



# Land and natural resources in a Federal system in Myanmar

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To NCA-S EAOs

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# Objectives of session:

- Develop awareness of the differences between Unitary and Federal system with regards to land and natural resource rights and decision-making
- Review this in different federal systems around the world
- Examine how land and natural resource rights and decision-making occurs in different jurisdictions in Myanmar
- Envision how to promote solutions towards land and natural resources rights and decision-making, while evolving from Unitary to Federal democratic system

**‘Land has very deep meaning and value for us.  
It is our lives and the very blood in our veins.  
Without our land, our nationality will vanish.  
Land is our dignity.’**

**— Kayah farmer, Dawsoshay village, Demoso Township, Kayah State**



LAND IS A  
BASIS FOR  
CULTURE,  
COMMUNITY,  
FOOD,  
MEDICINE,  
LIVELIHOODS

# Why explore land and natural resources in relation to federal governance?

*Land and natural resources is at the root of conflict in Myanmar's civil war*

*...solutions to peace must address land*

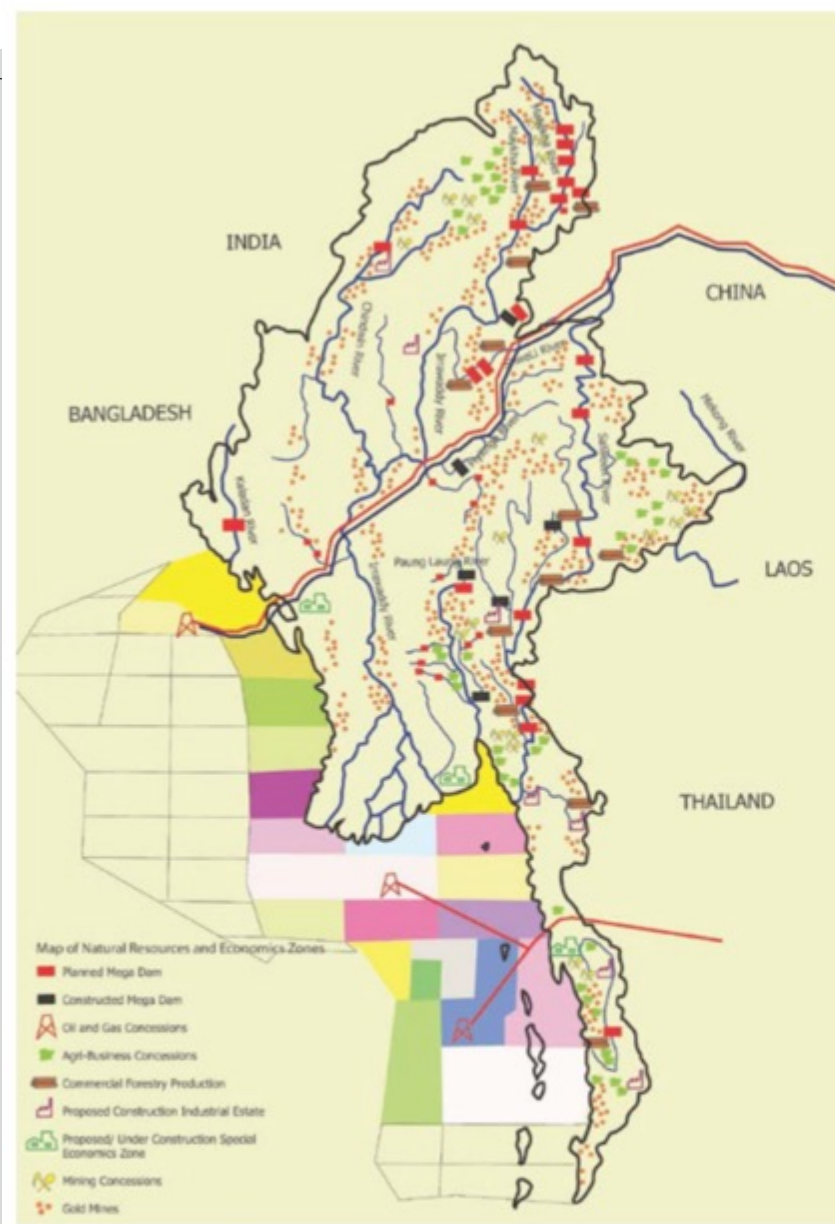


Figure 1A | The geography of natural resource wealth. Source: BNI



Figure 1B | The geography of active armed conflict in Myanmar. Source: TNI, 2013

# Why explore land and natural resources in relation to federal governance?

*Land = livelihoods and people's cultural and economic future*



Photo credit: Yukari Sekine

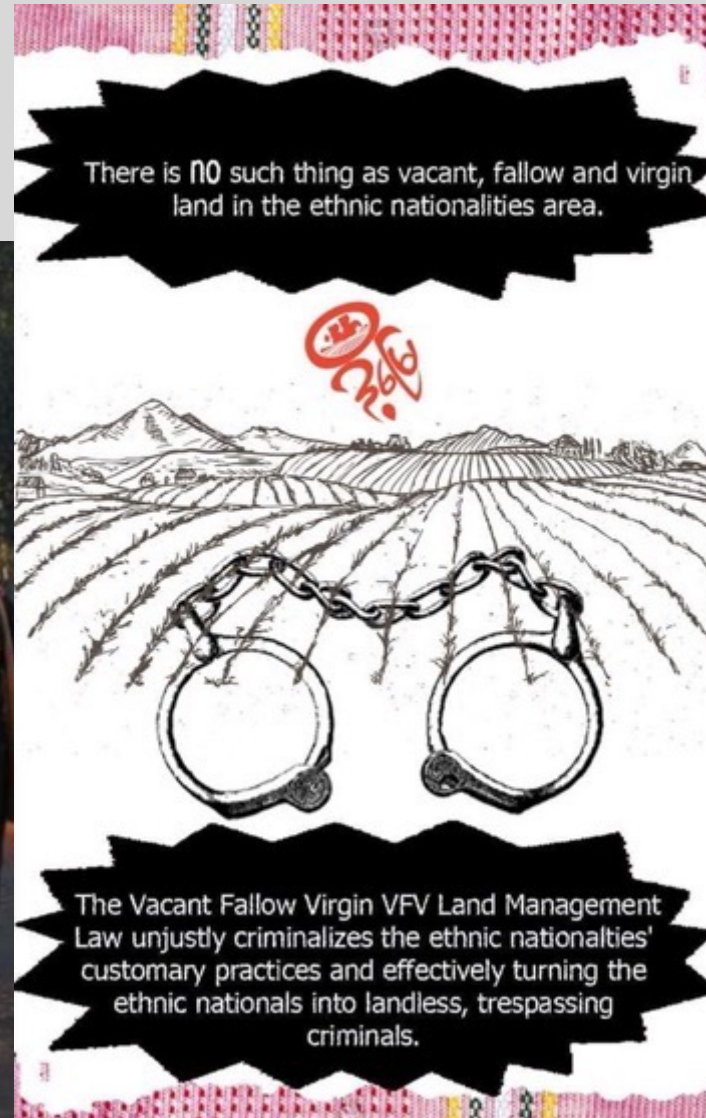


Photo credit: Community Involved Tourism Pa-O Region (CITPAR)



