

The background photograph shows a rural setting with large rocks. A woman in a green top and red headscarf stands in the background. A young child sits on a rock to the right. In the foreground, another woman in a pink top is washing a pink cloth. A large metal pot is on the ground, and a stream of water flows from a pipe into it.

Land and Cultural Survival

The Communal Land Rights of
Indigenous Peoples in Asia

Edited by Jayantha Perera

A close-up photograph of a woman's hands washing a purple cloth in a large metal bowl. The woman is wearing a patterned pink and purple sari. The background is slightly blurred, showing more of the outdoor setting.

Asian Development Bank



ADB

Land and Cultural Survival

The Communal Land Rights of Indigenous Peoples in Asia

Edited by
Jayantha Perera

2009

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Printed in the Philippines.

ISBN 978-971-561-801-4
Publication Stock No. BKK090139

Cataloging-In-Publication Data

Asian Development Bank.

Land and cultural survival: the communal land rights of indigenous peoples in Asia.
Mandaluyong City, Philippines: Asian Development Bank, 2009.

1. Indigenous peoples. 2. Communal land. 3. Asia. I. Asian Development Bank.

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Foreword

In 1986, the Asian Development Bank (ADB) issued the *Staff Instructions on Socio-cultural Impacts of Bank Projects* identifying “rights of tribal/ethnic minorities, cultural integrity and traditional land use control” as factors affecting the success of development projects. In 1994, ADB revisited the *Staff Instructions*, outlining a broad approach to indigenous peoples issues to ensure that development interventions facilitate informed participation of affected indigenous peoples; foster full respect for their dignity, human rights, and cultural uniqueness; provide them with culturally compatible social and economic benefits; and avoid adverse impacts on them. In 1998, ADB adopted the *Policy on Indigenous Peoples*, which pays special attention to their customary rights over ancestral lands and territories, the legitimacy of their social and economic institutions, and their right to direct the course of their own development.

In 2009, ADB updated the *Policy on Indigenous Peoples* and integrated it into a comprehensive safeguard policy framework to enhance the relevance and effectiveness of its application. In the process, ADB endeavored to reflect on and learn from past experience; respond to changing political and legal contexts; and reflect changing best practices of other multilateral financial institutions and of private sector institutions.

This book focuses on indigenous peoples and their communal land management. The analyses it contains explore how some Asian countries recognize indigenous peoples’ environmental interests and land rights, and engage them in the development discourse. Collectively, the chapters examine how some Asian countries have introduced laws, regulations, and institutional mechanisms to safeguard and promote indigenous interests in areas such as natural resources, communal land management,

and consultative decision making. These analyses are supported with case studies and timely critical reflections.

I thank the contributors to this important book for not only addressing the outcomes of past project experiences but also for providing insights into how the development processes might better accommodate the development needs and aspirations of indigenous peoples. I would like to acknowledge the work of Jayantha Perera in editing the book in his capacity as the focal person for the environment, involuntary resettlement, and indigenous peoples safeguards in the South Asia Department. I hope that this work will catalyze further scholarship on indigenous peoples issues.



Xianbin Yao

Director General

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Acknowledgments

In 2004, the Asian Development Bank (ADB) celebrated with indigenous peoples and international development agencies the completion of the “International Decade of the World’s Indigenous Peoples”. As part of this celebration, ADB organized a workshop to discuss the distinctive relationship between indigenous peoples and their habitat. Ten in-depth case studies were presented and discussed at the workshop held in Manila. This volume contains eight chapters, six of which were selected from the papers presented at the workshop. The other two chapters and the introduction were especially written for this book.

The contributing authors are people from diverse backgrounds who hold different views regarding indigenous peoples, their development rights, and communal land management as a way of life. Their expertise ranges from anthropology to environmental issues, development studies, public administration, forest management, and development practice. It has been a stimulating intellectual exercise for me to discuss each chapter with its author(s) and to agree on the contents, the analysis of data and information, and the presentation. All contributors took a keen interest in writing their chapters in several drafts following the general theme of the volume, that is, communal land management of indigenous peoples in Asia.

As indigenous peoples’ rights, particularly their communal rights over ancestral lands, are becoming part of international law, it is important to share information on such rights and how they are applied in varied sociocultural and political milieus with development practitioners, academics, and the public. It is fascinating to watch how fast indigenous peoples’ interests and rights are being recognized and applied by various countries in Asia and by international development agencies. This book

has attempted to capture the general trends while examining how individual countries have accommodated them, particularly with legislative changes.

The book does not claim to be an exhaustive treatment of the close relationship between indigenous peoples and their communal land rights in Asia. But it presents diverse aspects of the connections between the state and indigenous peoples and shows how such connections affect their worldview, economic survival, and cultural identity. The views and opinions expressed by the contributors reflect their own personal views and convictions; they do not necessarily reflect the views of ADB.

Kunio Senga, director general of the South Asia Department of ADB, encouraged and supported this project, and Xianbin Yao, director general of the Regional and Sustainable Development Department, kindly wrote a foreword to the book. I owe an enormous debt to my guru, Professor Scarlett Epstein, who chaired the workshop in Manila where the preliminary drafts were presented and inspired me to edit and publish this book. Muriel Ordoñez coordinated the production of the book with keen interest and dedication, and Judy Burke diligently edited the manuscript with acuity. Frederick Roche, Nessim Ahmad, Indira Simbolon, Natasha Davis, Jan Van Heeswijk, Ruben Martinez, and Shyamala Abeyratne helped me at various stages of this project. I thank all of them.

Jyantha Perera

Editor

Abbreviations

ADB	Asian Development Bank
BARS	Batang Ai resettlement site
FRA	Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act
ICES	International Centre for Ethnic Studies
ILO	International Labour Organization
IPRA	Indigenous Peoples Rights Act
NGO	nongovernmental organization
PESA	Panchayats (Extension to Scheduled Areas) Act
SALCRA	Sarawak Land Consolidation and Rehabilitation Authority
SLDB	Sarawak Land Development Board
UNDP	United Nations Development Programme
UNOHCHR	United Nations Office of the High Commissioner for Human Rights

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Administering Development in the Third World; Managing Projects That Involve Resettlement: Case Studies From Rajasthan, India; Development Projects and Impoverishment Risks: Resettling Project-Affected Peoples in India; Managing Resettlement in India: Approaches, Issues and Experiences; Can Compensation Prevent Impoverishment: Reforming Resettlement Through Investments and Benefit-Sharing; and India Social Development Report 2008 (Development and Displacement). He has been a consultant to several United Nations (UN) organizations, the Asian Development Bank (ADB), and the World Bank.

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Introduction

Jyantha Perera

Over 900 million people in the world are the poorest of the poor. At least one-third of them are indigenous peoples, and more than half of them live in Asia. Social indicators such as life expectancy, maternal mortality, nutrition, education, and health show that they are the poorest. They do not have sufficient land to gather or grow food or to raise livestock. They have few opportunities to learn new skills, obtain medical care, or improve their livelihood. They also find it difficult to influence national policies, laws, and institutions that could improve their life chances and shape their collective future. As a result, most indigenous peoples have been socially, politically, and economically marginalized, endangering their survival in a rapidly changing environment.

Despite the serious risks that indigenous peoples encounter as individuals and communities, indigenous rights in Asia have attracted little interest from the international legal community. Australia, North America, New Zealand, and some Latin American countries have been more prominent within transnational indigenous movements. Such movements are absent in Asia, except in the Philippines and Indonesia, where such movements have evolved into a robust indigenous peoples' rights forum, which is supported by national legislation. In a few other countries such as Cambodia and India, some legislative instruments have recently been introduced to safeguard indigenous interests at the country level. In India, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 is a landmark piece of legislation that elaborates the rights of forest dwellers and others who depend on forests for their livelihood and cultural identity. Despite such legislation, Asian indigenous communities as "marginal groups" have only limited means to maintain an active involvement in the international arena such that they are able to place

their claims on the international agenda (Xanthaki 2003). On the other hand, governments in these countries do not show sufficient interest in participating in international human rights forums and monitoring bodies that address and monitor indigenous peoples' rights issues. They usually do not take part in United Nations (UN) debates on indigenous rights. This reluctance to participate in international forums is reflected in their limited preparedness to initiate and maintain a serious dialogue with local indigenous peoples regarding indigenous rights. As a result, socioeconomic databases on indigenous peoples in the region are limited. Without comprehensive, updated, and credible information, it is difficult for Asia's indigenous peoples and their representatives to become actively involved in the international arena regarding indigenous rights and to place their claims on the international agendas.

International Legal Context

Since the 1950s, international recognition of indigenous peoples and their marginal status in newly established nation states has encouraged them to struggle against the dispossession and marginalization that were the common outcome of colonization. During the past several decades, indigenous peoples' attempts to regain control over their ancestral domains and cultural spaces have gradually moved from localized group-specific struggles to issues of wide public awareness and debate, which in turn have led to the formulation and recognition of their economic, social, and cultural rights at both the international and state levels. Their movements now transcend national boundaries and have been interwoven into international protest networks, where environmentalists, human rights advocates, and nongovernment organizations articulate their rights in different forums, demanding the recognition of their economic, environmental, cultural, and land rights.

Over the decades, the UN has become the pivotal forum where indigenous peoples' rights are given shape and expressed in declarations, covenants, and other instruments that form an important component of international law and international human rights law. By using the legal concept "indigenous rights" in international law, indigenous peoples seek recognition for

their collective rights to land and livelihood strategies within nation-state structures that have discriminated against them. Their demands focus on sharing and inclusion rather than on domination and exclusion by the mainstream society and the state. Nevertheless, this indigenous communalism still clashes with the principles of state sovereignty and modern individualism that underpin property laws and directions of national economic development.

The Universal Declaration of Human Rights was adopted by the UN in 1948. Articles 22 and 25 set forth the seminal protection of economic, social, and cultural rights of all human beings. In 1966, the UN General Assembly formulated the Covenants on Economic, Social and Cultural Rights, which codified in treaty form and elaborated upon the principles in the Universal Declaration of Human Rights. The International Labour Organization Convention Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries (ILO Convention 107 of 1957) and the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169 of 1989) further articulated indigenous peoples' rights. The first convention was the first international instrument that addressed the situation of indigenous peoples as a separate category from "non-self-governing territories or minorities". In other words, it applies only to economically and culturally distinct groups living within the borders of independent states—in particular, indigenous populations that pre-existed the state and its dominant population, and "tribal" groups that have existed on the margins of dominant societies throughout history. Through recognition of their relative position regarding mainstream society and economy, the first convention attempted to incorporate them into the wider economy, society, and polity. This "integrationist" or "assimilationist" purpose of the convention soon became a topic of debate among the concerned indigenous and tribal peoples and the states. The debate culminated in the revision of ILO Convention 107 of 1957 in the form of ILO Convention 169 in 1989. Unlike the earlier document, ILO Convention 169 recognizes the distinctive cultural traditions of indigenous and tribal peoples and places them on an equal footing in terms of their contribution to the world's culture. It marks a move away from the integrationist and paternalistic approach of its predecessor toward an acknowledgment

of indigenous and tribal peoples' cultures and ways of seeing the world, and a recognition of the importance of their full participation in decision making to enable them to set their own priorities and safeguard their interests and rights.

Since the Stockholm Declaration on the Human Environment of 1972, the evolution of various human rights instruments specifically focused on the infringements of the human rights of indigenous peoples. It declared, "Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being" (UN 1973). Twenty years later in 1992, the UN Conference on Environment and Development (the Earth Summit) at Rio de Janeiro marked a turning point in the promotion of indigenous peoples' rights, particularly relating to the environment. A number of legal instruments adopted at the Earth Summit, such as the Rio Declaration, Agenda 21, and the Convention on Biological Diversity, established international legal standards to protect indigenous peoples' rights to traditional knowledge and practices regarding their environment and its conservation. What is most important, the Stockholm and Rio declarations established an international legal framework that recognizes the unique relationship indigenous peoples have with their traditional land, or territory.

The Draft Declaration of the Principles on Human Rights and the Environment of 1994 highlighted the close relationship between the environment and human rights (UN 1994). It recognized and emphasized the environmental aspects of established human rights such as the right to life, livelihood, health, and culture. Section 14 of the draft declaration states that "indigenous peoples have the right to control their lands, territories and natural resources and to maintain their traditional way of life. This includes the right to security in the enjoyment of their means of subsistence." These rights display the inseparable link between sustainable development and environmental justice (Magraw and Lynch 2006). In international law, three key sets of rights are now well established regarding the relationship between sustainable development and environmental justice: first, "the right to life, including the right to a healthy environment"; second, "the traditional and customary property rights of indigenous and other local communities"; and third, "participatory and procedural rights" such as the right to be informed and the right to know

(Magraw and Lynch 2006). These rights are discussed at some length in Chapter 1.

In 1994, the report of the UN Sub-Commission's Draft Principles on Human Rights and the Environment listed several key procedural rights:

- the right to information concerning the environment,
- the right to receive and disseminate ideas and information,
- the right to participation in planning and decision-making processes,
- the right to freedom of association for the purpose of protecting the environment or the rights of persons affected by environmental harm, and
- the right to effective remedies and redress for environmental harm in administrative and judicial proceedings (Magraw and Lynch 2006).

Procedural rights are critically important in the conversion of “interests” into “rights”. They are not easily enforceable through legal proceedings, but they indicate the wider ascription of value or status to the interests and claims of a particular entity. Because of such ascriptions, lawmakers and institutions are encouraged to take account of those interests and confer on them some priority that they might not otherwise enjoy. Moreover, such ascriptions make them part of the context for interpreting legal rules (Magraw and Lynch 2006). Therefore, the value of procedural rights is to be judged in the context of national legal systems: how well have such rights been absorbed into the national legal framework? This is a key question that is addressed in several chapters of this book. Briefly, because some of these are procedural rights recognized by international law, individuals and nongovernment organizations (NGOs) could call upon national courts to enforce them, thereby helping to shape domestic environmental policy and laws. In this regard, “public interest litigation” in many developing countries such as India and the Philippines has become a very popular vehicle of access to environmental justice in the form of class actions, liberal rules of “standing”, and NGO interventions on behalf of individuals and groups.¹ Such access to environmental justice provides a window for indigenous peoples to seek judicial remedies on the grounds

¹ Rural Litigation and Entitlement Kendra v State of Uttar Pradesh, A.I.R. 1985 S.C. 652.

that development interventions such as dams, hydropower production, and agricultural development do, in fact, have direct adverse impacts on their environmental rights to livelihood and their inseparable links to their territory. This vital link between environmental rights and survival of indigenous peoples was clearly highlighted by a study that was commissioned in 1997 by the Working Group on Indigenous Populations on “indigenous peoples and land rights” (UN 1997). The study confirmed that access to land and resources is crucial for the survival of indigenous peoples. It also emphasized the need to recognize and secure indigenous land rights and urged governments to consult with indigenous peoples in the management of land and resources—in other words, the environment.

