic) peoples in a Scrutiny Body (which determines rights of the public regarding lands within reserved forests), working committees (which determine rights of the public regarding land within public protected forests), but does not clarify the selection process of the local/ethnic representatives.
- The Scrutiny Body centralizes decisions, and so does not follow principles of decentralization & subsidiarity which call for local administrative bodies. For working committees, there is no clarity as to what level of governance they operate (e.g., union, state/region, etc.)
- Section 6 does not identify the decision-making process of the Scrutiny Body or working committees
- Section 7 gives MoNREC authority to change the category of forests, and so does not involve participation of indigenous peoples whose lands are within forests and does not follow principles of decentralization & subsidiarity
- Section 7d) gives MoNREC authority to recognize natural forests & mangroves conserved by traditions of local people, and so does not involve participation of indigenous peoples whose lands are within forests and does not follow principles of decentralization & subsidiarity
- Section 2(u) & Section 9(h) reference community forestry under Community Forestry Instructions, but does not guarantee indigenous participation in the identification and management of community forests
- There is no guarantee of legal rights for community forestry
- There is no presumption of community forestry
- There is no recognition of self-determination for indigenous lands within forests
- There is no recognition of ICCAs
- There is no assurance of respect for indigenous rights, either pre-existing rights in lands that are designated as forests under the Forest Law 2018 or rights in lands that are within forests under the Forest Law 2018
- There is no assurance of respect for indigenous shifting cultivation or agroforestry
- There is no assurance of FPIC for research, economic, or conservation activities in indigenous lands within forests
- There is no provision of legal remedies for restoration of rights and livelihoods to indigenous communities, families, & individuals for violations of indigenous rights, loss of land, cash crops, or displacement arising from the designation & management of forests
- There is no education or awareness-raising component to educate indigenous peoples, local communities, CSOs, or international NGOs regarding the designation &

management of forests. In addition, there is no education or awareness-raising regarding the various entities created by the law (e.g., Scrutiny Body, working committee, etc.) regarding management powers, procedures, or decisions

Conservation of Biodiversity & Protected Areas (CBPA) 2018



The Conservation of Biodiversity & Protected Areas (CBPA) Law 2018 is focused on biodiversity, but it contains provisions that involve communities and so affects indigenous peoples whose lands fall under the CBPA Law 2018. However, with respect to the recommendations presented in previous sections, the law has the following issues:

- Section 4 sets a National Steering Committee with members from government departments and experts, but does not provide representation for indigenous peoples
- Section 9 gives power to MoNREC to designate protected areas and co-ordinate with other government offices
- Section 9 provides transparency regarding notice of land to be made a protected area or buffer zone, with a “Preliminary Settlement Body” to inquire rights affected by the designation of protected areas and buffer zones. But it does not guarantee indigenous participation or respect for indigenous rights in the Preliminary Settlement Body. In addition, by centralizing such decisions, the Preliminary Settlement Body also does not follow principles of decentralization and subsidiarity.
- Section 13(e) allows for “community participatory protected area management” with harmonization of sustainable socio-economic development of local communities, but does not clarify the meaning of participation
- Section 13 lists powers of the Director General regarding management of protected areas. This does not provide for participation of indigenous peoples whose lands fall within protected areas & buffer zones. It also contradicts principles of decentralization & subsidiarity to place authority at local levels.
- Section 13(g) identifies buffer zones around protected areas which allow a permit system for community forestry, community-based tourism, and locally managed marine areas, but does not identify the permits, permitting authorities, and permitting procedures
- Sections 8 & 17 use the term “Local Community Protected Areas” (LCPAs) which is different from ICCA. ICCAs are areas that are created and managed by indigenous peoples. Section 17(g) states that LCPAs are administered by states and regions, and so does not provide for indigenous creation or management of ICCAs and does not fulfil principles of subsidiarity in terms of local administration
- Chapters 6, 8, & 9 all involve administrative permits, registration, and punishments, but

do not recognize indigenous rights for indigenous lands within protected areas & buffer zones.

- Chapters 6, 8, & 9 do not provide transparency regarding administrative procedures, and do not clarify the administrative procedures
- Chapters 6, 8, & 9 do not allow appeals
- Chapters 6, 8, & 9 do not allow for indigenous participation in administration.
- There is no recognition of self-determination regarding indigenous lands that fall within protected areas & buffer zones, and no recognition of indigenous control over access to outsiders
- There is no assurance of indigenous participation in identification, mapping, & management of lands within protected areas and buffer zones
- There is no assurance of recognition or respect for indigenous rights for indigenous lands that fall within protected areas or buffer zones, and so is inconsistent with IUCN guidelines on protected areas (the IUCN is an advisory body to the World Heritage Convention and UNESCO, and Myanmar is a party to the World Heritage Convention and is subject to UNESCO)
- There is no assurance of indigenous access to indigenous lands that fall within protected areas or buffer zones (e.g., spiritual, cultural, cultivation, etc.)
- There is no provision of FPIC regarding activities or decisions involving indigenous lands that fall within protected areas or buffer zones
- There is no provision of legal remedies for restoration of rights and livelihoods to indigenous communities, families, & individuals for violations of indigenous rights, loss of land, cash crops, or displacement arising from the designation & management of protected areas & buffer zones
- There is no education or awareness-raising component to educate indigenous peoples, local communities, CSOs, or international NGOs regarding the designation & management of protected areas & buffer zone. In addition, there is no education or awareness-raising regarding the various entities created by the law (e.g., National Steering Committee, Preliminary Settlement Body, etc.) regarding management powers, procedures, or decisions

Vacant Fallow Virgin Lands (VFVL) Law 2012 & Amendment 2018

.....