# What does land and natural resources encompass?

## Land attributes

Soil, terrain, biodiversity

Water resources

Land resources

Human settlement  
(urban/rural)

Plant and Livestock  
(agriculture, forest,  
rangelands)

Mineral resources (oil,  
metals, gems)

Spiritual/cultural/social

## Land rights

### Holders of rights:

- Collective
- Public
- Private

### Bundles of land rights:

- Commons
- Customary land systems
- Public Property
- Private property

## Authority on decision-making and Management

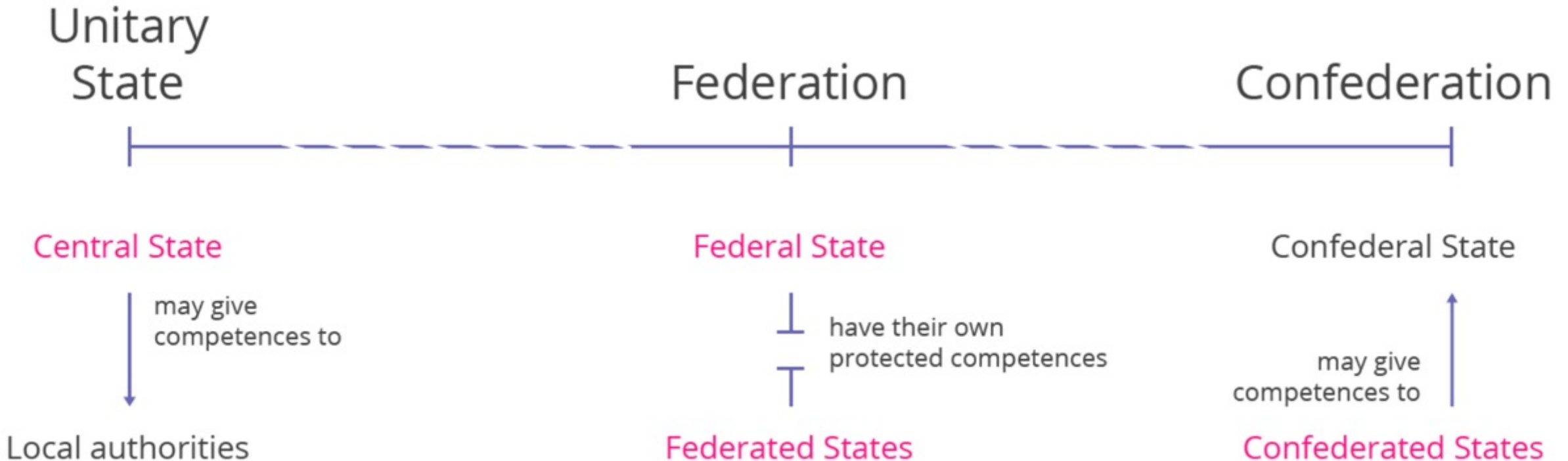
Land and natural resource regulations and management

Land and natural resource revenue and rents

Access, utilization or protection of land and natural resources

Due process, conflict resolution, restitution and relocation for IDPs, rights to resolve grievances

# How does a unitary state differ from a federation (and also confederation)?



Source: EuropeanConstitution.eu

In red, entity holding sovereignty.

Examples of Unitary states: Myanmar, China, United Kingdom, Japan

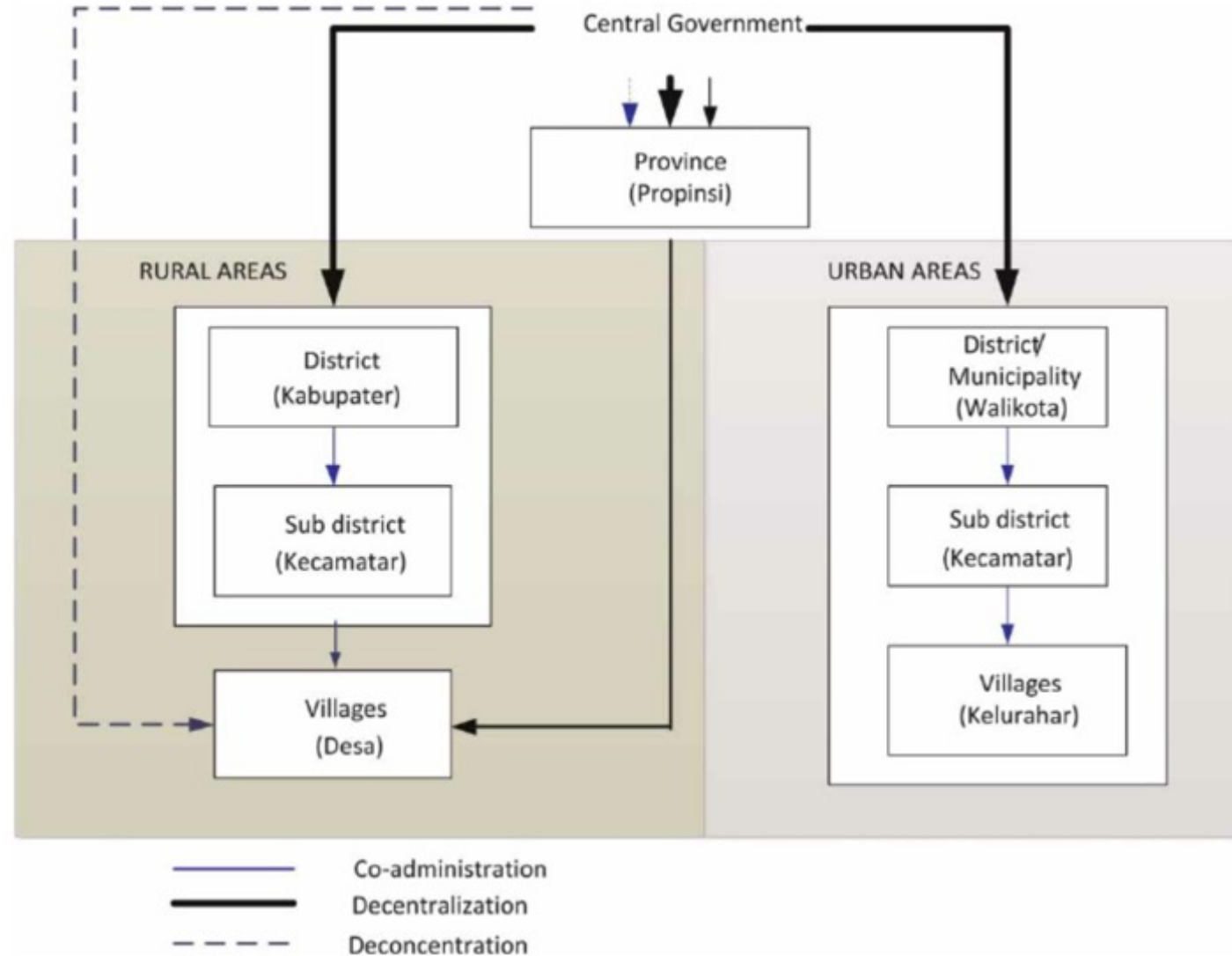
Examples of federal states: Canada, India, United States under the Constitution