The landmark UN Declaration on the Rights of Indigenous Peoples of 2007 consolidated the incremental growth of international law and international human rights pertaining to indigenous peoples. Although the declaration is not legally binding in the way a convention or an act of Parliament is, it could nevertheless be regarded as a “soft law”. Such a soft law would be binding in a country where it has been either expressly enacted or has become part of domestic law when superior courts use it in interpreting domestic law as applicable to a particular situation.

International Development Context

International development agencies such as the Asian Development Bank (ADB) and the World Bank recognize the vulnerabilities and risks that indigenous peoples encounter in development interventions. These agencies have developed safeguard policies to ensure that the development projects they support will take place in indigenous lands or territories only if the affected indigenous peoples are consulted and participate. The World Bank introduced its first policy on indigenous peoples in 1982. ADB introduced staff instructions on indigenous peoples’ administrative issues in 1994, based on the World Bank Operational Directive 4.20 on Indigenous Peoples of 1991 and the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries of 1989. In 1998, ADB issued its own *Policy on Indigenous Peoples*. In both organizations, indigenous peoples policies are considered as safeguard policies giving indigenous peoples a way to hold the banks and the borrowing country

or the client accountable for any infringements of their rights caused by a bank-sponsored development intervention.

Many Asian states pay attention to indigenous peoples, variously known as tribal people, forest dwellers, scheduled tribes, ethnic minorities, national minorities, indigenous cultural communities, and indigenous groups. These states have adopted international legal instruments as part of national laws to protect indigenous populations. In India, for example, the Constitution guarantees some rights to tribal people and has listed more than 200 tribal groups as “scheduled tribes”. By enacting the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act in 2006, India has demonstrated its willingness to accommodate the environmental and human rights of tribal people in domestic law. The proactive role played by the Indian judiciary during the past three decades in matters such as the sovereign obligation toward tribal people and in dealing with tribal interests and rights relative to national laws and development priorities has also improved the legal recognition of rights of tribal people in the broader context of development.

Two parallel processes with direct impact on indigenous peoples have emerged in Asia during the past several decades. The first is the growing presence of international and local NGOs and human rights advocates in countries where indigenous peoples live in large numbers. They have played a vital role in increasing the awareness among indigenous peoples of their rights and of transnational indigenous peoples’ networks. The second is the rapid arrival of international corporations and global capital in the form of extractive industries, mega-energy programs, and transport development with the blessings of national governments and international donor agencies. Such agencies often obtain land for their industries with the support of national states. A state could invoke its right of “eminent domain” to take private or communal land with or without the consent of the owners or users of the land. “Throughout Asia, resources that lie within the lands of indigenous and tribal peoples are taken without their consent. Land that has belonged to them for hundreds, and sometimes thousands, of years is appropriated for forestry and mining” (Gray 1995). The most affected indigenous resources are timber, water, and minerals. These two parallel processes inevitably clash with each other, leading to a limited interpretation of international covenants intended to protect

the human rights of indigenous peoples. In this context, it is necessary to examine how well international legal covenants, safeguard policies of multilateral development agencies, and policies and laws of national governments address indigenous peoples' interests and rights in the realm of their ancestral domains. This is a key objective of this book.

Defining "Indigenous"

Many different labels have been used to identify and classify indigenous peoples. Widely used terms are tribes, ethnic minorities, cultural minorities, scheduled tribes, scheduled castes, and religious minorities. In many countries, such identities and classifications are used to deprive them of their rights to ancestral lands and to usurp such lands for development programs.

The British colonial rulers of India were the pioneers in preparing lists of "primitive tribes" and "backward castes" to suit their political goals of isolating them and maintaining power, as **Contributor Hari Ram Mathur** describes. Later, as an independent country, India created the list of scheduled tribes and defined those tribes partly by their "nomadic" living, unbound by ownership of territory. In Sarawak, Malaysia, the government cited the "wasteful," "lazy" lifestyle of the local Iban people as reasons to move them to new settlements—and appropriate the land for other uses, **Contributor and Editor Jayantha Perera** writes.

Today, in a role reversal, indigenous peoples are using the power of classification to assert their rights. Crucial to this is the concept of ancestral domains—lands that have provided home and livelihood for countless generations. Perera describes how international forums have accepted and disseminated the principle of ancestral territory and in fact have made it central to the definition of indigenous peoples. Agenda 21 of the UN Conference on Environment and Development recognized that "indigenous peoples and their communities have an historical relationship with their lands" as well as a distinct role in achieving sustainable development. This implies that unsustainable use is incompatible with the collective ownership of those lands. Moreover, displacement, relocation,

or urbanization would appear to diminish a group's identity and rights as indigenous peoples. Development interventions often erode communal land management, affecting indigenous economy, society, and culture and thereby triggering impoverishment, social isolation, and marginalization among indigenous peoples.

Many nations have acknowledged the broad concept of indigenous rights, and some have incorporated the principle of ancestral domain, at least to a degree. Perhaps the strongest example is the Philippines, which passed the Indigenous Peoples Rights Act in 1997. This law, as **Contributors Lorelei Crisolago-Mendoza and June Prill-Brett** show, recognizes the communal land tenure of indigenous peoples as a legitimate right. In Cambodia, the government adopted the Land Law of 2001, which includes a section on "Immovable Property of Indigenous Communities" and defines such communities by the existence of "customary" land-use practices and "traditional" lifestyle. **Contributor Indira Simbolon** praises the law for recognizing the mobility of highland indigenous peoples in Cambodia as part of their traditional way of managing "lands in their possession".

Other nations have resisted the incorporation of "indigenous" rights. **Contributors Kunsuk Mitra and Radhika Gupta** explain that the Indian government today prefers the word tribal to indigenous, because indigenous connotes "original settler," or *adivasi*, which in turn carries a claim to ancestral territory. The countries that gradually show some willingness to recognize indigenous peoples' rights still are largely reluctant to accept "ancestral domain" as a legal right, as they believe such an acceptance would create a state within the state, justifying the right of self-determination of indigenous peoples under international law.

Communal Land

The phrase "communal land rights" used in the title of this book highlights the key characteristic of indigenous peoples: their collective representation through communal use of ancestral land. Generally, indigenous peoples hold and exercise rights as groups. They claim customary rights to the lands that were traditionally occupied or used by their ancestors, and

they attempt to exert a measure of collective regulatory control over the allocation and use of such land and natural resources contained in it.

Historically, different legal, economic, and political situations have marginalized them from communal management of land in their ancestral domains. And current state policies, laws, and development programs generally refuse to accept the domains of indigenous peoples and attempt to divest such lands from communal management.

Development specialists who espouse the market economy sometimes see communal land ownership as a deterrent to the full participation of indigenous peoples in sharing benefits generated by the market economy. Research undertaken by **Contributors John P. McAndrew and Oeur IL** in northeast Cambodia in Ratanakiri, Mondulakiri, and Kratie provinces suggests otherwise. Findings of the studies indicate that given the opportunity, indigenous groups were eager to participate in sharing benefits brought about by the growth of local markets. By contrast, it was precisely the dismantling of and disregard for communal tenures by outsiders through the buying up of communal land for cash crops or future speculation and through forest concessions, economic land concessions, and illegal logging that diminished the natural resources necessary for sustaining livelihoods. McAndrew and IL further argue that indigenous groups who retain control over their communal land and forest resources are in a stronger position to adapt to the rapid and inevitable changes brought by the market economy than those who do not. This demands that government policies, laws, and practices protect communal land rights and accommodate indigenous peoples in the development of northeast Cambodia.

Crisologo-Mendoza and Prill-Brett believe that the passage of the Indigenous Peoples Rights Act has increased the prospect for sustaining communal land management in indigenous areas of the Philippines. On the other hand, they find that economic forces of change appear to endanger it. New livelihood opportunities push indigenous peoples to claim individual ownership over territories and resources traditionally covered by common property regimes. Earning income from nontraditional crops such as temperate vegetables, from non-farming activities such as tourism, and from temporary migration as overseas contract workers generates concomitant changes in lifestyles. Such economic and social

changes may be the insidious force that will bring about the demise of the exercise of communal land management by indigenous communities.

In India, traditional communal land systems that flourished widely in tribal areas in the past are now limited to remote, inaccessible tracts in the northeast, according to Mathur, and even these tribal people are influenced by the pressures of globalization and emerging market systems. A key impact is the change from shifting cultivation to permanent cultivation of tribal land. This has led to the formation of private property in tribal areas where communal ownership has been the predominant form of land tenure. Mathur shows that in the face of modernizing changes, tribal communities will find it increasingly difficult to hold on to their age-old communal land management system.

Nation Building

Two persistent assumptions have shaped many Asian governments' actions: that indigenous peoples' economic, social, religious, and cultural practices are a major obstacle to modernization and nation building, and that the introduction of private property and large-scale agriculture would not only improve the national economy but also help isolated and primitive indigenous peoples join the stream of modernization and improve their standard of living. These assumptions have proved false—and devastatingly so—in Sarawak, Malaysia, where development projects that have dislocated Iban communities from their ancestral lands have marginalized and impoverished them.

Cambodia illustrates a paradox that challenges indigenous peoples in Asia. They have to seek assistance of the state to protect their rights to communal lands and resources, but unfortunately, it is precisely the state that often denies them such rights and resources. Even where legal instruments exist to protect communal land rights and resources, indigenous peoples are still disadvantaged in the development processes because the government does not enforce the laws and does not even produce the regulations for implementing them. The most significant challenge that indigenous communities encounter in Cambodia, as Simbolon shows, is the encroachment of external development and state interests on their

traditional lands, forest, and water resources. Those forces are accelerating deforestation and increasing commercial pressure to exploit natural resources in ancestral domains.

Natural Resources: Exploitation and Conservation

Historically, tribal communities living within and on the fringe of forest areas depended on forests for their livelihood. The forest shaped their collective imaginations, belief systems, and culture, thereby molding their very identity. This umbilical relationship between tribal people and forests was first disturbed in the colonial era. As Mitra and Gupta describe, the industrial revolution and expansion of railways spurred the demand for timber, which motivated India's colonial government to claim large tracts of forests. Since then, the issue of land rights and indigenous peoples, especially in the forestry sector in India, has been highly sensitive because many tribal communities have been divested of their customary rights for purposes such as large dams, mining, timber contracts, or biodiversity conservation.

India has recently enacted a law that confers forest rights on tribal people. However, several agencies and individuals have challenged the constitutional validity of the act, with the outcome, as Perera points out, uncertain. Implementation of this law is encountering obstacles from many forces, including wildlife conservation groups that want to protect the endangered tiger population. Here and elsewhere, indigenous peoples find themselves blocked from their traditional lands in the name of biological conservation, while national and local governments allow large corporations to exploit the natural resources in those same lands in the name of development.

"The time has come," say Mitra and Gupta, "to seriously examine new and alternative approaches to reconciling this conservation versus livelihood dilemma."

The indigenous peoples' experiences in Asia suggest that the time has indeed come to ask what legal and political changes are further required to balance their right to a better life with their right to protect their identities, livelihood resources, and ancestral domains.

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Chapter 1

International Law and Indigenous Peoples' Rights

Jayantha Perera

In recent decades, there has been an increased awareness among politicians, lawyers, and development workers of indigenous peoples' rights and a rapid growth in international law encompassing indigenous peoples' economic, social, and political interests and rights. This chapter outlines the international legal developments to provide a broad context for examining the case studies of individual countries. With this background, the reader can gauge how well the basic tenets of international and human rights law have been assimilated into national laws and development policies regarding indigenous peoples' communal land rights.

Historically, empire builders have disregarded indigenous peoples' inseparable attachment to their lands and thereby denied them the relationship with their territory as a right (Gilbert 2006). International law played an important role in the history of territorial dispossession in Asia, Africa, and the Americas (Anaya 2004). It is only in recent years that indigenous peoples have been able to assert their rights under international law. They have pushed for international recognition of their ancestral right to live and earn their livelihood on their ancestral lands—lands on which they have lived since time immemorial and which have contributed to their distinct social and cultural identity.

A common characteristic of indigenous peoples is the *centrality* of their connection to their territory (Stavenhagen 2007). Territory provides for social identification and for the spiritual and cultural distinctiveness of an indigenous community. It also reflects indigenous peoples' economic dependence on such ancestral lands. In recent decades, international law,

particularly international human rights law, has increasingly acknowledged this multifaceted, deep, and special relationship between indigenous peoples and their ancestral land as crucial to their existence and well-being. This vital bundle of indigenous rights is captured by Article 13 of the International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries of 1989 (ILO Convention 169) as follows:

In applying the provisions of the Convention, governments shall respect importance of the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

Definition of Indigenous Peoples

In international law, a critical question is, Who are “indigenous peoples”? There is no universally accepted legal definition, although several attempts at defining indigenous peoples have been made by scholars, development practitioners, and legal experts. The definition proposed by Martínez Cobo (1983) is usually accepted as authoritative:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and precolonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

This definition emphasizes the centrality of the attachment of indigenous peoples to their territories. It also stresses the historical continuity of their existence on their ancestral territories from precolonial times. Moreover, it highlights that at present they live on these lands. Finally, it indicates that they are determined to transmit their ancestral territories to future generations. Hence, indigenous peoples are those who used to inhabit,

continue to inhabit, and wish to keep their strong attachment to a defined territory (Gilbert 2006). This binding tie to territory is the crucial element of “indigeneness” of any group of people. Therefore, it is a key issue of concern in the protection of indigenous peoples under international law (United Nations [UN] 2000).

Another key element of the definition of indigenous peoples is “the dimension of a relationship of dispossession or subordination in relation to another group that arrived later” (Scheinin 2005). For example, Article 1 of ILO Convention 169 emphasizes that indigenous peoples are “indigenous” on account of “their descent from the populations which inhabited the country or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries” (Article 1.1b).

Eminent Domain and Indigenous Peoples’ Rights

Territorial rights claimed by indigenous peoples could clash with the “eminent domain” right of a modern state. The state may allocate large tracts of land within its territory for development programs that would involve exploration and exploitation of natural resources such as minerals and water sources. Ironically, indigenous peoples’ territories are usually the wealthiest places in term of natural resources, although they remain at the fringe of economic development (Choudhary 2000). As Martinez points out, “The fundamental root source of conflict between indigenous peoples, on the one hand, and states and non-indigenous entities and individuals, on the other, is their differing views as to which actor possesses valid title to the land and resources, located in territories traditionally occupied by indigenous groups” (2004).

