Tribal Land Rights and Resource Management in Federal Contexts:
Lessons for Myanmar

The role of federal versus state governments in land management and the control of natural resources varies considerably across federations[1]. In addition, in many federations with indigenous or tribal peoples, there are distinct legal—and constitutional—provisions to protect the land and resource rights of these populations and to provide them with a role in the governance of land and natural resources. Should Myanmar develop a federal constitution it will face the challenge of defining the roles and rights of the federal and state (regional) government and perhaps of the self-administered areas or tribal governments in relation to land and natural resource management.

This paper reviews a paper by Gabrielle Kissinger, done for Forest Trends (FT), *Federalism and the Recognition of Indigenous Rights to Land and Natural Resources in Myanmar: Case Studies from Canada, Ethiopia and Brazil* as well as a shorter slide presentation that she did for interested groups in Myanmar. It finds that these documents are strongly focused on indigenous rights with little context in terms of the respective roles of the federal and state governments in resource management. Moreover, even in relation to indigenous rights and roles, the two documents are relatively superficial. The treatment of Canada, which holds interesting lessons, is especially weak. While there are lessons to be drawn from the three case studies, arguably the most relevant case study would have been India, which is not included. This paper provides a brief overview of why India's experience might prove highly relevant.

Review of the Forest Trends Documents

A: Case studies

1. Canadian case study

This case study is heavily focused on indigenous land and resource rights as they have developed since the passage of the new constitution in 1982. In doing so, it ignores the fundamental shifts in jurisprudence and government policy in the 1970s regarding aboriginal rights and aboriginal self-government. In 1973, following a major Supreme Court decision, the federal government announced it would negotiate comprehensive claims settlements with those aboriginal groups that were not under treaty (and for those that were under treaty, it would address specific claims associated with possible violations of those treaties). Since then, the federal government has negotiated 26 comprehensive claims settlements, 18 of which include self-government provisions.

[1] I reviewed these issues at length in the paper "Natural Resources in Federal and Devolved Regimes" Forum of Federations, 2021

These include major settlements in the James Bay area, in the Mackenzie Delta, as well as the Nisga'a agreement in British Columbia. The Nunavut settlement created a new territory with an Inuit majority and institutions of public government as well as rights and institutions specific to the Inuit community. A major weakness of the FT paper is that it ignores all these developments outside British Columbia. British Columbia is a special case within Canada in that almost the entire province, with many aboriginal groups, was not under treaty; the provincial government resisted joining in claims negotiations (which was required, given its control of land) until 1992, when a special claims commission was set up. Since then four comprehensive settlements have been reached in BC, including the Nisga'a agreement in 2000.

Despite its focus on British Columbia, the FT paper does not discuss the main elements of the 251 page Nisga'a settlement, which includes chapters on different classes of lands, on land title, on forest resources, access, roads and rights of way, fisheries, wildlife, environmental protection, Nisga'a government, the administration of justice, fiscal arrangements and taxation, cultural artifacts and heritage, local and regional government relationships, dispute resolution, eligibility and ratification. (Its summary of the Nisga'a treaty is in one sentence.)

The FT paper has a section on the Great Bear Rainforest Agreement, which was negotiated by the provincial government (responsible for forestry) with industry, native groups, and environmental groups. The relevance of this for Myanmar could be for a law relating to specific forests. At present such a law would be at the national level, but it could be at the state level if states were given control of forestry.

The settlement of comprehensive claims in Canada has been extremely complex and time-consuming. It is unlikely that Myanmar would adopt a similar process of negotiating individual settlements with each of the major tribal communities. More likely, would be to take inspiration from some of the concepts in the comprehensive claims settlements for provisions in a new constitution and in general legislation on lands and resources. The FT paper would be of little use in this regard. It lacks balance in providing a very negative account of developments regarding aboriginal rights in Canada, with the exception of its positive view of the recent Supreme Court of Canada decision regarding the Crown's "duty to consult", which applies to both federal and provincial governments. While in Canada the courts have taken it upon themselves to judge the adequacy of consultations affecting aboriginal rights, this has been very controversial and such a role for the courts is unlikely to be accepted in a country like Myanmar. Thus the FT paper fails to draw many lessons from the Canadian experience that could be useful in Myanmar.

2. Ethiopian case study

Ethiopia adopted ethnic federalism after the defeat of the highly centralizing Derg regime, which had nationalized all land. States are to administer land within the framework of federal law. The FT paper rightly points out that ethnic federalism creates risks for the equitable management of land, even if, as in Ethiopia, state land proclamations make no mention of ethnicity. (Nigeria, with its concept of "indigeneity" may be the federation where these risks are most acute.) The paper observes that in practice "neo-customary" tenure systems overseen by clan elders are widely followed and this tends to exclude outsiders from having land rights.
The FT review of Ethiopian experience is very brief, with the main point being the risks that ethnic federalism may bring for discrimination amongst groups.