Examples of Confederated states: United States under Articles of Confederation (1781-1788)



# Indonesia

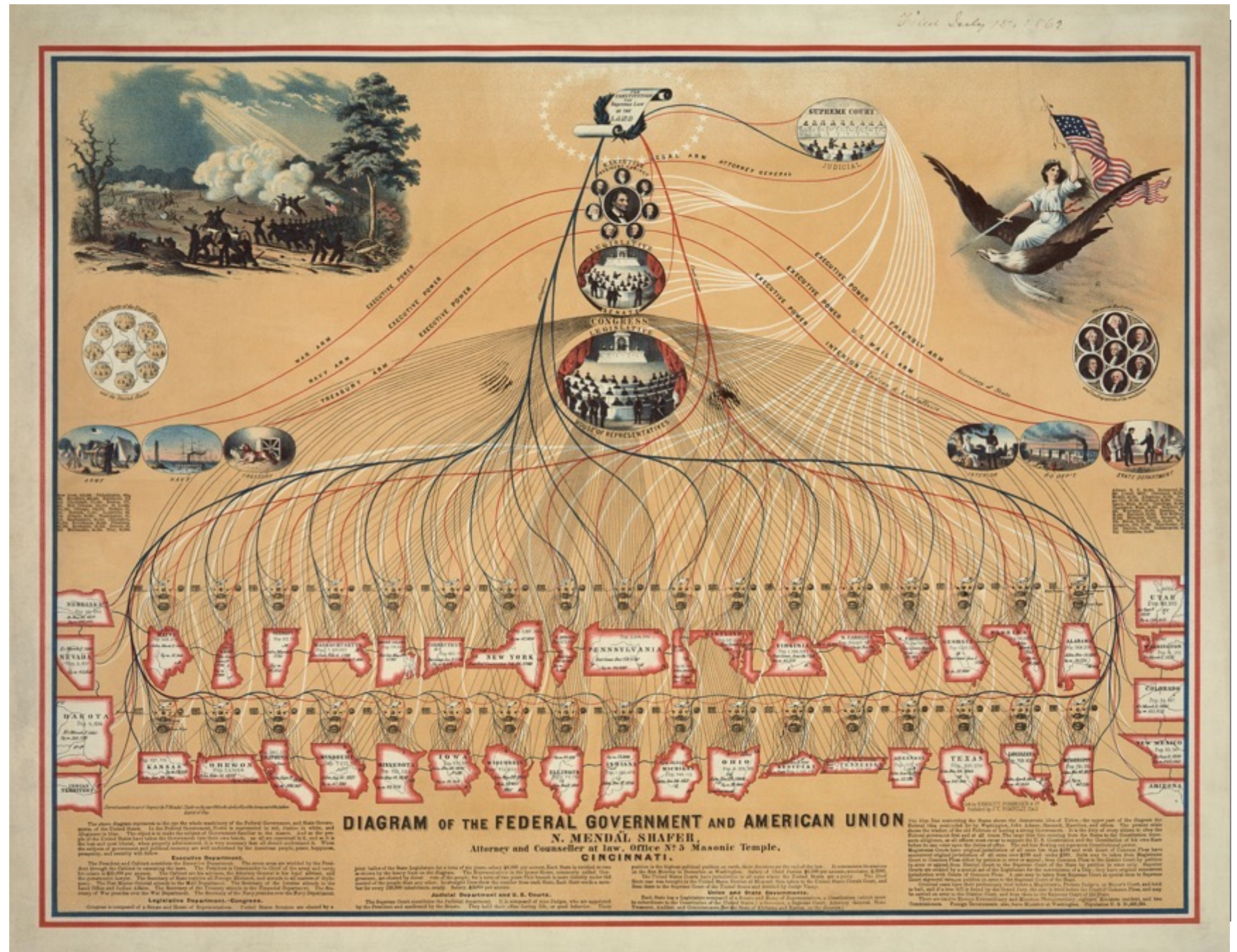
- Federal system shifted to Unitary in 1950. After 1998 and Suharto era, is now a Democratic Republic
- Ministry of Environment and Forestry, controls about half of land. Forest development authority is with district level, but Central level often ignores this and does it also. Corruption problems
- Little authority decentralized to Provincial level.
- Challenge: Insecure land tenure, lack of agrarian reform
- Constitutional Court ruling in 2013: removed customary forests from state control, and sought to formalize local peoples' ownership....  
*Implementation has been slow*