In the above context, three critical issues can be identified. First, can a state justifiably exploit indigenous peoples’ territory for the benefit of the mainstream society, even if such exploitation will destroy the environment on which the indigenous peoples depend for their sustenance, livelihood, and cultural identity? For example, mining minerals in forest reserves and building reservoirs and expressways in indigenous peoples’ territories may boost the country’s gross domestic product: Is that justified? Second, how

can such adverse impacts be avoided or minimized? Third, how can countries strike a balance between indigenous peoples' right to their ancestral territories and national development requirements?

International law approaches these questions from a human rights perspective. In other words, it accepts indigenous peoples' rights to their ancestral territory and its environment as a bundle of human rights. In this regard, there are three difficulties to overcome. First, in indigenous communities, land rights are often presented as "collective" rights, and states are reluctant to recognize such collective rights (Sanders 1991). Second, indigenous peoples' land rights do not fit easily into conventional categories of rights such as political rights or economic, social, or cultural rights, as they encapsulate a range of interests and rights that are indivisible and interdependent. Third, such land rights threaten a state's territorial sovereignty. Land rights touch upon the issue of territoriality, and state territorial sovereignty is certainly an area where states are most reluctant to allow any encroachment. Territorial rights of indigenous peoples also include "self-rule rights" that would ensure "the full and free development of their cultures and the best interest of their people" (Gilbert 2006). Thus, it is quite a paradox that international law has at once two key tasks, the protection of the territoriality of states and the territorial rights of indigenous peoples, which invariably clash with each other.

During the past 25 years, international law has displayed steady progress in identifying and protecting indigenous peoples' rights. The UN Working Group on Indigenous Populations was established on the basis of the Economic and Social Council Resolution 1982/34. The group began working in 1985 on a "Draft Declaration on the Rights of Indigenous Peoples". The declaration took two decades to evolve, and its final form—the UN Declaration on the Rights of Indigenous Peoples of 2007—is a long and complex document with a preamble and 46 articles, divided into nine sections. It recognizes a wide range of basic human rights and fundamental freedoms of indigenous peoples. Among these are the right to unrestricted self-determination; an inalienable collective right to the ownership, use, and control of lands, territories, and other natural resources; and the rights to maintain and develop their own political, religious, cultural, and educational institutions and to protect their cultural and intellectual property. The declaration highlights the requirement for obtaining free,

prior, informed consent of affected indigenous peoples regarding activities of any kind that may affect them and their territories. It specifies the requirement for fair and adequate compensation for violation of the rights recognized in the declaration, and it establishes guarantees against ethnocide and genocide. The declaration also provides for fair and mutually acceptable procedures to resolve conflicts between indigenous peoples and states, including procedures such as negotiations, mediation, arbitration, and national courts, and international and regional mechanisms for examining and denouncing human rights violations. The key opposition to the contents of the draft came from several states that challenged the right to self-determination, which they thought would damage state sovereignty and territorial integrity (Tebtebba Foundation 2007).

The Human Rights Council adopted the declaration in 2006, and the General Assembly of the UN adopted it on 13 September 2007. The first preambular paragraph says, "Guided by the purposes and principles of the Charter of the United Nations." This brings indigenous peoples' rights within the context of international law. The adoption of the declaration clearly indicates that the international community is committing itself to the protection of the individual and collective rights of indigenous peoples. The declaration will not be legally binding on states and will not, therefore, impose legal obligations on states. Nevertheless, it will carry a considerable moral force. This document has the distinction of being the only declaration in the UN that was drafted by the rights-holders themselves, that is, indigenous peoples.

Individual Rights vs. Collective Rights

In focusing on indigenous peoples' communal land rights, a key problem is how to distinguish individual rights from collective rights. National legal systems are usually geared toward determining individual rights. Collective or communal rights are therefore considered as "common property" or "customary property" rights, which often are not part of national legal systems. During the past several decades, international law, particularly human rights law, has focused on individual and group rights of people, paying special attention to the concept of property (Gilbert 2006). Generally, property is defined to mean "a thing or things belonging to

someone; possessions collectively” (Oxford University 2005). These two aspects of the definition of property are relevant to the discourse on indigenous peoples’ land rights. First, property means the right to own, possess, use, and dispose. Second, that possession can be exercised collectively or individually. It is by way of the latter, that is, the *social* rights approach to property rights, that indigenous peoples’ land claims could be brought to the forefront of the discussion on property rights (Gilbert 2006). In this regard, the distinction between the right to *own* land and the right to *use* land (which is well established in international law pertaining to property rights) could be a useful instrument for indigenous peoples in claiming their land rights over their ancestral domain. The right to use land is particularly important for indigenous peoples’ survival as distinct cultural entities, as a state could accommodate use rights of groups of people without getting entangled in the question of territorial sovereignty.

During the past several decades, indigenous peoples have demonstrated that they would not accept the right to use ancestral land as the final target of their struggle for self-determination. In demanding the right to own ancestral land, however, the stress is on collective ownership rights. A difficult task for human rights law is how to validate a collective form of land ownership in a national legal context where individual ownership of property is predominant. Recent developments in human rights law that recognize a collective right of land ownership have opened a window to deal with indigenous peoples’ communal rights over their ancestral land. Initial evidence of this approach is evident in the Universal Declaration on Human Rights, adopted and proclaimed by General Assembly Resolution 217A (III) of 10 December 1948, which enshrines the most universal conception of values. During the debates for the drafting of this declaration, the issue of property rights formed an important part of the discussions. One of the issues was whether it is possible to recognize property rights as individual or as collective rights. The debate on this issue led to Article 17, which reads as follows: (1) “everyone has the right to own property as well as *in association with others*;” (2) “no one shall be arbitrarily deprived of his property” (emphasis added). Thus, Article 17 of the human rights declaration recognizes a corporate as well as an individual approach to the right to property. This effectively removes the limitation imposed by the application of a Western notion of property, which generally recognizes only individual ownership.

The International Convention on the Elimination of All Forms of Racial Discrimination of 1965 in Article 5(d)(v) stipulates that states should guarantee “the right to own property alone as well as in association with others.” Regarding indigenous peoples’ land rights, the convention makes several references to this article in its concluding observations. In General Recommendations 23, the convention further explained the meaning of this provision in relation to indigenous peoples’ land rights as protecting communal ownership of territories. Article 5 of the convention is directly relevant to indigenous peoples’ land rights at the national level. The reference to a right to own property in association with others not only is critical to indigenous peoples’ identity and livelihoods but also guarantees substantive collective rights over their ancestral territories. Article 5 could be interpreted proactively to mean that where traditional or ancestral lands of indigenous peoples were confiscated without their “free and informed consent”, such lands should be returned to them or, where returning is not possible, they should be compensated. Thus, by expressly requiring states to guarantee the right to everyone to own property without distinction as to race, color, or national or ethnic origin, the convention significantly opened the door to indigenous peoples’ collective approach to property in lands. This, in turn, facilitated the inclusion in human rights law of the collective rights of indigenous peoples to their ancestral land and subsistence on such land.

Collective Rights Under International Law

The ILO Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO Convention 107) was the first instrument that specifically addressed the issue of land ownership rights of indigenous peoples. Article 11 states that “the right of ownership, collective or individual, shall be recognized.” However, as noted by Swepston (1990), the land rights provisions in this convention (Articles 11 to 14) were designed to protect the rights of indigenous peoples in the context of their “inevitable” integration into national society. In contrast, ILO Convention 169 recognizes the right of indigenous peoples to exercise their own specific form of land ownership, insisting on the collective aspect of such a relationship. Article 13 of Convention 169 says that in applying the convention, “governments

shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship." Regarding ownership rights, Article 14 says that "the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised." Even though Article 14 does not mention the collective or individual aspect of indigenous peoples' ownership, it affirms the rights of ownership and possession "of the peoples concerned" and thus suggests that if peoples concerned do exercise a collective form of ownership, it should be recognized.

In fact, ILO Convention 169 specifically protects indigenous peoples' customary systems of land ownership by declaring that "persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them" (Article 17.3). Thus, ILO takes into consideration that in most cases, indigenous peoples have an alternative concept of property rights that could be based on a traditional collective form of ownership premised on customs, folklore, and oral tradition, which are not considered as evidential proof of property ownership under national legal systems. "The existence of indigenous property systems does not depend on prior identification by the state but rather may be discerned by objective evidence that includes indigenous peoples' own accounts of traditional land and resource tenure" (Anaya 2001).

Right to Use Natural Resources

Indigenous peoples' traditional or ancestral territories are usually located in regions where natural resources have still not been fully tapped on a commercial scale. But with the demand for energy, water, minerals, and food, thousands of hectares of forest and wetlands are being cleared and converted into reservoirs, factories, mines, and fields of corn or rice. Such expansion of development into the ancestral lands of indigenous peoples has raised the issue of who has the control over natural resources on such lands. This was a topic that ignited a wide-ranging debate at the UN during

the revision of ILO Convention 107. A number of states insisted that the state owns its natural resources and that the state has the right to decide how to explore and exploit such resources for the benefit of its citizens. However, ILO Convention 169, by distinguishing between the right of land ownership and the right of use, established that a state could own and use land in the territory recognized as its own territory, but that such state rights do not supersede the rights of indigenous peoples. Article 15(1) of ILO Convention 169 states:

The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

In addition, ILO Convention 169 has a specific provision on sub-surface resources. Article 15(2) states:

In cases in which the state retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Thus, ILO Convention 169 recognizes indigenous peoples' traditional form of land ownership as a source of property and clearly affirms that states should protect the right of indigenous peoples to a collective ownership and should include them in any exploration, extraction, and management of natural resources in their ancestral lands and ensure that they receive from those their fair share of benefits.

The UN Declaration on the Rights of Indigenous Peoples of 2007 deals with indigenous peoples' proprietary right to land in much clearer language than that of ILO Convention 169. Article 26 takes a very wide approach by putting together notions of ownership, possession, and use. Article 26(2) states:

Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

Hence, even though the UN declaration does not specifically refer to collective property rights, it clearly recognizes indigenous peoples' traditional form of land tenure. However, the issue of collective rights is not uncontested; for example, the United Kingdom issued a statement soon after the adoption of the 2007 declaration stating that it would not accept the concept of "collective right". The United States (US), Australia, and New Zealand have expressed similar opposition to the recognition of collective rights. Nevertheless, the text of the declaration clearly affirms in Article 27 that states have to recognize indigenous peoples' customs, traditions, and land tenure systems whether they are based on individual or collective rights.

The evolution toward the recognition of collective rights to land at the international level mirrors the development of the indigenous right to collective property at the national level. Part of such recognition is related to the gradual recognition of the "social" nature of land rights. Article 6 of the UN Declaration on Social Progress and Development of 1969 states that "social progress and development require...the establishment, in conformity with human rights and fundamental freedoms and with the principle of justice and the social function of property, of forms of ownership of lands and of the means of production which preclude any kind of exploitation of man, ensure equal rights to property for all and create conditions leading to genuine equality among people."

The recognition of indigenous peoples' collective form of territorial ownership is now found in national constitutions and legal systems. The Supreme Court of Canada in *Delgamuukw v. British Columbia* ([1997] 2 S.C.R. 1010) defined the nature of aboriginal title as a collective-proprietary right. Hence, the court established a distinction between the proprietary rights to which all Canadian citizens are entitled and aboriginal title. In the words of McNeil (2000), aboriginal title "is not a mere private property right, but a communal right that includes governmental authority and therefore is more in the nature of title to territory than title to land."

One difficulty with the reception of indigenous customary laws by national jurisdictions comes from the fact that indigenous peoples usually rely on the long-term possession of territories supported by folklore, genealogies, rituals, and cultural practices as both record and proof of their ownership over the territory. In *Delgamuukw v. British Columbia*, the Supreme Court of Canada accepted songs as proof of ownership. In reversing a lower court's judgment, which refused to accept such evidence as proof of ownership, the judges of the Supreme Court ruled that when there are no documentary forms of evidence, such oral testimony had to be considered by national courts as evidence of rights over traditional territories. Similarly, courts in Australia have recognized the customary and traditional property rights of indigenous peoples. In 1992, the Australian High Court in *Mabo v. Queensland (175175 C.L.R)* recognized a common law of property rights held by aboriginal inhabitants in their historically occupied territories. This judgment displays the court's willingness to recognize native title as both communal and emerging from traditional laws of indigenous tribes. The importance of this approach is that it was premised on the native perspective of the human–environment relationship when considering a tribe's land rights (Manus 2006). The US Supreme Court in 1988 in its decision in *Lyng v. Northeast Indian Cemetery Protective Association* (485 U.S. 439) displayed its willingness to accept the vital connection between tribal cultural survival and legal protection of the natural environment. The Supreme Court of Belize in 2007 in *Arurelio Cal v. Attorney General* (Consolidated Claims Nos. 171 and 172 of 2007) held that the national government must recognize the indigenous Mayans' customary tenure to land and refrain from any act such as giving rights to logging and land for hydroelectric projects on traditional Mayan lands that might prejudice the value, use, or enjoyment of this property. The chief justice of Belize stated that British colonial and subsequent acquisition of land in Belize did not abrogate the Mayan peoples' primordial rights to their land. Referring to *Delgamuukw v. British Columbia*, the chief justice stated that "indigenous title is now correctly regarded as *sui generis*." This means that the very fact that original peoples inhabited a land over time confers land title to the original peoples. This is the first judgment with reference to the 2007 UN declaration on indigenous peoples.

The general movement observed in many countries toward the gradual recognition and inclusion of indigenous customary laws as part of the

larger development of human rights law supports the integration of laws and rights including their communal land rights into national legal systems. However, the development of indigenous peoples' right to own their ancestral land remains limited by the enduring distinction between collective and individual rights. Despite many recent changes, the right to property is still far from encompassing indigenous peoples' land ownership concepts, as it remains embedded in its Western origins and appears incapable of accommodating other approaches. Even ILO Convention 169, which recognizes land rights as property rights, does not encompass the notion of territories. Although there are signs of an evolution toward the recognition of indigenous peoples' rights to collective ownership, human rights law unfortunately still focuses largely on private, individual property. The view that states exercise territorial sovereignty and that individuals within a territory hold private property rights is strongly present in domestic jurisdictions.

Right to Use Land as a Cultural Right

International law recognizes the dual nature of cultural rights. On the one hand, cultural rights cover arts, sciences, and local knowledge. On the other hand, the term means respect for cultural differences. Such differences exist among groups or collective identities. Thus from a legal perspective, culture is a way of talking about collective identities (Anaya 2004).