3. Brazilian case study

Brazil's federal constitution of 1988 recognizes "Indians" rights in traditional lands; such lands are the property of the Union, which has the power to legislate regarding Indian populations. Since 1972 a key aspect of Brazilian policy for Indians has been the demarcation of Indian lands; some 14% of the country has been so designated and the process continues, with periodic hot disputes. Critics object to so much land being reserved for less than 1% of the population. However, as the FT paper points out, the protection of these lands is weak. Many of Brazil's Indians live with little contact with the larger society and follow traditional ways. They have no legal autonomy and self-governance is limited through protocols and "Life Plans" developed with the State.

The relevance of the Brazilian case for Myanmar is probably very limited, given its weak provisions. Perhaps the one exception is the cautionary lesson provided by the process for demarking Indian lands, which has taken decades—far beyond the five years originally envisaged—and is still not complete.

B: Implications for Myanmar

The FT paper is negative about the experience of aboriginal land and resource rights in all three federations. It is certainly correct in its statement that constitutional provisions and federalism itself have not proven adequate, but it misses the more positive recent developments, notably in Canada with the comprehensive claims settlements. For example, it does not recognize that in many cases, these settlements have removed aboriginal communities from the provisions of the *Indian Act.* It is right to point out, drawing on Canadian and Brazilian experience, the difficulties that demarcation of aboriginal lands may pose. The paper recognizes the risks of Ethiopia's ethnic federalism for minorities within states, but does not follow up with concrete examples in Ethiopia.

The FT paper recognizes the very limited authority that has been devolved to states and regions in Myanmar and the silence regarding ethnic governance as a third tier.

It lists options for greater recognition of indigenous rights—consultation, revenue-sharing, accommodation, shared decision-making and co-management, indigenous self-government—but the treatment is very shallow. Its range of options for land designation includes federal ownership options and "aboriginal title" options, but it does not recognize the important role that ownership by states or regions might play and it does not consider mixed options, where indigenous communities have direct title to some lands with lesser interests in other lands (as in the Canadian comprehensive settlements). Despite its critique of Ethiopia's ethnic federalism, the FT paper does not consider to what extent Myanmar's states (and regions?) might fall prey to the same problems of favouring the dominant ethnicity, whether at the state or district level.

In sum, there is some material in the FT papers that could be of use in Myanmar, but the paper and presentation as they stand are not suited to be a primary reference or guide on lessons from other federations.

Myanmar's Challenge

Any consideration of comparative experience relevant to Myanmar should start with recognition of the nature of the country and what this might mean for its federalism and the character of its states and regions. Myanmar is very different from Canada and Brazil, which are settler countries where the indigenous population is relatively very small. Canada is a wealthy country with strong public administration, while Brazil is an upper-middle income country with reasonably functional public administration; both countries are heavily urbanized. Myanmar is more like Ethiopia, with its multiplicity of ethnicities, heavily rural population and low income, but the existence of the dominant Birman majority makes it quite different from Ethiopia. The seven regions have Birman majorities, but some also have significant territorially concentrated minorities, notably the Naga people in Sagain region. The seven states are extremely heterogenous in make-up and despite being named after ethnicities perhaps only Chin state has a single ethnic group composing the majority (and even the Chin themselves are highly diverse). Shan state, which is much the most populous state, has five self-administered zones, each with a distinct ethnic majority. The greatest challenge relating to land and resources in Myanmar relates to the rights of the minority peoples, but regional Birman populations will have interests in what happens to the land and resources in their region, so they might not want all authority left with the central authorities.

To date, control of land and resources in Myanmar is highly centralized. In 2010-2013 Myanmar passed several laws relating to land and resources, with especially major implications for the uplands. The Farmland Law stipulates that land can be bought and sold with land use certificates and farmers who have used hereditary lands have had serious problems with the registration system. The Vacant, Fallow and Virgin Land Law permits the central government to reallocate farm and forestlands and this has endangered community managed land and resources while permitting land grabbing. The Foreign

Direct Investment Law open the agricultural sector to large-scale private investment on very long leases, while the Special Economic Zones law provides incentives for foreign investors for such zones, some of which are planned in ethnic regions. These laws were rushed through and caused deep concern, notably amongst ethnic minorities. This legislation was followed in 2015 by a sixth revision of the National Land Use Policy, which has some positive elements but many negative ones, especially for small land holders and ethnic communities. In 2018, the legislature approved a new Forestry Law that appears inconsistent with the NLUP and applies equally to ceasefire and non-ceasefire areas, in violation of the National Ceasefire Agreement. Thus even before the coup, there was an urgency to dealing with the direction of land and resource legislation and policy in Myanmar, which will need attention when democracy resumes. It is likely that at least initially this would be done through national legislation prior to agreement on longer-term federal, constitutional arrangements.