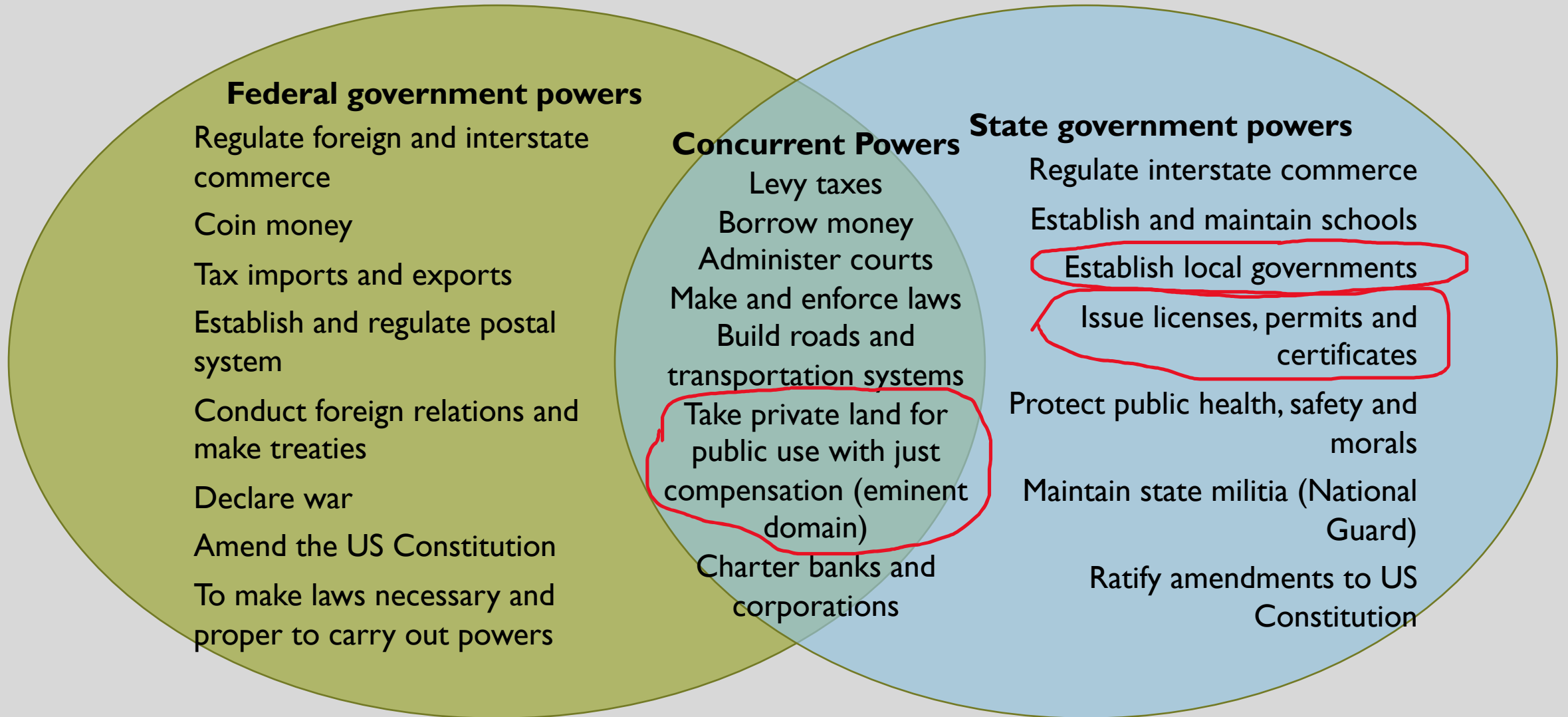
Source: Simanjuntak, I., et al (2012) Evaluating Jakarta's Flood Defence Governance: The Impact of Political and Institutional Reforms. Water Policy

# United States of America

- Is a Confederation
- Federal laws developed to ensure minimum standards; Clean Water Act and Clean Air Act
- Federal government manages federal lands (National Parks, National Forests, etc.), but most land is private land and regulated by states
- Land use laws and regulations usually at local levels