Human rights law recognizes that landholding systems constitute a central aspect of indigenous peoples' cultures, providing a key criterion of "indigeneness". In this paradigm, protection of ancestral land becomes crucial for the sustenance of a cultural system, and without such protection, it is difficult to maintain collective identity of an indigenous group. This brings us back to the central concept of territoriality, which provides the key identity to an indigenous group. In this context, the right to territory is understood as requiring sufficient habitat and space to reproduce culturally as a people. Human rights law has developed in a manner that favors indigenous peoples' rights to use their ancestral lands as a part of their fundamental right to enjoy their own culture and to sustain it for future generations. In terms of indigenous peoples' land rights, this results

in the legal recognition of indigenous peoples' specific cultural attachment to their traditional territories. The right of indigenous peoples to use their lands also refers to their ability to access the resources that sustain life as well as to the geographical space necessary for the cultural expression and social reproduction of the group (Upadhyay and Upadhyay 2002; Anaya 2004).

Land Rights as Subsistence Rights

There is an obvious connection between indigenous peoples' right to use their land and their survival, as without access to their land, indigenous communities cannot access their means of livelihood. This right has two aspects: the right to a collective existence and the right to subsistence. A critical question in this regard is, Does the removal of indigenous peoples from their territories amount to a preconceived strategy of destroying indigenous groups? On the relevance of the protection of groups under the prohibition of genocide, it has to be emphasized that ultimately, the test will be based on the notion of "specific intent" (Gilbert 2006). The destruction of property and burning of the harvest as well as the practice of so-called scorched-earth operations amount to genocide, as found in the case of Guatemala regarding Mayan populations during the civil war. Genocide may be recognized if it is proved that the destruction of the conditions of life was one of the principal mechanisms used to destroy the group (Gilbert 2006).

One important development of human rights law in recent years is that states have to make sure that indigenous peoples have access to natural resources such as water, plants, and forest produce on their traditional lands. Access to natural resources more than their ownership determines whether indigenous peoples' rights to livelihood and food are upheld. Associated with the right to life is the right to health. In this context, the obligation to protect an environment is important because if the environment is not conducive, indigenous peoples cannot live on their lands. In this sense, indigenous peoples' land rights are part of the wider debate on the link between environmental protection and human rights. As the International Court of Justice in 1996 pointed out in its advisory opinion to the UN General Assembly on the "Legality of the Threat or Use of Nuclear

Weapons”, “The environment is not an abstraction but represents the living space, the quality of life, and the very health of human beings, including generations unborn” (quoted in Gilbert 2006).

Article 7.4 of ILO Convention 169 states that “governments shall take measures in co-operation with the peoples concerned to protect and preserve the environment of the territories they inhabit.” Indigenous peoples’ right to use natural resources includes the right to continue their traditional practices for using, managing, and conserving these resources. Article 10(c) of the 1992 Convention on Biological Diversity protects the “customary use of biological resources in accordance with traditional cultural practices”, and this article has been interpreted to require the recognition of indigenous peoples’ control over natural resources that lie on their land. The UN Declaration on the Rights of Indigenous Peoples underlines the connection between environmental protection and human rights. Article 29(1) states that “indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States should establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.” The established link between environmental degradation of indigenous territories and violation of their right to life signifies enlarged comprehension of the right to life, encompassing access to livelihood and the right to live in an environment that does not threaten life. In this regard, the connection between land rights and the right to life has deep and far-reaching meanings, as access to livelihood implies rights such as the right to food, health, and a decent natural environment that allows for human development.

Human Rights Standards

The emerging human rights standards increasingly emphasize the right to life that includes an obligation on states to prevent foreseeable harm to life including activities with possible threats, such as environmental degradation (Gilbert 2002). This raises the possibility for arguing that indigenous peoples’ right to access to their traditional territory is part of the protection of the right to life. This argument rests on two pillars: the notion of access to subsistence and the right to livelihood, and the states’

obligations to ensure the protection of an environment that allows for safe conditions of life.

Even though no independent right to a decent environment has yet become part of international law, there remains the possibility that environmental rights can usefully be derived from other existing treaty rights, in particular the rights to life, private life, property, and access to justice under the 1966 UN Covenant on Civil and Political Rights, the 1950 European Convention on Human Rights, and the 1969 American Convention on Human Rights. The right to life has been a fruitful source of environmental jurisprudence in several national jurisdictions, especially in India (Jaswal 1990). The Supreme Court of India in *Mullin v. Union Territory of Delhi* (A.I.R. 1981 S.C. 746), *Rural Litigation & Entitlement Kendra v. State of Uttar Pradesh* (A.I.R. 1985 S.C. 652), and *Charan Lal Sahu v. Union of India* (A.I.R. 1480 S.C. 1990) has not only ordered the closing down of industries causing harm to health and safety of people but also has held that the right to life includes the right to live with human dignity and all that goes along with it, including the right to live in a healthy environment with minimal disturbance of the ecological balance.

Both the right to life and the right of respect for private life and property entail more than a simple prohibition on government interference; governments additionally have a positive duty to take appropriate action to secure these rights. This is the opinion of the European Court of Human Rights in both *Guerra v. Italy* (116/1996/735/932) and *Lopez Ostra v. Spain* (16798/90 [1994] ECHR 46). One way of reading these decisions is to see them as a guarantee of effective remedies, as called for in Principle 10 of the Rio Declaration on Environment and Development of 1992. Indian courts have also used the right to life (section 21) and the environmental provisions (section 48A) of the Indian Constitution as the justification for judicial review of executive decisions. In *MC Metha (Taj Trapezium Matter) v. Union of India & Ors* ([1997] 2 S.C.C. 353), the Indian Supreme Court compelled the Government of Uttar Pradesh to protect the Taj Mahal monument in Agra by creating a special environmental protection agency, closing nearby iron and glass factories, providing pollution-free air and water, and restoring the "ecological balance" of the environs by planting a "green belt" around the monument. The judgment also held that Indian legal system recognizes "the 'polluter pays' principle" and

“the precautionary principle”—which prescribes taking the most reasonable course of action in situations of potential environment risk—as part of Indian law.

The expansive right to life adopted by Indian courts shows the potential for existing human rights to take on environmental dimensions, which will have direct impacts on tribal people in India, many of whom depend on forests for their livelihood.

Environmental Protection and Procedural Rights

Environmental protection is directly related to indigenous peoples’ survival. The strongest argument for applying human rights to environmental protection focuses not on environmental quality but on procedural rights, including access to environmental information, access to justice, and participation in making environmental decisions. This approach rests on the view that environmental protection and sustainable development cannot be left to governments alone but require and benefit from notions of civic participation in public affairs already reflected in existing civil and political rights.

Although the Rio Declaration (UN 1992) contains no explicit human right to a decent environment, its Principle 10 does give substantial support in mandatory language for participatory rights of a comprehensive kind:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

The Rio language is important because of its specificity and strong environmental focus and its emphasis both on participation in decision making, including access to information, and on access to justice. It is these

features that justify the proposition that there is a role for human rights law in promoting procedures for protection of the environment, and a need for further development over and above those more general rights already protected by human rights treaties. Such development of general rights that encapsulate the right to life, food, and a healthy environment as well as cultural rights is directly beneficial to indigenous peoples.

The most significant and comprehensive multilateral scheme for giving effect to Principle 10 of the Rio Declaration is the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 1998. Parties to this UN convention guarantee rights of access to information, participation in decision making, and access to justice in environmental matters. "Environmental information" is very broadly defined and includes information concerning the physical elements of the environment, such as water and biological diversity, as well as information about activities, administrative measures, agreements, policies, legislation, plans, and programs likely to affect the environment, human health, safety, or conditions of life. Following Principle 10 of the Rio Declaration, Article 9 of the Aarhus Convention also makes general provisions for access to justice to challenge breaches of national law relating to the environment.

The main advantage of focusing on procedural rights is that they enable groups including indigenous communities, individuals, and nongovernment organizations to enforce domestic environmental law. They provide them with an opportunity to influence and shape domestic environmental policy and laws. Furthermore, public interest litigation may also reduce problems of anthropocentricity, because rights can be exercised on behalf of the environment or of its nonhuman components, and not solely for human benefit. They can also be employed in the interests of future generations. A further advantage of such litigation is that it can serve as a way to make public bodies accountable for their actions under international law. It has enabled environmental groups in the US to seek review of government decisions affecting the Conventions on Trade in Endangered Species and Whaling (Lessoff 1996). In India, public interest litigation has resulted in significant benefits to the public at large, tribal people, and wildlife (Ahuja 1997).

Conclusion

Over the past several decades, international law, particularly human rights law, has evolved rapidly partly because of globalization and partly because of continuous and well-organized indigenous movements in various parts of the world that demand the recognition of indigenous peoples' rights to their ancestral land and to a decent livelihood. The UN agencies, regional and national advocacy groups and institutions, and national governments have contributed to bring indigenous peoples and their demands to the international arena through a series of conventions and declarations affirming the integrity and survival of indigenous peoples' rights. These processes have, in turn, strongly influenced states to recognize indigenous peoples' distinct socioeconomic and cultural characteristics and their desire for living side by side with nonindigenous communities, while maintaining their ancestral domain and distinct sociocultural characteristics.

Several key patterns can be discerned from recent developments in international law and parallel national laws. First, the judiciary is increasingly willing to view human–environment relationships from an indigenous peoples' perspective. Moreover, the judiciary is willing to treat indigenous peoples' interests in land and natural resources as two separate spheres of indigenous peoples' rights. Second, courts often do not impose rigorous evidential standards that are applied in Western jurisprudence in determining the environmental interests of indigenous people. For example, courts sometimes accept oral traditions as sufficient evidence of an indigenous person's access interest in a forest and its produce. Third, the judiciary now accepts that it has powers to acknowledge a sovereign duty of a state to preserve indigenous peoples' interests in the face of a major threat to them. This acknowledgment mainly arises from current developments in international law. However, courts are somewhat reluctant to interfere with the executive decisions of the state on national development. The broad pattern that has evolved, in India, for example, is to ensure that the affected indigenous peoples are well informed, their consent is obtained, and sufficient compensation and relocation facilities are provided before they are physically or economically displaced to accommodate a development project. Thus, the judiciary attempts to balance the environmental rights of indigenous people and national development requirements.

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Chapter 2

Communal Land Management in the Cordillera Region of the Philippines

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Indigenous land tenure systems define practices of access, use, and control over resources by individuals, clans, and communities. These practices among indigenous cultural communities are circumscribed and modified by varying economic and political transformations as well as national land laws within a diversity of historical and social conditions. This chapter examines the issues of indigenous land tenure systems and communal land management, in particular, among Cordillera communities of Northern Luzon, Philippines.² The discussion covers three aspects: (i) national land policies and laws affecting the land rights of indigenous peoples in the Philippines, (ii) the character of communal land ownership in different land-use systems and the forms of access to and control over land by landholding households, and (iii) the prospects for communal land

² Primary data used in this discussion were collected through a research program on ancestral domain and natural resource management conducted from 1997 to 2002, a household survey in 1994, and field work periodically undertaken since the 1970s. The authors wish to acknowledge the support of the International Development and Research Center of Canada, which funded the first author's household survey in 1994. The Canadian center also supported the Cordillera Studies Center of the University of the Philippines Baguio in conducting the research program on ancestral domain and natural resource management in Sagada, Mountain Province, from 1997 to 2002, in which both authors participated. They wish to acknowledge the contribution of the members of the research team: Gladys Cruz, Victoria Diaz, Ben Tapang, Arellano Colongon Jr., Ma. Cecilia San Luis, and Alica Folloso. All interpretations and errors remain theirs.

ownership and management under the legal framework of the Indigenous Peoples Rights Act (IPRA). This law, passed in 1997, recognizes communal land tenure of indigenous peoples as a legitimate right and creates a favorable legal environment for it to continue. Economic forces, however, appear to be pushing in the opposite direction. In the Cordillera region, new livelihood possibilities are motivating individuals to claim personal ownership over resources that have been commonly owned by their clans or by the community. The opportunity to replace subsistence farming with nontraditional cash crops and even nonfarming activities such as tourism may be the insidious force that will undo communal land tenure among indigenous peoples.

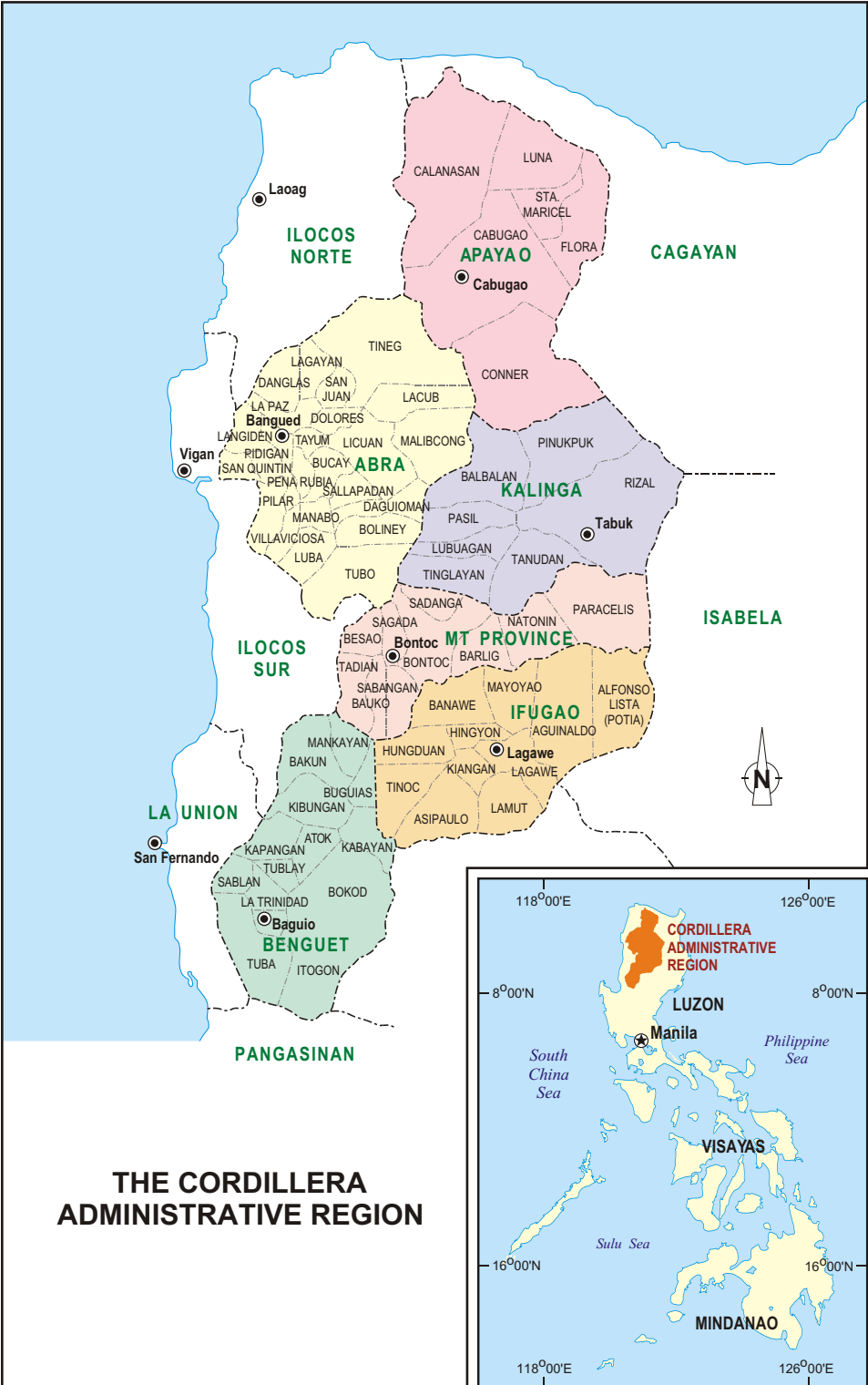
Diverse Mountain Cultures

The Cordillera is located in the northern part of Luzon, the largest island in the Philippine archipelago (figure). The Cordillera central region is formed by a series of mountain chains, and most of the major river systems of northern Luzon have their headwaters in the Cordillera.