The Indian model's relevance for Myanmar

Arguably the federal jurisdiction whose experience with special arrangements for tribal peoples is most relevant for Myanmar is in neighbouring northeast India. The Indian Constitution's Schedules Five and Six provide for special governance arrangements for tribal peoples: Schedule Five applies in mainland India and its provisions are less protective of tribal peoples than Schedule Six, which applies in Assam, Meghalaya, Tripura and Mizoram states in the northeast; of these, Meghalaya and Mizoram are predominantly tribal states. The Sixth Schedule was originally intended for predominantly tribal areas in undivided Assam. The special provision is provided for under Articles 244(2) and 275(1) of the constitution. It establishes Autonomous District Councils, based on the belief that the land is the basis of tribal or indigenous identity, and these councils have significant control over land and natural resources. The councils are empowered t make laws in respect of land, forests, agriculture, inheritance, public health, sanitation, local policing, marriage and divorce, mining and minerals, indigenous customs and tribal traditions. The have fiscal responsibilities for land revenues and certain other taxes. So each ADC is a mini-jurisdiction, like a state, with its own legislature, executive and judiciary. Their courts may hear cases where both parties are members of scheduled tribes and the maximum sentence is less than 5 years.

The ADCs established under the Sixth Schedule are qualitatively different from the Tribal Advisory Councils established under the Fifth Schedule. There are currently thirteen ADCs in the four states, with three having been created in 2020. The ADC in Meghalaya is coterminous with the whole state, which has caused frequent conflict with the state government, but conflict with state governments has been a common experience for all the ADCs. There have also been tensions and even violence between the tribal and non-tribal peoples, with the latter complaining about discrimination and the undermining of their rights to equality and to settle anywhere in India. There has been land alienation through external threats, such as development initiatives by the state, but also

displacement caused by intra-community land alienations. Those empowered by the formal structures of the ADCs have sometimes opposed traditional leaders. And there is evidence that the elite have used their powers for personal benefit on occasion.

The ADCs constitute in some way "states within states". Moreover, their authority over land and natural resources is generally greater than that of the states, notably in relation to sub-surface resources such as petroleum and minerals.

The Indian model of the Six Schedule with ADCs has some parallels with Myanmar and its self-administered zones within Shan state and Sagain region, though the latter are not nearly as empowered as the ADCs. It can be anticipated the self-administered zones will seek greater powers (along with the states) and that tribal groups in other states or regions might seek their own self-administered jurisdictions. So understanding India's experience could prove helpful for Myanmar. Two publications provide useful background:
https://www.cmi.no/publications/6243-tribal-representation-local-land-governance-in This paper is a case study of experience in Megalaya under the Sixth Schedule https://tspace.library.utoronto.ca/bitstream/1807/17375/1/ILJ-7.1-Kurup.pdf This book provides historic background to the two schedules and contrasts experience with both, with a particular focus on the negative experience under the Fifth Schedule of decentralization.

While the Indian experience is clearly of interest, I would suggest that Canada's experience with the comprehensive claims settlements may also contain valuable lessons. For example, Nunavut is based on the concept of a public government that does not discriminate amongst its citizens (though it has an Inuit majority), but it also has special rights and institutions for the Inuit as the indigenous people. Canadian claims settlements award indigenous communities different rights in relation to different classes of land, which is a model of potential application in Myanmar. The Canadian claims settlements are extremely complex and they have developed many creative solutions for accommodating competing pressures.

Federal-state roles in resource and land management

This brief paper has focused heavily on the provisions and practices of some federations for indigenous or tribal peoples to play a role in resource and land management. It has not looked at the very different models within federations for allocating responsibility amongst federal and state government for land and resource management, which I dealt with in the separate paper for the Forum noted above. Resolving the federal-state allocation of land and resource powers may prove to be one of the greatest challenges for Myanmar in writing a federal constitution. While the tribal communities may press for extensive devolution to states, the Birman majority is likely to protect a strong role for the federal government. There could be an element of path dependency here, where the

current legal frameworks are adapted to a new federal context: this would imply revision of the laws to provide greater protection for communal rights (and constitutionalizing some of this) combined possibly with making natural resources and land a concurrent federal jurisdiction at least for certain purposes. While it is likely the federal government would have some direct administrative responsibilities in this area—notably over major resource developments and relevant fiscal terms—the states might have the right to pass their own legislation within the framework of federal legislation and to administer certain parts of the legislation. Would the self-administering zones have greater protections or powers relating to land and natural resources than the states (as happens in India)? There is no answer to this but the issue will likely arise. If self-governing areas win significant powers, it can be expected that there will be demands for new self-governing areas to be created.

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