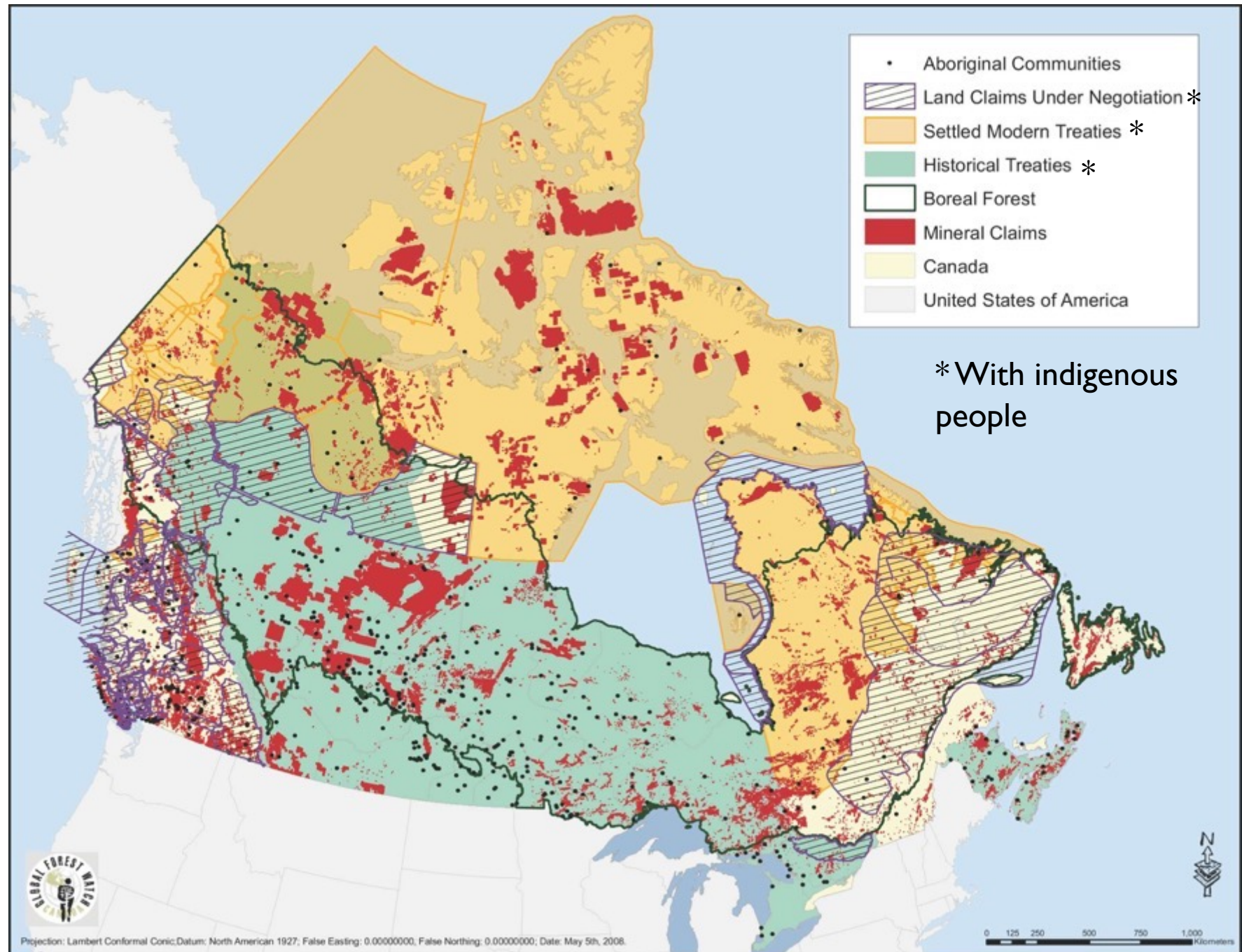


# Government powers under US federalism



# Canada

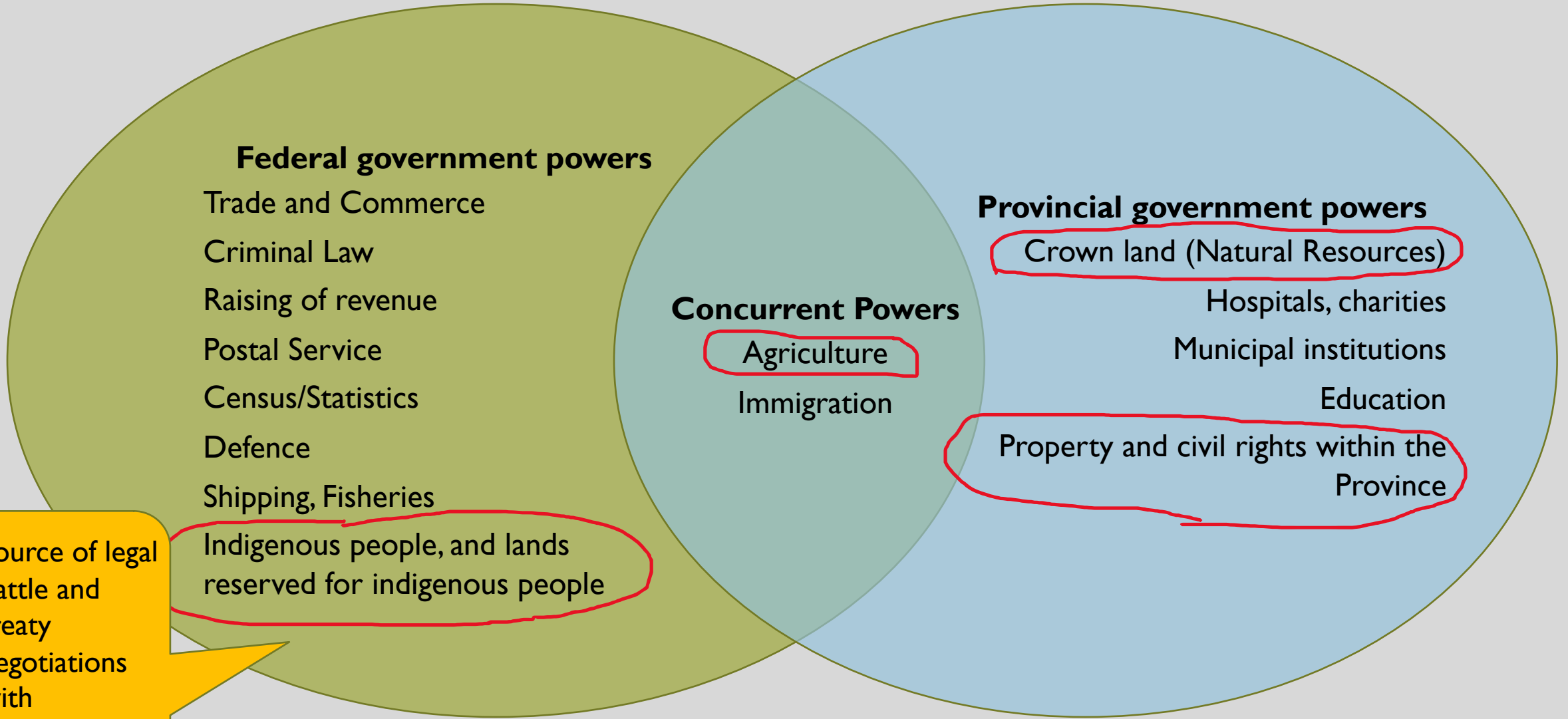
- 89% of Canada's land area is Crown land: 41% is federal crown land (mostly in the north) and 48% is provincial crown land. The remaining 11% is privately owned.
- Provinces and territories have jurisdiction over forests, mining, and agriculture, developing and enforcing laws, regulations and policies, and collecting revenue



# Canada offers more parallels to the Myanmar context

- As Canada was settled, many treaties were signed with Indigenous people in the 1800's – early 1900's. Indigenous culture (closely rooted in land and nature) was banned, and people forced to live in reserve areas. In Western Canada, few signed treaties giving up their indigenous rights to land, and many of these areas are contested today.
- Indigenous people are fighting to reclaim their cultural heritage, languages, and land.
- *Constitution Act of 1982* recognized and affirmed the existing indigenous and treaty rights of Indigenous peoples in Section 35. This is the legal basis to uphold indigenous land title rights in their traditional territories
- Thus, Federal system has had to adapt to the 'third tier' of governance (e.g. indigenous governance seeking self-determination within federal system...does not refer to local).
- In 2018, the Government of Canada began a process to reform its laws and policies to ensure the rights of Indigenous peoples, and the treaties and agreements the government has signed are upheld, through a 'Recognition and Implementation of Indigenous Rights Framework.'

# Constitutional division of powers in Canada



Source of legal battle and treaty negotiations with indigenous

# Summary of insights from case examples

- Divisions of power are defined in Constitutions
- In a Unitary system, central government holds authority, though rights can differ. For instance, in countries with large % of private property, central government may not exert much authority on private lands. In contrast, unitary governments overseeing a large % of public lands can exert strong authority (as in China)
- In Federal systems, divisions of power and power-sharing occurs between central and state governments. In the US and Canada, states/provinces have **authority** over land/natural resources management. **Rights** (such as ownership, concession, lease) are also granted at this level. Thus, land governance and regulation mostly occurs at state/provincial level, municipal levels, and increasingly in the case of indigenous land governance, at the indigenous territory-level.