Cordillera culture is characterized by its diversity. The major indigenous cultural communities who occupy the Cordillera are the Ibaloy and southern Kankana-ey in Benguet Province, the Ifugao of Ifugao Province, the Bontok and northern Kankana-ey of Mountain Province, the Kalingas of Kalinga, the Isnag of Apayao, and the Tingguian of Abra.³ There are numerous smaller distinct ethnic groups and subgroups within these provinces, such as the Balangao, Kalanguya, and Karao. The groups vary in their political, kinship, economic, and religious organizations (De Raedt 1987; Prill-Brett 1987; Russell 1983; Scott 1982).

Lowland Philippines was a Spanish colony for more than 300 years, but peoples who lived in the Cordillera uplands and the island of Mindanao were never subjugated by the Spaniards (Scott 1982). The highlanders of the Cordillera were successful in repelling the punitive expeditions sent by

³ There are 110 indigenous peoples in the Philippines, listed by the government in seven clusters: (i) Cordillera and Region I; (ii) Region II, Caraballo Mountains; (iii) the rest of Luzon/Sierra Madre Mountains; (iv) the island groups; (v) southern and eastern Mindanao; (vi) central Mindanao; and (vii) northern and western Mindanao (Guide to R.A. 8371, 1999).



the Spanish colonial government, especially during the 1800s, primarily because the highlanders had undermined the Spanish tobacco monopoly. During the Spanish colonial period, community lands were assigned to early Spanish conquerors as a reward for their services to the Spanish Crown. But the mountain peoples have continued to control their communal lands through their indigenous land tenure system. During the American occupation of the Philippines, the indigenous communities in the Cordillera region continued to practice their traditional resource management with minimal intervention from the colonial government (Jenista 1987).

Land Laws and Indigenous Peoples: An Overview

The claim to land ownership in the Cordillera is legally no different from the land claims of other indigenous peoples in the Philippines and other parts of the world. On the one hand, these peoples claim rights to the land as ancestral lands, which they have tilled and which have sustained them for generations. On the other hand, the national government, pursuing a policy of integration, has promulgated and attempted to implement land policies that have displaced and/or dispossessed the indigenous communities of their ancestral lands (Casambre and Rood 1994).

During the American period, several land laws were passed to the detriment of indigenous communities. These include the Land Registration Act of 1902, which required the acquisition of a Torrens title as proof of land ownership, and the Public Land Act of 1905, which declared all unregistered lands and those without Torrens title public lands.

The ambivalent attitude of the Philippine national government toward the assertion of land rights by indigenous communities is reflected in legislation with contradictory intentions. One group of laws and administrative orders has recognized the rights of indigenous peoples to the land they have occupied. The more salient legislations include (i) Executive Order 180 of 1950, authorizing the Bureau of Lands, Forestry, and Soils and the Mountain Province Development Authority to grant Igorots the right to acquire titles over lands they had occupied and cultivated within the Mount Data National Park and the Central Cordillera Forest Reserve; (ii) the

Manahan Amendment of 1964, which reset the legal viability of the period of possession of untitled agricultural land by national cultural communities from 1945 to 1955; and (iii) Administrative Order 11 of 1970 of the Bureau of Forestry, providing that all forest concessions, “shall be subject to the private rights of cultural minorities within the concession.”⁴

The other body of law has striven to protect the “national patrimony” even though the state might recognize that indigenous communities live in the affected areas. This includes laws setting aside forest reserves, watersheds, and national parks. Of particular interest to the Cordillera region is Proclamation 217 that established the Central Cordillera Forest Reserve in 1929 and Proclamation 634 that established the Mount Data National Park in 1940 covering 5,513 hectares of territory in Benguet and Mountain provinces. Both proclamations were passed during the American period. Other laws passed after Philippine independence in 1946 include the Forestry Reform Code of 1974 and the Revised Forestry Code of 1975. These declared that all lands of the public domain that had a slope of 18% or more would be permanent forests or forest reserves. This policy negates the classification of most of the centuries-old highland terraced pond fields found in wet-rice cultivating villages of the Cordillera, which should generally be categorized as agricultural land. There was also Presidential Decree 1559 of 1978, which declared that *kaingeros* (slash-and-burn dwellers), squatters, cultural minorities, and other occupants of public forests or unclassified public land shall, whenever the best land use of the area so demands, be ejected and relocated to the nearest government settlement area.

As Casambre and Rood asserted (1994), “The juxtaposition of these two sets of legislation creates a disjunctured situation where, on one hand, the indigenous peoples’ right to the land by virtue of occupation is recognized, but on the other hand, this is also virtually taken away because of the setting aside of uplands for forest reserves.” What is more important, “the claim of the Cordillera communities to the occupied lands is to be validated only by appropriate procedures of registration and titling” (Casambre and Rood 1994).

⁴ Igorots is a term for members of indigenous communities in the Cordillera mountain region.

Recognizing ancestral holdings

In 1990, the Department of Environment and Natural Resources (DENR) created a Special Task Force on Ancestral Lands to identify, evaluate, and map ancestral land claims in the Cordillera Administrative Region. Three years later, in January 1993, the agency's Special Order 25 and its accompanying Departmental Administrative Order 2 set up task forces on ancestral lands and ancestral domains throughout the Philippines (Rood 1994). This was a watershed in the long struggle of Philippine indigenous cultural communities to make the Philippine state recognize *native* title.

More specifically, the administrative order recognized indigenous property regimes and the rules of indigenous land tenure systems. Indigenous cultural communities were now legitimate occupants on lands they had traditionally occupied, possessed, and controlled over many generations. Within this legal context, ownership and/or usufruct right is vested in persons or groups not through a land grant from the state but because of the proof of the possession of the land over a long, continuous period of time, which confers natural rights or native title to the occupants. The main objective of the order is to preserve and maintain the integrity of ancestral domains and to ensure that customs and traditions of the indigenous cultural communities are recognized. Moreover, it provides the basis for identifying and delineating ancestral domains and ancestral land claims, and it formulates strategies for effective management of such lands.⁵

The grant of a "certificate of ancestral domain claim" provided the legal basis for the recognition of ancestral lands and ancestral domains. Ancestral domain claims are made by indigenous cultural communities, and ancestral land claims are made by households or clans. Although the

⁵ *Ancestral domain* refers to all lands and natural resources occupied or possessed by indigenous cultural communities, by themselves or through their ancestors, communally or individually, in accordance with their customs and traditions since time immemorial, continuously to the present except when interrupted by war, *force majeure*, or displacement by force, deceit, or stealth. It includes all adjacent areas generally. *Ancestral land* refers to land occupied, possessed, and used by individuals, families or clans who are members of the indigenous cultural communities, since time immemorial, by themselves or through their predecessors-in-interest, continuously to the present except when interrupted by war, *force majeure*, or displacement by force, deceit, or stealth.

certificate is a claim rather than a title, it vested indigenous communities with the legal basis to confront the actions of government agencies or development programs that assert the state's prerogative to claim indigenous peoples' lands that lack paper titles. The recognition of ancestral domain of indigenous communities is necessary to provide legal protection for indigenous communities in their claims on forest resources against outside forces, especially state interventions and large-scale commercialization.

Then, in 1995, the National Protected Areas System law recognized ancestral domain and customary rights in designated protected areas and stressed the role of indigenous cultural communities in protecting biodiversity. Finally, the expanding recognition culminated in the passage of the IPRA in October 1997.

This landmark law commits itself to the protection of four rights of indigenous communities: the right to ancestral domains and lands; the right to self-governance and empowerment; the right to social justice and human rights; and the right to cultural integrity. Taken together, these represent a national decision to choose acceptance of ethnic diversity and political and social heterogeneity over a determined integration of minorities into political processes dominated by hispanized Filipino groups.

The decision is reflected in the evolution of official terms for indigenous peoples in the Philippines. In colonial history, various words have been used, each of them reflecting the attitude of national government. Religion was an important factor in this identification process. Under the Spanish government, members of indigenous communities were referred to as *infieles* (or infidels), Christianized natives as *Indios*, and natives who were converts to Islam as *Moros*.⁶ The American government officially referred to

⁶ Corpuz (1997) says that for centuries before the arrival of the Europeans, Southeast Asia had been penetrated by world traditions from the People's Republic of China, Saudi Arabia, and India. However, the people of pre-colonial Philippines participated little in these developments. This was so because "the archipelago lay beyond or at the end of land and sea routes travelled by these great traditions." The exception is the southernmost part, where "Islam entered Sulu in the 13th century. The sultanate was founded here by 1450. By the 16th century and early 17th century, Islamic political institutions were present in Magindanao." Islam expanded northward

these groups as “Non-Christian Tribes” or “Non-Christian Filipinos”. The Philippine government, creating the Commission on National Integration in 1957, referred to them as national cultural minorities. This term appeared in the 1973 Constitution (Article 15, Section 2): “The state shall consider the customs, traditions, beliefs, and interests of national cultural communities in the formulation and implementation of State policies.” A slightly different phrase—“indigenous cultural communities”—appears in Article 11, Section 5 of the 1987 Constitution: “The State, subject to the provisions of this constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being.” This was later adopted in the IPRA, where it was made synonymous with the term “indigenous peoples”. The national Forestry Department, however, has used the terms “upland dwellers” and “forest occupants” to refer to members of these groups (Resurreccion 1999). Unfortunately, these phrases highlight the individual identity and neglect the collective identity that the terms “indigenous cultural communities” and “indigenous peoples” carry.

International organizations can be credited for drawing attention to the collective identity of indigenous cultural communities and to the eventual adoption of the phrase “indigenous peoples”. A pivotal role was played by the United Nations (UN). In the early 1980s, a UN special rapporteur, José Martínez Cobo, submitted a comprehensive report detailing the woes suffered by indigenous peoples. In response to this, in 1982, the UN established a Working Group on Indigenous Populations composed of five independent experts chosen from five UN geographical regions (Tauli-Corpuz and Alcantara 2004). This group crafted the Draft Declaration of the UN on the Rights of Indigenous Peoples, which was adopted by the UN Sub-commission on the Promotion and Protection of Human Rights (formerly called the Sub-commission on the Prevention of Discrimination and Protection of Minorities) in 1994. Tauli-Corpuz and Alcantara (2004)

through Palawan and Mindoro, then to Batangas in Luzon and the Manila-Tondo area. Here, some people had converted to Islam before the Spaniards took Manila in 1571. “By 1588, the Muslim link to Luzon was ended and the Spanish regime became secure.” Islam strengthened its foothold in Mindanao, disappeared from Luzon, and did not establish itself in the Visayas.

assert that the IPRA is one example of a national law that was significantly influenced by this draft.

The act provides a legal framework for upholding indigenous land rights, particularly over communal land. It provides for the grant of state recognition of native title that indigenous peoples in the Philippines have long sought. It also establishes free, prior, and informed consent of the affected indigenous peoples as a requisite for any development program introduced by the state or any outside agency in their ancestral domains. The consent requirement has given indigenous peoples some clout in dealing with outside commercial interests keen on exploiting resources found within their ancestral domains.

Regalian Doctrine versus indigenous rights

The Regalian Doctrine, a concept dating back to the days of the Spanish monarchy that still underpins the Philippines' legal system of land ownership, declares that the state owns all natural resources. As Article 12, Section 2 of the 1987 Philippine Constitution says:

All lands of the public domain, waters, mineral, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the state.

Under this system of land ownership, lands are generally classified as private or public. Private lands are lands that have been segregated from the general mass of the public domain by any form of grant by the state. Public lands refer to all lands that are not acquired by private persons or corporations and are generally classified as agricultural or nonagricultural lands. Only lands classified as agricultural may be declared as "disposable" and eligible for private ownership.

One can argue from the point of view of the Regalian Doctrine that most indigenous occupants are squatters on public lands since any land not covered by official documentation is considered part of the public domain and owned by the state, regardless of how long the lands have been continuously occupied. The occupants may be evicted should the government have a need for the land. This negates the viewpoint of the indigenous

peoples that villagers have prior rights to territory they have traditionally occupied and exploited from generation to generation (Prill-Brett 1988).

The proposition that the Regalian Doctrine and the state recognition of ancestral domains and ancestral lands are incompatible became the subject of a petition in 1998 less than a year after the passage of IPRA. A suit before the Philippine Supreme Court was filed challenging the constitutionality of certain provisions of the law and its implementing rules and regulations as an unlawful deprivation of the state's ownership over lands of the public domain as well as minerals and other natural resources there, in violation of the Regalian Doctrine embodied in the Philippine Constitution.⁷ After listening to arguments from respondents and intervenors, the Supreme Court deliberated and then voted on the petition. The first vote was tied at seven to seven, which meant that the petition would be denied. A re-deliberation followed, but the outcome of the voting remained the same. Hence, the petition against the law was dismissed on 6 December 2000 (Candelaria 2002). Based on this decision, one can conclude that the court saw no inconsistency between the concept of native title and the Regalian Doctrine.

Justice Reynato Puno, now chief justice of the Supreme Court, said the IPRA is "recognition of our active participation in the indigenous international movement. Indigenous rights came as a result of both human rights and environmental protection, and have become a part of today's priorities for the international agenda" (Human Rights Agenda 2000).

⁷ This suit was filed by Isagani Cruz and Cesar Europa. The specific provisions are Sections 3(a), 3(b), 5, 6, 7, 8, 57, and 58 defining ancestral domains and ancestral lands, indigenous concept of ownership, and rights to ancestral domains and ancestral lands. The petitioners also cited (i) provisions defining the powers and jurisdiction of the National Commission on Indigenous Peoples and making customary law applicable to the settlement of disputes involving ancestral demands and ancestral lands for violating the due process clause of the Constitution, and (ii) the rule that defines the administrative relationship of the commission to the office of the President as lateral but autonomous for purposes of policy and program coordination as an infringement upon the President's power of control over executive departments under Article 7, Section 17 of the Philippine Constitution (Candelaria 2002).