The major concerns relate to the VFVL Amendment 2018, which changed language in the VFVL Law 2012. To a degree the amendment responded to indigenous peoples concerns,

POINT: Policy Summary 2014-2021

albeit with language regarding ethnic groups. The first gaps relate to the decision-making by the Central Committee and management committees created by the VFVL Law 2012, with VFVL Amendment 2018 Section 3(a) stating that the Central Committee may assign management committees with representatives of local ethnic groups, farmer representatives, CSO representatives, and appropriate experts. The language is consistent with principles of subsidiarity in terms of decentralizing power to region and state levels. There are, however, issues:

- subsidiarity also calls for administration at the lowest levels possible, which means more decentralization into more local committees
- the principle of inclusion and participatory decision-making requires involvement of indigenous peoples on the committees, but it is not clear if the language guarantees representation by indigenous peoples on the management committees, or if the language only provides for their participation in the choice of members to the management committees
- it does not specify the decision-making procedures on the committees (e.g., majority decision, consensus, etc.)
- there is no assurance that committee management decisions must respect indigenous rights or human rights
- there is no assurance that committee management decisions must be harmonized with existing laws
- there is no assurance that the committee management decisions are reviewable or subject to checks, as required by the principles of accountability and checks-and-balances
- there is no assurance of record-keeping and transparency of committee management or committee decisions
- there is no assurance that committee management decisions can be changed or amended in response to new information or changing circumstances (there is no adaptive management)
- there is no appeals procedure for committee management decisions
- there is no education or awareness-raising component to educate indigenous peoples, local communities, CSOs, or international NGOs regarding committee management powers, procedures, or decisions

The second gaps appear with VFVL Amendment 2018 Section 5 which indicates the use of a permit system for enterprises on vacant, fallow, and virgin lands. There are a number of issues:

- there is no clarity regarding the form of permits or the procedure to obtain permits
- there is no appeals process for decisions regarding permits

- there is no clarity regarding record-keeping and transparency of permits and permit procedures
- there is no inclusion in terms of a participatory process for permits or permit procedures involving indigenous peoples
- there is no assurance that permits or permit procedures will verify status of land as falling under VFVL Amendment 2018 Section 30(a) (see below)
- there is no assurance that permits or permit procedures will respect indigenous rights, or existing lands identified as falling under VFVL Amendment 2018 Section 30(a) (see below)
- there is no education or awareness-raising component to educate indigenous peoples, local communities, CSOs, or international NGOs regarding permits or permit procedures

The third gaps appear with VFVL Amendment 2018 Section 30(a), which says that the VFVL Law 2012 and VLFVL Amendment 2018 do not apply to hillside cultivation (Taungya land); customary lands under traditional culture of local ethnic people; and lands used for religious, social, education, health, & transportation purposes of the public & ethnic peoples. However, there are the following issues that should be addressed:

- there is no clear procedure on how to identify lands that might fall within these different categories
- there is no appeals procedure for identification of land
- there is no assurance of indigenous participation in the mapping and categorization of lands
- there is no assurance of indigenous rights regarding lands placed under Section 30(a), and no assurance of self-determination, control of access to outsiders, or Native Title for lands placed under Section 30(a)
- there is no assurance of transparency regarding mapping and categorization of lands
- there is no assurance of harmonization of decisions under Section 30(a) with existing laws
- there is no assurance of interim measures to protect or halt activities on land during time required to identify lands that fit within the above categories
- Taungya land does not encompass all types of shifting cultivation of indigenous peoples
- there is no assurance that indigenous rights have precedence over potential claims to vacant, fallow, or virgin lands, and no assurance that indigenous lands have precedence over government zoning or classification
- there is no education or awareness-raising component to educate indigenous peoples, local communities, CSOs, or international NGOs regarding authorities, procedures, or decisions regarding identification or classification of land

Ethnic Rights Protection Law 2015

The Ethnic Rights Protection Law (ERPL) 2015 does not focus on indigenous areas, but does deal with aspects of rights for indigenous peoples that are relevant to issues of land, territories, and resources. With respect to the recommendations raised in previous sections of the present analysis, the ERPL 2015 has several issues:

- It does not reference or identify international laws, particularly the ICESCR (Myanmar is a state party) or UNDRIP (Myanmar voted in support)
- It does not clarify the relationship between indigenous group rights and indigenous individual rights
- It does not clarify the harmonization or relationship between indigenous rights and other rights (e.g., gender rights, childrens' rights, intellectual property rights, property rights, contract rights, etc.)
- It does not provide a right of self-determination, and does not provide related rights of indigenous peoples to maintain their own political, economic, and social systems (which are relevant to maintaining indigenous governance systems), rights to determine membership, and rights to control access to outsiders to indigenous lands
- It does not provide FPIC
- It does not provide a state duty to prevent & provide redress for actions that deprive indigenous peoples of their lands, cultural integrity, and rights
- It does not guarantee right of participation to indigenous peoples in decisions that affect indigenous peoples
- It does not provide assurance of transparency over decisions affecting indigenous peoples
- It does not recognize or protect indigenous customary land tenure systems or Native Title
- It does not provide legal remedies for restoration of rights and livelihoods to indigenous communities, families, & individuals for violations of indigenous rights, loss of land, cash crops, or displacement due to armed conflict, natural disaster, or land grabbing

V

Additional comments

In addition to the necessary changes in Myanmar land law identified in the previous section, there are additional changes that are needed to protect indigenous land rights. The additional changes relate to issues regarding conflicts of jurisdiction, conflicts of laws, & conflicts of rights.

Conflict of jurisdiction between committees and courts

The above slate of laws do not clarify what happens if there is conflict between the decisions of the various government offices responsible for each law, or what happens if there is conflict between the decisions of those government offices and the courts.

Conflict of laws & conflict of rights

The above slate of laws do not clarify what happens if there is conflict between their provisions and Myanmar's existing commitments to indigenous peoples as specified by Myanmar's status as a state party to international laws regarding cultural heritage (e.g., World Heritage, etc.), environmental conservation (e.g., World Heritage, UNFCCC, CITES, etc.), human rights (e.g., ICESCR, ICR, etc.), and transnational crime (e.g., UNODC, etc.). In addition, there is ongoing work being done by the UN Special Rapporteur on Human Rights & Environment (UNSRHE) involving indigenous rights, such that Myanmar state obligations to international human rights and environmental law should also follow the advisory statements of the UNSRHE.

- Cultural heritage
- Environmental conservation
- Human rights
- Transnational crime
- Human rights & environment

V

Additional comments

The previous sections worked to achieve two goals: summarize the policy recommendations of the POINT policy briefs on indigenous land rights published during 2014-2021, and identify the types of reforms that need to be made to existing Myanmar land laws to meet the POINT policy recommendations. The analysis started with a presentation of findings in individual POINT policy briefs on indigenous land rights, continued with a distillation of those findings into a single body of recommendations, followed by a mapping & gap analysis identifying the deviations between the recommendations versus existing Myanmar land laws, with attendant comments on the changes to Myanmar land laws that are needed to satisfy the recommendations. The value of the analysis is to aid reform efforts to improve Myanmar land laws in terms of recognizing and protecting indigenous land rights.

Bibliography

Conservation of Biodiversity & Protected Areas (CBPA) 2018

Ethnic Rights Protection Law 2015

Farmland Law 2012 & Amendment 2020

Forest Law 2018

Myanmar Climate Change Policy 2019

Myanmar Sustainable Development Policy 2018-2030

National Environmental Policy 2019

National Land Law (NLL)

Vacant Fallow Virgin Lands Law 2012 & Amendment 2018

POINT: Indigenous Peoples' Rights to Customary Land in Myanmar (2019)

POINT: The Necessity: Collaboration for Coherence in Myanmar Climate Change Response (2018)

POINT: How Can REDD+ Support Climate Change Adaptation of Indigenous Peoples? (2018)

POINT: Customary Land Tenure: Case Study in Sar Pauk Village (2016)

POINT: Customary Land Tenure: Case Study in Myay Latt Village (2016)

United Nations (UN). (2018) *Indigenous Peoples Sustainable Development Goals: Indigenous Peoples & the 2030 Agenda*. Available at: <https://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/Indigenous-Peoples-and-the-2030-Agenda-with-indicators.pdf>

United Nations General Assembly (UNGA). (2015) *Resolution Adopted by the General Assembly on 25 September 2015: A/RES/70/1*. Available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1



ယဉ်ကျေးမှုနှင့် သဘာဝပတ်ဝန်းကျင် ထိန်းသိမ်းရေး

အမှတ် (၆၈၇)၊ ကြို့ကုန်း၊ ဂလမ်း(တောင်)၊ အရှေ့ကြို့ကုန်း၊ အင်းစိန် - ရန်ကုန်။

ရုံးဖုန်း / ၀၉- ၂၅၄ ၂၄၉ ၄၉၄

ဖေ့(စ်)ဘွတ်လိပ်စာ / <https://www.facebook.com/PromotionOfIndigenousandNatureTogether>

အင်တာနက်လိပ်စာ / www.pointmyanmar.org

အီးမေးလ် / point.org.mm@pointmyanmar.org