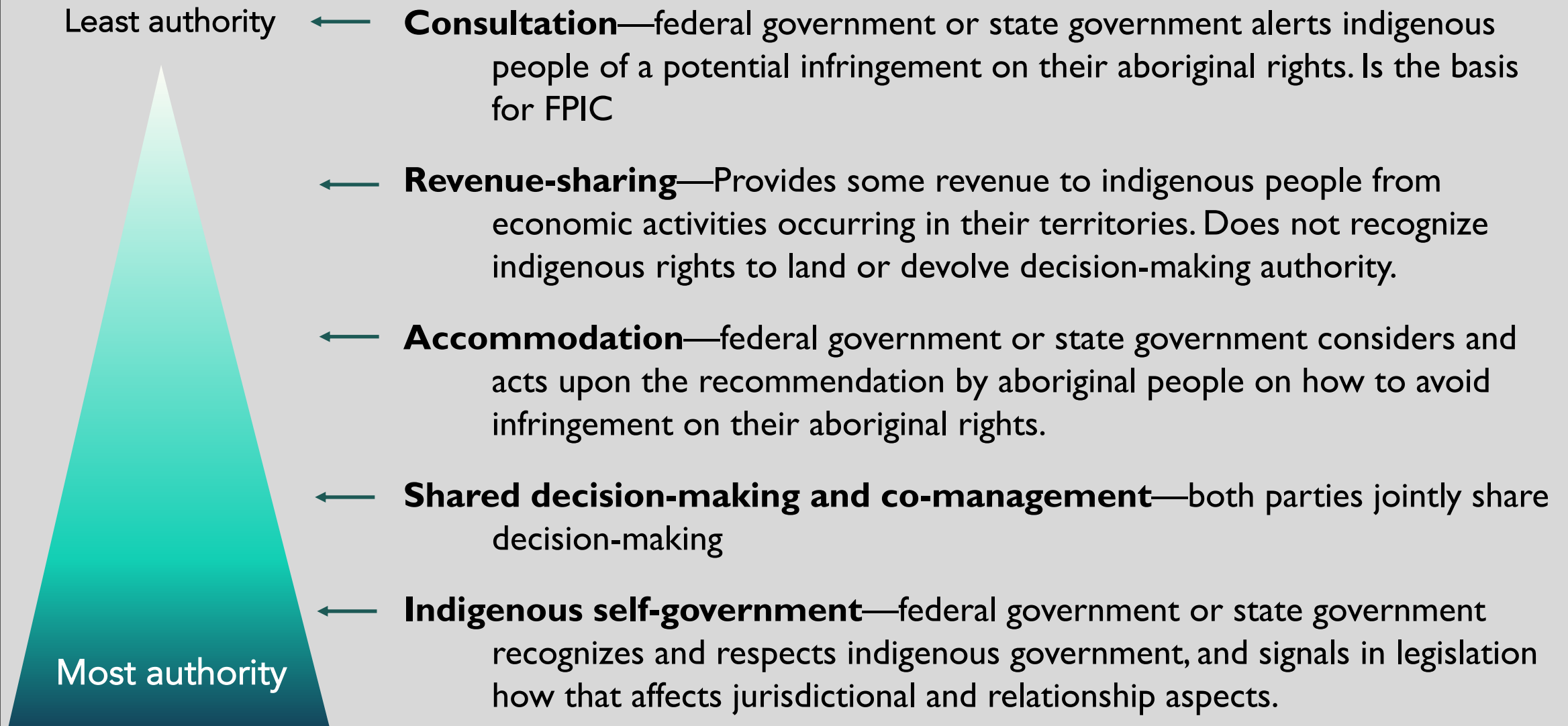
# How does a 'third tier' (e.g. ethnic/indigenous) fit in federal government systems?

- In other countries, this works when there are Constitutional protections (e.g. Canada, Brazil, Ethiopia) for indigenous people
- There must be recognition of indigenous **rights** and **authority**, and this is negotiated with federal and state levels
- The key is in finding a way to honour indigenous self-determination, within a federal context. It can take the form of autonomous regions with agreed relationship between third tier, state and federal. It can also include co-management, devolved authority, benefit-sharing, and other forms (see next two slides).
- Canada has a robust legal framework that is highly relevant to Myanmar. Ethiopia and Brazil also have many lessons learned that are applicable.

...We can reflect on Constitutional protections and various forms (and degrees of) rights and authority / responsibility in the following publication (which is provided with the training):



# Range of engagement options for federal and state government with indigenous people



# Range of land designation options that allow indigenous people to define their traditional territory and related decision-making authority

Least authority

- ← Central government holds ownership **rights** over land, and:
  - ← Delegates limited authority to state government, and does not recognize customary land use and rights
  - ← Delegates authority to a federal agency to oversee indigenous people's affairs and land
  - ← Grants usufruct rights
  - ← Co-Management in federal system that recognize customary land use and rights
  - ← Government recognizes recognize customary land use and rights in some areas, and allows for self-governance (customary traditions) in these areas
- ← **Indigenous hold rights & recognition of Aboriginal title and self-government within federal system**

Most authority

# Overview of Myanmar's current situation:

- Land and resources is central to the demands of ethnic civil society stakeholders and EAOs, but the 2008/2015 Constitution and Union laws and policies do not yet reflect these demands.
  - With the exception of the National Land Use Policy of 2016, which does recognize customary land tenure rights
- Union Accord peace principles do not yet contain clauses specific to natural resources, and principles specific to land mostly serve to further centralize unitary state control.
- Current land and natural resources administration at sub-national level is still upwardly accountable to Union authority
- How can this administration system acknowledge EAO land and forest policies, and also community-level land use plans and tenure?
- Yet many land concessions have been granted (and confiscated from local owners) in many areas, especially VFV areas...how to meet the needs of local people for their food security and livelihoods?

## Union government – Current Constitution:

2008 Constitution follows Unitary model – centralized state ownership and control of land and natural resources by the Union government:

- Section 37(a) states: “The Union is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere.”
- Section 37(b) states: “The Union shall enact necessary law to supervise extraction and utilization of State owned natural resources by economic forces.”
- Constitution does not legally recognize customary authorities, land or resource ownership or use rights and decision-making

## Union government – Current Constitution:

2015 Constitutional Amendments allow for limited political and fiscal deconcentration, as States/Regions are allowed to:

- Carry out specific activities, in accordance with laws enacted by the Union government.
- Reclamation of vacant, fallow and virgin lands, but overall authority and title is still held by the Union government.
- The licensing and collection of certain revenues allowed from artisanal and small-scale mining activity, salt, land revenue, agriculture, freshwater fisheries, smaller-scale electricity generation and traditional medicines.