Communal Land Tenure in the Cordillera

In the Cordillera region, traditional occupancy and exploitation of land and natural resources by indigenous cultural communities are covered by indigenous land tenure systems. These have evolved over time through the process of selection and adaptation as a result of the interaction of the people with their natural environment (Rambo 1983; Sajise and Rambo 1985). Such community–environment interactions produce social arrangements affecting the utilization of natural resources. These types of property systems have been practised among Cordillera cultural communities, especially among the wet-rice irrigators (Prill-Brett 1985, 1993; Boquiren 1995).

Land use and tenure rights

The general principle in claiming land rights in the Cordillera region is to be the first to occupy the land by clearing it. Indigenous cultural communities recognize different land-use systems with corresponding rights, e.g., land rights for wet-rice farming, grazing cattle and water buffalo, swidden—also known as shifting—agriculture, foraging, and mining. It is not uncommon for indigenous communities to have multiple land-use systems, each of which is governed by a different set of customs and rules.

For shifting cultivation, productive land is acquired by clearing a portion of a forest through the slash-and-burn method. Shifting cultivation is governed by usufruct rights, and each cultivator has exclusive ownership rights to the crops produced. Such lands are cultivated for several years until the soil becomes depleted of nutrients. Then the land is kept fallow for several years for regeneration. During this period, the cultivator either clears another portion of the forest or returns to a piece of land that has been kept as fallow land for several years. In such a cyclical system, minimal land improvement is made because of the temporary tenure and the limiting ecological conditions. Indigenous communities who practice shifting cultivation where land is still plentiful and the population density is low are governed by community rule. However, where land is scarce and population density is high, the communities have a well-defined form of ownership rights for a more regular “short cycle” cultivation of land. This usually is prevalent among wet-rice cultivators.

Pasture or grazing lands called *estancias* generally belong to community members who have common ownership rights over the land, as in the case of Ibaloy and Bontok communities. Although any member of the community can graze cattle, buffalo, and other livestock on such land, it is generally the more wealthy people—those who can afford many animals—who benefit from such land rights. Some pasture lands were privatized among the Ibaloy during the American colonial period (Tapang 1985; Wiber 1986).

Stands of trees may belong either to the community as communal property or to a descent group as corporate property. In vast and sparsely populated areas, such tree stands may even become “open access” land. Forest lands that have become agro-forests are looked after by individual members of indigenous communities who collect forest products and exclude others from benefiting from them. The rights to agro-forests such as the *muyong*, found in Ifugao province, have devolved to individuals, but this private property is managed by households or by clan.

Those whose livelihood depends only on forest products generally do not display a strong attachment to land, as they do not invest labor in maintaining or improving the land. The claims of such communities are not for the land but for the products gathered within a territory that they have traditionally exploited.

Mining sites, particularly in Benguet province, are traditionally owned by individuals who have invested labor and materials in the construction of mines and tunnels and possess exclusive rights over such sites (Scott 1974; Wiber 1986; Bagamaspad and Hamada-Pawid 1985).

An important characteristic of land ownership in the Cordillera region is the rule of non-alienation of lands to individuals or groups who do *not* belong to the community. Land transfers are strictly governed by the following rule: land is first offered to the immediate family, then to close kin, before it is finally offered to other members of the community.

Access to land and land “markets”

The presence of different forms of indigenous land tenure and land-use rights is confirmed by a 1994 survey in which 125 landholding house-

holds in three villages of the Cordillera region participated: Village 1 is in Benguet, Village 2 is in Ifugao, and Village 3 is in Mountain Province. Survey data show a household can have access to common land owned by the husband's or the wife's clan and also to common land owned by the community. A household may also possess land inherited by each spouse.

At the time of marriage, household land consists of each spouse's inherited land. Inheritance rules may be specific to the type of land. One such distinction is between the inherited land and the acquired land (Agarwal 1994). The former is that which has been passed on to the first-born from generation to generation along a descent line referred to as *ancestral*. The latter is land acquired during the spouses' lifetime. The acquired land is passed on to non-first-born children. Inheritance rules in the Cordillera region do not discriminate between sons and daughters.

Children inherit usufruct rights to land owned either by their father's or their mother's clan. The harvest from the cultivation of such land is privately owned, although the land itself is not. Thus, the land cannot be used as collateral for a loan, nor can the cultivator sell it. When he or she stops tilling it, another member of the clan with user rights may cultivate it. However, in some communities like the Bontoks, it is possible under certain conditions to appropriate and alienate parcels from the clan land. These rules include continuous cultivation for five years or more and land improvements such as the building of irrigation canals or terracing.

In addition, the married couple may have access to land through individual user-rights to the clan's and the village's land. Sharecropping exists in some villages, allowing land-scarce farmers to have access to land. Although the traditional means of access to land through inheritance and usufruct remain dominant, land purchase and land rental have recently become quite common in Cordillera region.

To gain access to land to cultivate was not difficult in the sample villages according to the 1992 census. Access to farmland was available to 91% of households in Village 1, 84% in Village 2, and 80% in Village 3. The table presents the proportion of sample households that have access to land through different types of tenure. In all three villages, there is a close relation between the type of access to land and the level of commercialization

Land Access and Commercialization of Crops (% Distribution of Households)

Forms of Access to Land	Cash Crop Cultivation			
	High (Village 1) n = 48	Moderate (Village 2) n = 29	Low (Village 3) n = 48	All 3 Villages n = 125
Inherited by husband	62	62	79	69
Inherited by wife	50	48	81	62
User rights from husband's clan	10	14	12	12
User rights from wife's clan	4	14	17	11
User rights to community land	2	0	8	4
Sharecropped land	0	14	6	6
Rented land	40	14	23	27
Purchased land	12	7	8	10

Source: Household survey 1994. The table was adapted from Lorelei Crisologo Mendoza's *Agricultural Commercialization in Cordillera Communities: A Household Perspective*. 2007. In Tapang, B., ed. *Cordillera in June: Essays Celebrating June Prill-Brett*, *Anthropologist*. Quezon City: University of the Philippines Press.

of farms, that is, cultivation of cash crops. The percentages of households that rented or purchased land are high among farms that grow cash crops. On the other hand, on land where they have only user rights, farmers were not keen to cultivate cash crops. Farms in Village 1 are highly commercialized, Village 2 farms are moderately commercialized, and Village 3 farms are the least commercialized. Village 1 grows only vegetables, while Villages 2 and 3 both practice a mixed farming system with rice and vegetables.

For most of the households in all three villages, inheritance gives access to land. More than two-thirds (69%) of households have access to land by the husband's inheritance, and 62% have access through the wife. Even without inherited land, a married couple can have access to land for cultivation through their individual user rights on land owned by the husband's or wife's clan, and/or the community. Land can also be accessed through inheritance or through share-cropping agreements, renting with a fixed rental, or by purchase. About one-fourth of houses have access to land through land rentals. Ten percent of households purchased land from others and became absolute owners of such land. The sale and purchase of land usually result from the inability to redeem mortgaged land.

The type of access to land varies among the three villages. The number of households having access to land through inheritance is highest in the least commercialized village, Village 3. Households with user rights to clan land are slightly more prevalent in rice-producing Village 2 and Village 3 than in vegetable-growing Village 1. Again, the proportion of households with user rights to community land is highest in the least commercialized Village 3, and there are none in the moderately commercialized Village 2. This means that there no longer any land that is communally owned.

Sharecropping is nonexistent in the highly commercialized Village 1, because villagers no longer cultivate rice, which often requires the help of sharecroppers. In Village 2, fewer than one-sixth of households cultivate rice on their lands. As Sajor concludes from the data from an Ifugao village, sharecropping is the most important access a landless person could have to a piece of land to earn his living (1999).

Renting of land is significant among vegetable-growing Village 1 (40%) but much less so in Village 2 (14%). This indicates that land rental and purchase are more important in the highly commercialized farms, where vegetable gardening is the predominant agricultural activity. However, quite unexpectedly, 23% of households rented land in the least commercially developed Village 3. This may be because of the growth of other cash-earning jobs, such as local tourism and overseas employment, which bring money to the village. Such money has enabled households with limited land resources to rent extra land parcels for growing crops. On the other hand, some households with large landholdings have rented out part of their land because they have discovered that their household labor can find employment elsewhere that is more lucrative than farming.

The access to land through purchase is rather low in the rice-growing villages, with 7% in Village 2 and 8% in Village 3. The proportion of households with purchased land is highest—12% in the highly commercialized Village 1, where about two-thirds of purchases of land are transactions between relatives (Cruz 1994).

Farm cultivation and new crops

Vegetable gardens have transformed the physical landscape of the Cordillera. The spread of vegetable farming was gradual in the past but

has become rapid since the 1980s. Farmers in Mountain Province grow salad tomatoes not only on their pond fields in rotation with rice but also on their swidden land parcels (Mendoza et al. 2006). The Regional Office of DENR has confirmed that the mossy forests of Mount Pulag in Benguet are in danger of being overrun by vegetable gardens.⁸

Among farmers in Cordillera communities, decisions to adopt new crops and new technology on agricultural plots have not all been detrimental to the environment. In the rice-growing village in Ifugao, farmers adopted the modern, double-cropping varieties in the 1980s, replacing indigenous rice varieties that had been cultivated. Given that the net income per cropping on the same field is more or less equal between the two varieties, farmers adopted the high-yielding varieties because the maturation period is shorter, labor inputs are generally smaller, and resistance to local pests is higher. These farmers either avoid the heavy application of agrochemicals or refrain from using them altogether, thereby minimizing the damage to the soil and to edible fish in their pond fields (Sajor 1999).

Prospects of Communal Land Management in the Cordillera

A key argument for recognizing indigenous peoples' land rights is that there is a link between land conservation and indigenous peoples, as "they would be better ecological managers" (Leonen 1998). In this regard, an accepted presumption is that recognizing ancestral domain and thereby communal land ownership is ecologically sound (Rood 1994). Indigenous resource management practices are seen as conservation-oriented. For example, the Regional Master Plan for Forestry Development of 1992 cites the forests owned by indigenous corporate groups, such as the *tayan* of Bontoc or the *muyong* of Ifugao, as living representations of excellent methods of soil and water conservation practices present in indigenous forest management systems. Policy documents of the natural resources department affirmed that by recognizing ancestral domain and land claims, the state would enlist indigenous cultural communities (who become responsible for rehabilitating, protecting, and managing the

⁸ *Midland Courier*. 2007, 20 May.

resources in their ancestral domain) for sound forest conservation (Sajor 1999). In January 2006, a memorandum of agreement was signed by the department with the National Commission on Indigenous Peoples, recognizing the indigenous forest management practices in the Cordillera such as among the *muyong* in Ifugao, the *batangan* of Sagada, Mountain Province, the *kijuwán* of Benguet, and the *lapat* of Abra. The memorandum expands the department's limited recognition of the *muyong* in 1996. The most significant outcome of this agreement is the recognition that members of indigenous cultural communities in the Cordillera can utilize forest resources under certain conditions, that is, villagers can harvest lumber or other forest products to build houses and for other domestic needs from their clan and communal forests without first obtaining a permit from the natural resources department.

Recognition of indigenous people's land rights could address the growing threat to the environment from the tendency toward "open access", which is a result of the interface of customary land law and the Regalian Doctrine of national law. Prill-Brett (2003) argued that in the Cordillera, there is an increasing tendency for common property regimes to be converted into open access regimes. The state, through agencies such as DENR, formally asserts its rights over forests through the declaration of forest reserves or protected areas. The indigenous cultural communities who may have previously exercised rights to use these forests as resources in their ancestral domain are deprived of their access and use rights. From their view, when these forests are declared public lands, they become "open access" property. As such, they are open to competition for use by all. Users try to extract the most that they can while the resources are still abundant. There is little regard for allowing resources to regenerate, because the users' future access is not guaranteed. The tragedy is that even members of indigenous cultural communities will compete for such limited resources, thereby hastening their rapid depletion. This is the story that one draws from the accelerated conversion of the mossy forests of the Mount Data National Park into vegetable gardens since the 1970s (Delson 1989). The same is threatening the mossy forests in the Mount Pulag Protected Area of Benguet and Mount Polis of Ifugao. In addition, the government's declaration that the forest is a public property and is owned by the state has encouraged neighboring villages to encroach into the traditional domain of other villages to exploit their resources. This

has resulted in increased conflicts over resources and boundary disputes among members of different village communities.

Delineating ancestral domains: the *ili*

The prospect for sustaining communal land management brightened with the passage of the IPRA because the law recognizes “ancestral domains” of indigenous cultural communities. However, a thorny problem has arisen regarding the identification and delineation of ancestral domains in terms of who the indigenous cultural communities are with rights to their ancestral domains. The elaborate definition of indigenous peoples contained in IPRA does not uniquely identify the spatial reference of the territory of the organized community that exercises authority over an ancestral domain. The definition may apply spatially to the *barangay*, which is the smallest politico-administrative unit of the Philippines, or to the municipality, a larger unit. So far, certificates of ancestral domain titles have been awarded to municipalities. The first one granted under IPRA in the Cordillera was awarded to the municipality of Bakun in Benguet in July 2002.

However, if historical realities were to be the basis of such demarcation, the spatial reference must be neither to a *barangay* nor a municipality but to the smaller *ili*, a term in the Philippines for a geographical area historically inhabited—and defended—by a homogeneous people with common ancestors. The traditional territory that a Cordillera community would defend, as a way of asserting the prior right to its natural resources, today would constitute only a *barangay* or a cluster of *barangays*. Rarely would an *ili* be as large as an entire municipality. Thus, the awarding of an ancestral domain claim or title over an entire municipality may not be prudent, as there is no traditional mechanism for managing resources in such a created “ancestral domain” and it would lead to serious problems of conflicting uses, resource competitions, and boundary disputes. Municipal officials may insist on making decisions over the ancestral domain, since the certificate was granted to the municipality. The council of elders of the *ilis* within a municipality may also assert their authority based on customary laws. Clans, user groups, and even peoples organizations may contest these. Who will adjudicate these competing claims to exercise authority over the ancestral domain is still unknown.

Privatizing indigenous corporate property

Another emerging problem is the tilt toward individual ownership of common resources as new livelihood opportunities emerge. Among indigenous communities that still practice collective land ownership through corporate descent groups, there are occasions when such corporate land becomes privatized through individual actions. This tendency of privatization is facilitated by the cultivation of nontraditional crops and cash crops such as temperate vegetables, coffee, citrus, and fruit trees on indigenous corporate lands. The incentives to adopt such crops also come from the development programs of the Department of Agriculture, which are part of the poverty alleviation measures to uplift the economic conditions of these indigenous cultural communities.

After planting orchards and making other changes to the land such as building barbed-wire fences, the enterprising person then takes the next step toward privatizing the land by declaring it to be individual property for the purposes of paying taxes. This is also referred to as obtaining a tax declaration on the property, filed with the local Assessor's Office or the Bureau of Lands. If the other members of the descent group, who by virtue of customary law possess coequal rights to this property, do not protest, they will eventually find themselves excluded from any future use of this common property. Hence, the common rights of members of the corporate descent group would have been successfully extinguished by the tax declaration that contains only the name of the individual who complied with the requirements of national law for the registration of the property and the payment of taxes.

It is also likely that this scenario will be repeated even for the common property owned by the community or the *ili*. As cash crops require a large investment of financial capital, the push toward individual ownership is strong as the farmer seeks to ensure sole and continuous land use to recoup expenses. Individuals would claim what would normally be communal land owned by the indigenous corporate group or the community for cultivation. And when no one challenges the private utilization of such communal land, it may eventually be claimed by the cultivator as individually owned. It is plausible that communal ownership will dismantle over time, as the exercise of exclusive control over land and its resources is

increasingly becoming lucrative, especially with the scarcity of farm land (Smith and McCarter 1997).

The Right to Say No to Development Projects

Free, prior, and informed consent of the concerned indigenous cultural community is a foremost requirement before any project may be introduced in any area covered by the ancestral domains. Section 59 of the IPRA provides that indigenous cultural communities have the right to stop or suspend a project that has not undertaken the required consultation. This provision intends to avert the repeat of several struggles of indigenous cultural communities to ward off outsiders' encroachments into their ancestral territories. The most memorable and successful resistance to state encroachment into the Cordillera territory threatening the existence of several indigenous cultural communities was the concerted action against the Chico River Hydroelectric Dam Project in the 1970s (Leonen 1998). At that time, the dominant attitude among state agencies was that the need for national development projects such as large dams could override communal rights and traditions of indigenous cultural communities. The affected indigenous cultural communities, based on their own alliances, resisted the state forces, and the dam was not built.

Today, under the legal framework of the IPRA, indigenous cultural communities in the Cordillera are seriously exercising their right to decide over projects operating within their territories. In April 2007, seven ancestral domain units in municipalities in Kalinga were asked by the National Commission on Indigenous Peoples in a series of consultations whether they would agree to the intent of a company to explore their lands for possible sources of geothermal energy. Five gave their free, prior, and informed consent, one rejected the offer, and the other still had to make a decision. In July 2007, the Cordillera office of the commission issued a certificate of no consent for the planned expansion of a mining firm in Benguet. The provincial government was requested to look into the issues raised by residents of the affected area. In August 2007, an agreement was signed between an oil and energy corporation and a Kalinga cultural community to allow the company to conduct

exploration work and to develop and operate the mineral claims over territory located in the community's domain. In return, the corporation committed itself to several social development projects, including a geodetic survey for the ancestral domain of the community, construction of suspension bridges, rehabilitation of footbridges, undertaking a community medical outreach program, construction of a single classroom structure for the elementary school, and the acquisition of an ambulance for the community.

These favorable scenarios are perhaps strongly facilitated by the fact that in the Cordillera region, indigenous cultural communities constitute the majority of the population. As a result, members of indigenous cultural communities get elected to municipal and provincial positions. Owing to the passage of the Local Government Code of 1991, which decentralized important administrative functions and provided a stable source of funds for local government units, local government officials in the Cordillera have become a reliable partner in the pursuit of indigenous peoples' rights. This cannot be said of other regions in the Philippines, where indigenous peoples constitute a minority of their locality or where none of the elective or appointed officials of government agencies are members of indigenous cultural communities. In such instances, marginalization is probably the rule.

Conclusion

The passage of the IPRA in 1997 has provided a framework for safeguarding native title and indigenous resource management practices. The law recognizes communal ownership through its grant of a certificate of ancestral domain title, establishing a necessary support for communal land management. Not only did the law reverse the discrimination of indigenous peoples, but it also led to government policies that uphold human rights of indigenous cultural communities. What is more important, this national law has also created through free, prior, and informed consent a powerful process that indigenous cultural communities can wield against unwanted private and public incursions into their traditional domains. The process also enables the community to negotiate the terms and conditions under which outsiders may use the resources within its ancestral domain.

Among the Cordillera communities, communal land ownership is exercised alongside clan and individual land ownership. Communal ownership is a property system that is exercised by indigenous corporate groups such as clans or wards or by the ili or community over swidden lands, forests, and pastures. It is not strong enough to arrest the development of individual entrepreneurship among community members. As a result, many individual farmers with property rights over their farms have invested in productive land uses and adopted new crops and technology where appropriate. In fact, the persistent concern is that the lure of more farm income from cash crops has induced rapid conversion of swidden, pasture, and forest land, even those traditionally belonging to clans or communities, into private, individual agricultural plots. Not only does this conversion threaten the forest cover, but it also eliminates the channels through which equitable use of common property resources is ensured. From this perspective, the threat to communal land management may in fact arise from the internal socioeconomic dynamics of indigenous cultural communities. The drive for materially sufficient lifestyles may prove to be the more difficult threat to overcome.

All indigenous cultural communities have experienced changes in varying degrees. An important lesson that bears repeating is never to disregard the complexity of the dynamic interactions of indigenous cultural communities, which have their own historical antecedents, with economic, political, and social transformations and with state policy, as these take place in a specific ecological landscape. These are the specific contours of individual communities that policies and programs must take into account if they are to improve the socioeconomic status of indigenous people. There are no magic formulas, no universal templates, and no standard models that apply to each and every case.

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Chapter 3

Law Reforms and Recognition of Indigenous Peoples' Communal Rights in Cambodia

Indira Simbolon

This chapter analyzes the structures, actors, and processes that have influenced the recognition of the land rights of indigenous peoples in the context of overall law reform in Cambodia and the formulation of the Cambodia Land Law of 2001 in particular. Since the signing of the Peace Accord of 1991, Cambodia has faced at least three fundamental legal issues. The most basic one is how to remake a legal system in a post-war country where lawyers are almost nonexistent. The second is how to accomplish, within and by means of legal institutions, the transition from socialism to liberal democracy to which Cambodia has formally committed itself. The third is determining what legal system would apply, considering that those of the most recent previous regimes (Democratic Kampuchea and the People's Republic of Kampuchea) were considered flawed, while the French legal system, the basis of Cambodia's original post-colonial legal structure, was regarded as less than satisfactory by legal experts and reformers trained mostly in the Anglo-American legal tradition (Donovan 1993). While historically, the country's legal systems had never adequately recognized communal land rights of indigenous peoples, the law reform in 21st-century Cambodia has taken place in the context of the growing global awareness of the importance of recognizing and protecting indigenous peoples' rights.

The author relies primarily on historical and secondary data on Cambodia and its indigenous peoples, scholarly works on anthropological and legal studies, interviews with some of the people involved in formulating the

chapters relevant to indigenous peoples' rights in the Land Law in Cambodia, interviews with international and national civil society organizations and indigenous peoples' activists, and field visits to Ratanakiri Province in 2000. The chapter reorganizes widely scattered historical information on indigenous peoples of Cambodia, reconstructs historical pieces to shape a better understanding of the context in which indigenous peoples' land rights so far have been undermined or recognized by the state laws, and elaborates on the changing international context of a "rights-based approach to development", which has, in turn, shaped the manner in which indigenous peoples worldwide and in Cambodia are treated. The author applies a purely textual legal analysis of the rights created by the Land Law of 2001. The case studies in Chapter 4 will examine how the Land Law is actually being implemented in the same province of Cambodia.

Legal and Policy Framework

The only international instruments in force that deal specifically with the rights of indigenous peoples are the International Labour Organization's Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO Convention 107 of 1957) and the International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169 of 1989). The conventions demonstrate a shift in international thinking on indigenous peoples' rights in recent decades. ILO Convention 107 is premised on the notion that indigenous peoples are hindered from benefiting from development advantages enjoyed by other elements of the population because they are not yet integrated into the national community. It refers to indigenous peoples as "less advanced" and promotes their eventual integration as the way to resolve the "problems" their existence has caused to modern states. The convention therefore aims at their progressive integration into the national society, unmindful of the consequent loss of their distinct identity. In contrast, ILO Convention 169 acknowledges the need to adopt new international standards with a view to removing the integrationist orientation of the earlier standards and recognizes indigenous peoples' aspirations to exercise control over their own institutions, ways of life, and economic development; and maintain and develop their identities within a state framework.

The existence of indigenous peoples is perceived as an “accident of history” (Barsh 1986), and the use of the term has been contested for decades. First, the use of the term “indigenous” as opposed to “minority” communities in international law bears with it a distinctive marker of the presence or absence of the recognition of self-determination and collective rights. Indigenous communities legitimized the specificity of their special status within the broad category of minorities by referring to themselves as “victims of colonization”. Second, the use of the term “peoples” instead of “populations” reflects the fact that these indigenous cultural communities are organized societies with their own distinctive identity. However, many governments are wary of referring to their indigenous inhabitants as peoples for fear of acknowledging a possible right to secession, because peoples are bestowed with the right of self-determination by the International Covenant on Civil and Political Rights (United Nations [UN] 1966). While ILO Convention 107 uses the term populations, ILO Convention 169 uses the term peoples but explains in its Article 1 that the “use of the term ‘peoples’ in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.”

Any definition of indigenous peoples cannot fully capture diverse various historical contexts and the tremendous heterogeneity of groups that could be identified as indigenous peoples. The widely accepted definition of indigenous peoples was formulated by José Martínez Cobo, the special rapporteur to the UN Sub-commission on Prevention of Discrimination and Protection of Minorities, who emphasized “self-identification” as a key criterion of the definition. Particularly in Asia, where the majority of the world’s indigenous peoples are found, different states use different terminology to refer to them, including “ethnic minorities”, “minority nationalities”, “cultural minorities”, “*adivasis*”, “scheduled tribes”, “*masyarakat adat*” (people who adhere to customary ways), and “*orang asli*” (original peoples). Representatives of indigenous peoples at various international forums have consistently opposed any attempt to define the concept of indigenous peoples, fearing that any definition would imply a “closure”—a method often used by nation states to lay down criteria to exclude certain groups from participating in the UN processes on indigenous peoples and from claiming the rights guaranteed under international conventions. In line with Martínez Cobo’s emphasis, the

indigenous peoples' representatives have advocated "self-prescription" as the most important element for identifying indigenous peoples. They also reject any reference to national law in identifying indigenous peoples, fearing that national laws may exclude some population groups (who are in fact indigenous people) from the definition of indigenous peoples, which would adversely affect their rights.

One distinctive identity marker of indigenous peoples is their embrace of customary land tenure, which is usually referred to as "systems where some social authority or local political entity exercises administrative rights over land" (Lawry 1988). An important aspect of customary land tenure is the principle of "first occupancy", giving overriding special rights to the first settlers in a particular area (Adeyoju 1976). Individuals have rights to land usually in the form of usufruct rights by virtue of their membership in a particular social group. Bruce (1988) observes that group hierarchies in many societies can be defined by common descent or common residence, or by a combination of both common descent and residence. He points out that usually a customary land tenure system applies significant group control, reflecting some group interest, over land that is apportioned for the relatively exclusive use of individuals or families of the group. As a consequence, most customary land tenure systems tend to prohibit customary users from selling land to outsiders. Thus, customary land tenure systems are often represented either by their perceived negative aspects, as in the case of Hardin's "tragedy of the commons" (McCay and Acheson 1987), or by their highly idealized version, which romanticizes the customary ways of indigenous peoples in dealing with forest lands (Shiva 1988).

In addition to their physical relationship with land, indigenous peoples have a close cultural-spiritual relationship with the natural world. As a result, they could take a strategic position in relation to international environmental politics and fight for legal recognition of their rights to land and other natural resources, predicated on their special role in protecting natural resources (Renderia 2002). In 1992, the UN Conference on Environment and Development in Rio de Janeiro adopted "Agenda 21", which recognized indigenous peoples' role in environmentally sound and sustainable development. Article 22 of the Rio Declaration on Environment and Development treats indigenous peoples as bearers of knowledge about environmental preservation. In the preamble and in Article 8(j) of the 1992 Convention on Biological Diversity, they are recognized as protectors of

biodiversity. However, such a strategic coupling of the rights of indigenous peoples to natural resources with their role in the conservation of these resources cuts two ways (Wilder 1997). Because their rights to land and natural resources are legitimized by their role as guardians of nature, conflicts arise when they use these resources to develop and transform their own economies and societies (Benda-Beckmann 1997). Moreover, rights of indigenous peoples are often associated with the manner in which they earn their livelihood, practice their sociocultural traditions, and use indigenous knowledge for their survival. Such practices and knowledge are now threatened by climate change. Gradual disappearance of such practices, knowledge systems, and livelihoods could undermine their rights as indigenous peoples.

The UN Declaration on the Rights of Indigenous Peoples adopted by the UN General Assembly in September 2007 is commended by indigenous peoples and governments worldwide for its inclusiveness and innovative approach to global standards for indigenous peoples' land rights. Without attempting to define "indigenous peoples" and refraining from any reference to national laws as a determining element of their identity, the UN declaration reflects the desire of indigenous peoples to apply the concept to as many eligible groups as possible.⁹ In terms of standard setting, Article 43 of the declaration states that the rights it recognizes constitute "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."

The declaration of 2007 affirms that "indigenous peoples have the right to the lands, territories and resources which they have traditionally owned,

⁹ This approach compares well with that of the World Bank's Operational Procedure 4.10, adopted in 2005. The World Bank avoids defining indigenous peoples, saying that no universally accepted definition exists, but it uses the term in a generic sense to refer to a distinct, vulnerable, social and cultural group having these characteristics in varying degrees: (i) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others; (ii) collective attachment to the geographically distinct habitats ancestral territories in the project area and to the natural resources in these habitats and territories; (iii) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and (iv) indigenous language, often different from the official language of the country or region. Moreover, the World Bank does not make any reference to the national laws in identifying indigenous peoples.

occupied or otherwise used or acquired" (Article 26.1) to the extent that they "shall not be forcibly removed from their lands or territories" and that "no relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return" (Article 10). Free, prior, and informed consent is also required before states may adopt and implement legislative or administrative measures potentially affecting indigenous peoples (Article 19), or before "the approval of any project affecting their lands and territories and other resources, particularly in connection with the development, utilization or exploration of their mineral, water or other resources" (Article 32). Article 23 expressly acknowledges their "right to determine and develop priorities and strategies for exercising their rights to development." Articles 26 to 32 as well as Article 8(2b) deal with the protection of lands, territories, and resources (natural and cultural) of indigenous peoples, including establishing legal recognition to these lands, territories, and resources.