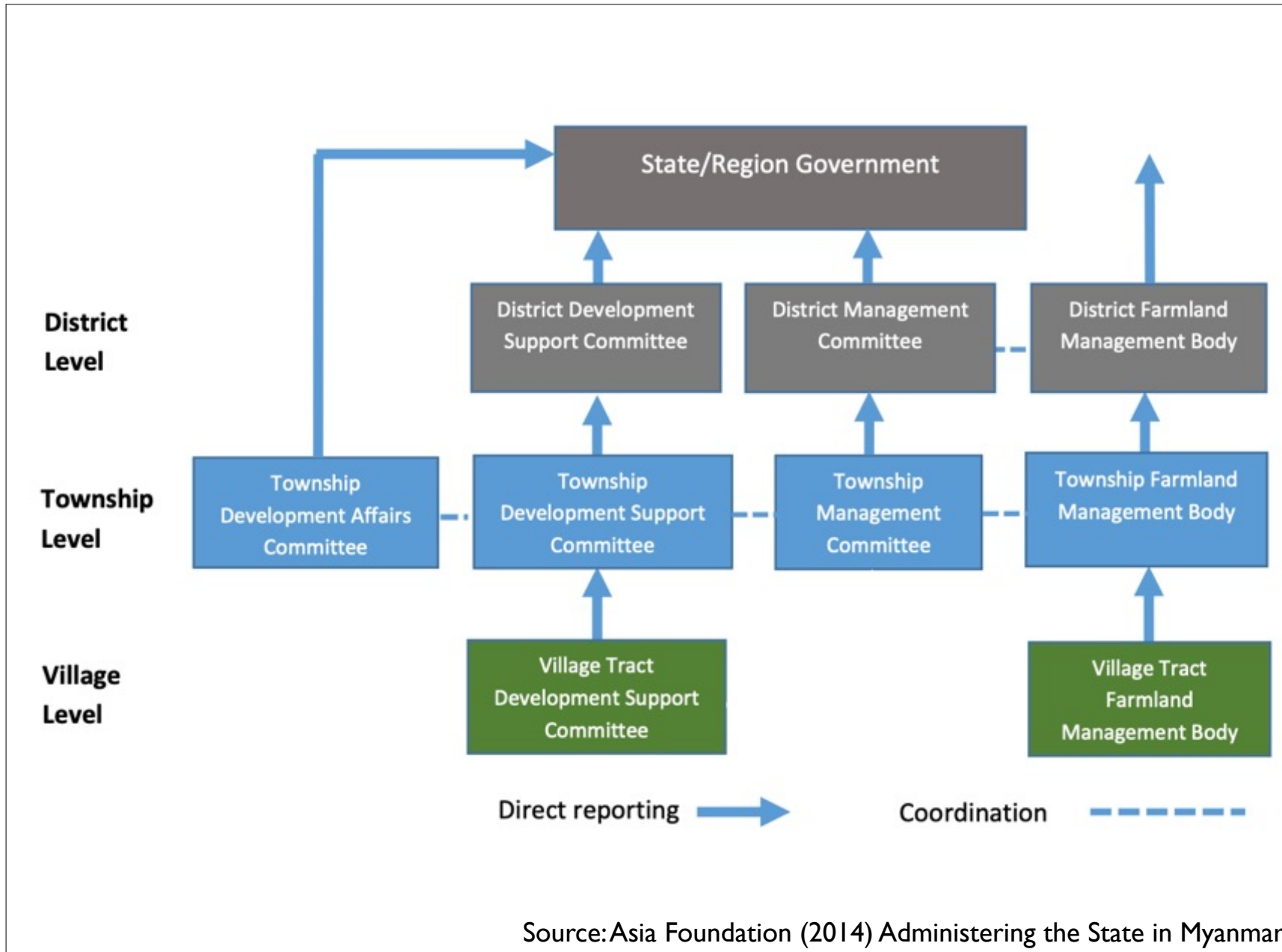
# Union government – Current Constitution:

2015 Constitutional Amendments also allow:

- States/regions have the right to legislate forest laws related to village firewood plantations and timber that is not marked as “State (e.g. Union government)” species (*which excludes all Myanmar’s revenue-producing species of teak and thityar, ingyin, pyingadoe, padauk, thingannet and tamalan*).
- Tax can be collected on non-timber forest products and those timber species not reserved by the State

# Reflection on Constitution

- These provisions largely reinforce a Unitary style of governance, as Union government retains control and authority over all lands.
- Movement towards **deconcentration** of some authorities and responsibilities under the 2015 Constitutional Amendments do not yet reflect federal style power-sharing. The **rights** and **authority** over land and natural resources still remains at Union level.
  - Deconcentration of powers that lacks accountability creates corruption (example: concession granting in Indonesia)
- Is allowing for **fiscal decentralization**, which is **not a substitute for political decentralization**. Dispersing powers to tax and generate revenues to lower levels of government, without transferring authority and decision-making at sub-national levels, can decentralize corruption.
- Does not yet reflect political decentralization and EAO demands for decentralized political federalism, and potentially decentralizes corruption (as was infamously the case in Indonesia).



## Management at sub-national level in Myanmar is still upwardly accountable to Union authority

- At township and district levels, authorities and committees are mostly appointed by Union administration, and are upwardly accountable
- Tatmadaw-appointed village administrators under the GAD are being replaced with locally-elected leaders under the Ministry of the Office of the Union Government..



# Concessions and rural livelihoods (on Myanmar's 26.7 million acres of arable land)

- Between 1991 - 2016, about 5.1 million acres of land were allocated to agri-business and entrepreneurs and to individual farmers if the area was less than 50 acres. The largest amount – 2.2 million acres – was allocated by the previous Central Committee for Vacant, Fallow and Virgin Land Management (CCVFVLM) (43%) and the military commanders (27%), followed by MoNREC (21%).
- Land use permits for agricultural development on VFV land are mostly concentrated in Kachin State, Sagaing, Tanintharyi and Shan Regions. Most large-scale schemes are a legacy of the military period, being signed off between 2007 - 2011.
- Of the 3.8 million acres of VFV land granted for agriculture purposes, only 15% percent has been cultivated

Source: San Thein, Hlwan Moe, Diepart J.-C. and C. Allaverdian (2018). Large-Scale Land Acquisitions for Agricultural Development in Myanmar: A Review of Past and Current Processes. MRLG Thematic Study Series # 9. MRLG.

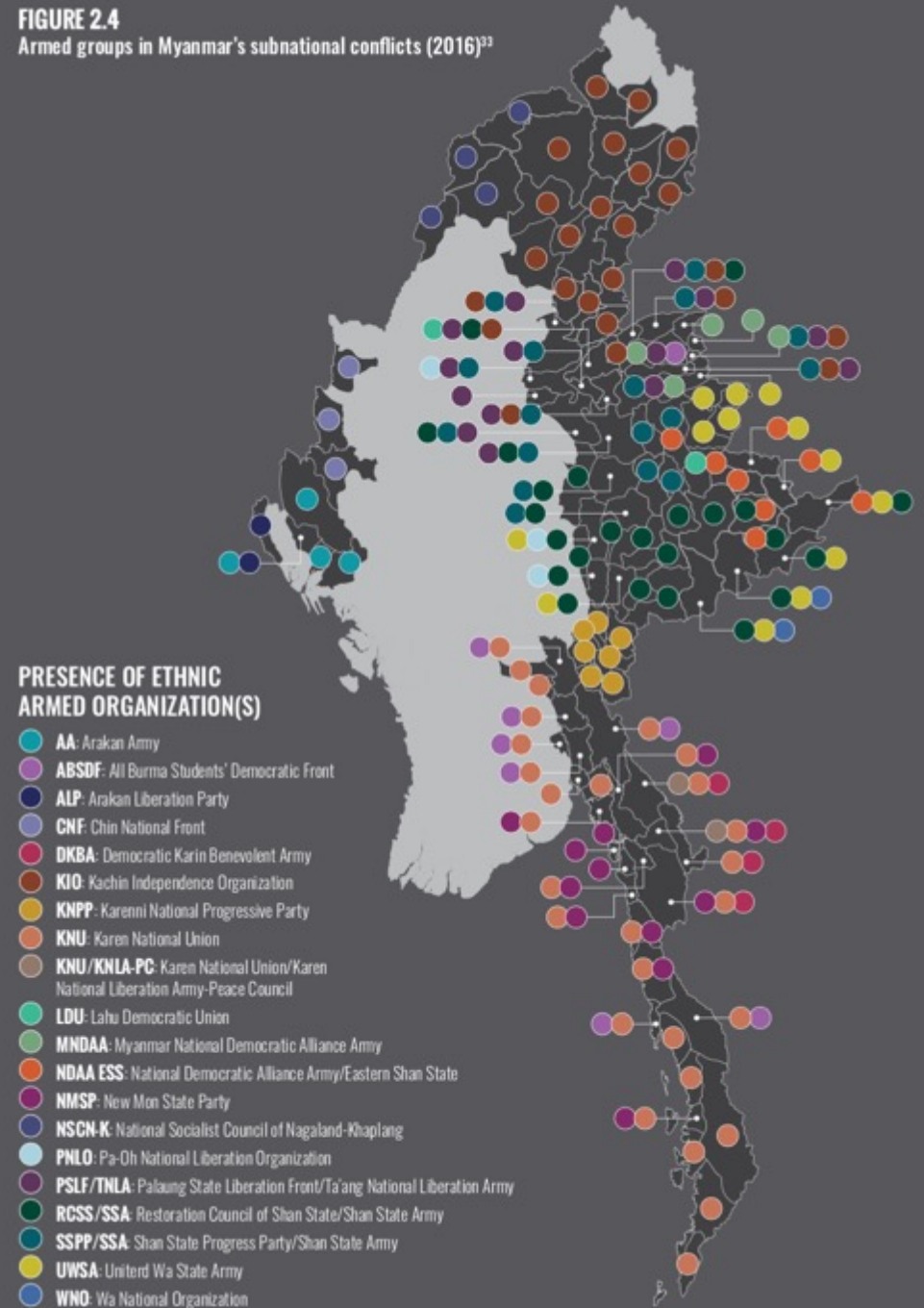
- About 20 % of all of Myanmar's land has been awarded to foreign or joint venture investors for 30 to 70 years.
  - Government officials concur that land leases/concessions have been negotiated and awarded in haphazard and inconsistent ways with little quantification of their impacts. Few concessions have generated expected revenue streams for the government.
- Less than 30% of agricultural land is controlled by smaller farmers and sharecroppers. Landlessness is increasing.

Source: Shivakumar Srinivas and U Saw Hlaing (2015) Myanmar: Land Tenure Issues and the Impact on Rural Development. FAO.

# Yet many VFV and concession areas are in EAO territories

- Significant areas of land are in National Ceasefire Agreement-signatory and non-signatory EAO territories
- Some EAOs are defining their own land, forest and agricultural policies
- In many areas, communities have managed lands by customary land tenure arrangements

FIGURE 2.4  
Armed groups in Myanmar's subnational conflicts (2016)<sup>33</sup>



# Union processes do not yet recognize EAO land policies, and the pathway for doing so is not yet known

- Increased natural resource exploitation, in NCA and non-NCA areas, as increased tension, fueled grievances, and provided funds that have sustained conflict
- EAOs are setting up systems and departments to govern and administer territories, land and resources in their territories:
  - KNU, KIO, NMSP, and KNPP have pursued such steps. Several EAOs also have forestry and agriculture departments
  - NCA-signatory and non-signatory EAOs have updated and revised policies related to land, environment and natural resources
  - These recognize and complement customary management practices, and provide culturally appropriate service provision.

# National Ceasefire Agreement

- NCA Basic Principle: ‘Undertake efforts to protect lives and property and improve the livelihoods of all persons living within the Republic of the Union of Myanmar.’
- NCA includes three clauses related to land and natural resources:
- 1) avoiding forcible confiscation and transfer of land from local populations (§9(f)), and avoid the taking of property without permission (§9(g))
- 2) Interim Arrangements– “EAOs ...have been responsible...for development and security in their respective areas. ...We shall carry out programs and projects in coordination with each other in said areas -§25(a):
  - Projects concerning...socio-economic development of civilians
  - Environmental conservation
  - Efforts to preserve and promote ethnic culture...also mentions receiving aid from donor countries...
- 3) Interim Arrangements– §25(b):
  - Planning of project with major impacts on civilians living in ceasefire areas shall be undertaken in consultation with local communities in accordance with the Extractives Industry Transparency Initiative Standard procedures and coordinated with relevant EAOs for implementation.

# How to bridge the gap?

- Big gap between current 2008 Constitution + 2015 Amendments and the aspirations of EAOs and ethnic civil society, and future Union Accord principles. The challenge is to define equitable solutions that ‘do no harm,’ respect the rights of people, allows for reconciliation, and builds trust in a future democratic system that allows for political decentralization
  - How can the Peace Process recognize rights and authority of ethnic/indigenous people to their lands? It should be added to Constitutional terms.
  - How can Union government signal intention towards the recognition of rights and authority / responsibility of ethnic/indigenous people and EAOs?
    - Role of emerging Land Law is crucial
- The NCA Interim Arrangements can be utilized to create solution space between Union government and EAOs, and demonstrate good faith.
- At a minimum, steps must be taken to implement terms of NCA Interim Arrangements.