Private Property: The Western Concept

The western land tenure system pays high tribute to the notion of individual land ownership; a "land system is in fact a property system" or a "commodity" (Simpson 1976), even if land does not enter the market (Bohannan 1967). The classical western conception of land ownership assumes a bundle of consolidated rights and a single "owner" of that bundle of rights who is identifiable by formal title rather than informal relations or moral claims (Singer 1996). Land rights and deeds have to be registered to guarantee the security of tenures (Simpson 1976), since land is physically immovable and everlasting. Tenure has to do with rights to land against or with other persons, with the consequence that rights to land can become an attribute of the land—in other words, "rules of tenure encompassing with those of the group in the same parcel of land" (Adeyoju 1976). This complex notion of land is absolutely essential to the western system of land tenure, as well as to the market-oriented economy (Bohannan 1967).

The concept of individual land ownership or private property rights in Cambodia was introduced to the mainstream Khmer society by the French

during colonization (Greve 1993; Kusakabe et al. 1995; Thion 1993). The first Land Act was promulgated through the Convention of 17 June 1884 and was imposed on the Khmer king by the French under threat of bombardment. Article 9 of the convention stipulates that “the land of the kingdom, up until today the exclusive property of the Crown, will no longer be inalienable. The French and the Cambodian authorities will proceed to establish private property in Cambodia.” Thirteen years later, the Ordinance of 11 July 1897 confirmed that “the government reserves the right to alienate and to assign all the free lands of the kingdom. The buyers and the grantee will enjoy full property rights over the land sold or assigned to them” (Thion 1993). Such legal developments met strong resistance among the lowland Khmers, especially their elite. As a result, the land reform could not be fully implemented before 1912 (Greve 1993). In 1920, the French authorities promulgated a new Civil Code, which reconfirmed a single landholding system.

The institution of the Land Act occurred in connection with a growing recognition of the importance of land as revenue-generating property, a transformation that came about mainly as a function of the commercialization of rice agriculture. The French reserved to themselves the right to determine the distribution of virgin land and the right of eminent domain over all lands, including those lands inhabited by the lowland Khmer society and the highland indigenous minorities, under their political control (Keyes 1997). Under the French colonial rule, private rubber plantations were introduced to Ratanakiri, where most of the highland indigenous minorities were employed for 15 days a month (International Centre for Ethnic Studies [ICES] and Minority Rights Group International 1995). The recruitment of rubber plantation laborers among indigenous minorities and the daily arrangements of their work were mainly organized by their chiefs, and the indigenous minorities therefore had very little or no contact with colonial administrators. Outside the rubber plantations, the traditional practice of indigenous minority land tenures system remained intact.

At the end of Second World War, it was a key objective of French policy to establish a self-governing Cambodia that remained closely linked to France. This involved a gradual transfer of power to the “reliable” Cambodian monarchy, then headed by Sihanouk, and the maintenance of a stable,

essentially patriarchal political structure, within which the principle of democracy would be introduced only gradually (Christie 2001). After the French were ousted in 1953, various national regimes using covert and overt means tried to assimilate the highland indigenous minorities into the lowland Khmer society (ICES and Minority Rights Group International 1995; Colm 1997a). At the time, the lowland Khmer elite had embraced private property as an acceptable form of investment, but the lowland Khmer rural masses and the highland indigenous minorities had not.

In the late 1960s during Sihanouk's regime, the situation of the lowland Khmer rural population was deteriorating, with more and more farmers becoming indebted and eventually landless. Meanwhile, discontent among highland indigenous minorities became visible and organized as the royal government promoted resettlement projects to bring the highland indigenous minorities into sedentary rice farming. Colm (1997a) notes that the Brou minority group, who traditionally lived in the most northeastern corner of Ratanakiri Province, bordering the Lao People's Democratic Republic (Lao PDR) and Viet Nam, were relocated along the Sesan River in the 1960s. These indigenous minority resettlement projects had some success but also met with some opposition (ICES and Minority Rights Group International 1995). Fox (n.d.) reports that when a rubber plantation was set up near Banlung, Ratanakiri, many indigenous minorities were driven off their land and they responded with armed resistance. Since members of the secret leadership of the Khmer Rouge had taken refuge in the mountains of Ratanakiri, government troops indiscriminately burnt the highland indigenous minority villages and killed the villagers. An increasingly demanding number of working days required in the rubber plantation and in the rice fields at the new resettlement sites as well as harassment by the royal troops greatly agitated highland indigenous minorities in Ratanakiri, culminating in a street protest in 1966 (ICES and Minority Rights Group International 1995).

In March 1970, the Cambodian royal government was ousted by a military coup d'état carried out by Lon Nol, who founded the Khmer Republic. Under the new republic, the system of private land ownership was untouched, and the French-based Civil Code and judiciary were continued. In line with the assimilationist spirit of ILO Convention 107, Lon Nol tried even harder to bring the highland indigenous minorities into the lowland Khmer way of life, which they very much resented (ICES and Minority

Rights Group International 1995; Colm 1997a). Within weeks of Lon Nol's coup, the Soviet Union, which by then had poured loans and grants into Cambodia that amounted to about \$20 million, sharply reduced its technical assistance personnel and programs (Kroef 1974). As a result, the Khmer Republic survived only with the help of US airlifts of supplies to government centers and armed convoys up to the Mekong and Tonle Sap rivers. American aid in 1974 included \$325 million in military supplies, \$170 million in food, and \$75 million in other economic support. Food aid included some 265,000 tons of rice, supplying more than two-thirds of Cambodia's needs (Simon 1975).

Maoist Collectivism

When the Khmer Rouge, under the leadership of Pol Pot, took over the country in 1975, a new political entity emerged: Democratic Kampuchea. This regime implemented a Maoist communist system promoting ultra-collectivism, making everything the common property of the state. Private property was totally abolished, and the right to property previously gained by working the land became merely a "right to work on it." All agricultural lands were collectivized. The government explained this shift to collectivization as just a variant of the traditional lowland Khmer principle of usufruct (Williams 1999). Under collectivization, the population was organized into work teams that labored long hours in agricultural production and in the construction of a vast network of irrigation canals (Ledgerwood 1998). During Pol Pot's regime, a number of highland indigenous minorities became involved in settled rice farming in Ratanakiri.

The abolition of private property by Democratic Kampuchea in 1975 was one of the most extensive expropriations of property by any state in the latter half of the 20th century (Williams 1999). During this period, market economy and business activities were done away with. All existing land records, including cadastral maps and titles, were destroyed. The regime brought about one of the greatest population displacements in human history, forcing hundreds of thousands to move from cities and towns to the countryside and from one part of the countryside to the other. Many thousands, including highland indigenous minorities, fled across the border to Viet Nam and the Lao PDR. As the Khmer Rouge were more interested in collectivizing rice fields and rice production, the

property systems of indigenous minorities, who widely practiced shifting cultivation of upland crops, were not directly affected by the collectivization policy. Although their means of production were not significantly affected, highland indigenous minorities were subject to forced cultural and economic assimilation. It was reported that the Khmer Rouge confiscated indigenous ceremonial jars and took away their ceremonial gongs. The highland indigenous minorities were forbidden to speak their own languages and had to learn and speak Khmer (ICES and Minority Rights Group International 1995).

In 1979, the Vietnamese responded to a series of border clashes with the Khmer Rouge and invaded Cambodia. The Khmer Rouge regime, which was driven across Cambodia's western border into Thailand, was replaced by a Vietnamese-backed communist regime, the People's Republic of Kampuchea. Many people fled the countryside to urban centers. After 1979, people had no legal title to agricultural land, and claims to ownership of residential land were mainly based on actual occupancy. The new regime did not recognize the policy on collective ownership of land of the previous regime. Following a socialist economic model, policies of solidarity and state collectivism were adopted. The government appealed to its internally displaced citizens to return to the villages they had occupied in the pre-Democratic Kampuchea period. Continuing the line of state-controlled collective property rights, the government divided the people into collective work groups called *krom samaki* (solidarity groups).

A Market Economy

In 1989, the People's Republic of Kampuchea, changing its name to the State of Cambodia, embarked on a transition to a market economy. Government officials acknowledged the failure of state-controlled collectivism and opened Cambodia's markets to the world. It adopted a liberalization process, and the *krom samaki* system was officially abandoned. In the land redistribution that followed, lowland Khmer farmers were allocated between 0.1 and 0.2 hectares (ha) of land per household member, which meant landholding sizes ranged from 0.5 to 2 ha per household (Ledgerwood 1998). The state reintroduced limited private ownership of property devised by the French, which had been abolished by the Khmer Rouge. An amendment to the Constitution in April 1989 granted land-

ownership rights with three private tenure regimes: (i) private property around a house not larger than 2,000 square meters, (ii) usufruct rights to state-owned land of plots less than 5 ha, and (iii) concession rights granted to farmers who are in a position to expand their cropping activities into plantation plots larger than five hectares (Ljungren 1993; Williams 1999). These rights were available only to Cambodian citizens who had used and cultivated their land continuously for at least 1 year before the promulgation of the open-market principles. Land left vacant for more than 3 years reverted to the state. Following the enactment of the 1992 Land Law, the government initiated a program for land tenure certificates to confirm occupancy and use rights. It was reported that 4 million applications were submitted, but by mid-2001 the government had processed only 15% of them.

After the enactment of the 1992 Land Law, international aid agencies and lending institutions supported the government in drafting a significant number of laws and regulations covering such areas as the penal code, the civil code, criminal and civil procedures, law of evidence, forestry law, audit law, anticorruption legislation, and the commercial code (Kato et al. 2000). To varying degrees, these agencies and lenders acknowledge the importance of recognizing and protecting the rights of indigenous peoples. As a result, the new Land Law of 2001, which attempts to reform Cambodia's chaotic land regulations and strengthen the western approach to property law, simultaneously recognizes the rights of the highland indigenous peoples' communities to land.

Indigenous Peoples and the Land Law of 2001

The Cambodian Constitution recognizes equal legal status of all citizens, including highland indigenous minorities.¹⁰ The country is also a party to some of the important international legal instruments such as the

¹⁰ Article 32 of the Constitution of Cambodia states: "Khmer citizens shall be equal before the law and shall enjoy the same rights, freedom and duties, regardless of their race, color, sex, language, beliefs, religions, political tendencies, birth origin, social status, resources and any position." During the debate on the Constitution in the National Assembly, the term "Khmer citizens" included Cambodian ethnic minorities (ICES and Minority Rights Group International 1995).

International Covenant on Economic, Social and Cultural Rights of 1966, the International Covenant on Civil and Political Rights of 1966, and the Convention on the Elimination of All Forms of Racial Discrimination of 1963, which provide for equal rights and status of all human beings before the law. Cambodia also ratified the Convention on Biological Diversity in 1992, which recognizes the role of indigenous peoples in the protection of biodiversity. Article 8(j) states: "subject to its national legislation, [a signatory state must] respect, preserve, maintain knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles relevant for the sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovation and practices." While Cambodia has not ratified ILO Convention 169, it voted for the adoption of the UN Declaration on the Rights of Indigenous Peoples of 2007.

The Cambodian government formulated the draft Land Law with technical assistance granted by the Asian Development Bank (ADB).¹¹ ADB agreed to the proposed revision of the 1992 Land Law as one of the policy reform measures under its Agriculture Sector Program Loan and provided technical assistance for drafting a new land law. The new Land Law that was adopted in 2001 includes a chapter on "Immovable Property of Indigenous Communities".

The Land Law of 2001 defines an indigenous community as "a group of people who are resident in the territory of the Kingdom of Cambodia whose members manifest ethnic, social, cultural and economic unity and who practice a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use" (Article 23). Thus, an indigenous community is legally defined by its customary land use and traditional lifestyle. But proof of established customary practices and traditional lifestyle may not always be easy to provide, because traditions are fluid, and customary land-use practices are continuously adapting to changing conditions brought on by decades of oppressive regimes,

¹¹ ADB. 1996. *Technical Assistance 2591-CAM: Agriculture Policy Reform Support*.

wars, and the aftermath. The importance of such land-use practices and lifestyles in identifying an indigenous community also implies the need for redefinition and reinvention of tradition to suit modern national laws (Bassett 1993; Hirtz 2003).

The Land Law of 2001 provides a definition of the individual member of an indigenous community in Article 24:

An individual who meets the ethnic, cultural and social criteria of an indigenous community, is recognized as a group member by the majority of such group, and who accepts the unity and subordination leading to acceptance into the community shall be considered to be a member of the indigenous community and is eligible to have the benefits of the guarantees, rights and protection provided by this law.

The Land Law of 2001 further states that “lands of indigenous communities are those lands where the said communities have established their residence and where they carry out traditional agriculture” (Article 25a). This leads to ambiguous implications of such definitions for social relations and a struggle to control meanings. Membership in indigenous communities elsewhere may be based on descent, residence, or both. Since anthropological studies on highland indigenous minorities of Cambodia are rare (McCaskill and Kampe 1997; Erni 2000), it is difficult to determine how indigenous community membership will be devised to fit the legal requirement of the Land Law of 2001. Fox (n.d.) has raised some concerns:

The variety and complexity of customary stewardship in Ratanakiri has been poorly documented and even more poorly understood by outsiders. The little evidence available however, suggests that customary systems may vary from a very individualistic approach among the Krung, perhaps with little concept of community lands or community boundaries, to a very community dominated approach among the Jarai, with a clear sense of community lands and boundaries.

Many studies conducted in other countries have indicated that the process of acquiring and defending rights in land is inherently a political one based on power relations among members of the social group. Membership in

the social group is, by itself, not a sufficient condition for gaining and maintaining access to land. In this regard, Johnson (1997) has aptly stated that the notion of an ethnically shared and bounded social organization among indigenous minorities obscures, on the one hand, a fundamental cultural similarity and, on the other, various tensions inherent in these social formations.

The Land Law of 2001 recognizes the traditional mobility of the members of an indigenous community as part of their way of managing land. "The lands of indigenous communities include not only lands actually cultivated but also reserved land necessary for the shifting cultivation which is required by the agricultural methods they currently practice and which are recognized by administrative authorities" (Article 25b). While in the past the various regimes actively relocated highland indigenous peoples in order to stop their traditional shifting cultivation practices (cf. Chazee 1994 in the case of the Lao PDR), the new Land Law's legal recognition of traditional mobility of indigenous peoples as part of their traditional way of managing land is praiseworthy.

Communal Rights and Limits

The characteristics of communal land rights of indigenous communities, as opposed to private ownership rights, are generally depicted in the Land Law as follows: "Ownership of the immovable properties described in Article 25 is granted by the State to the indigenous communities as communal ownership rights. This communal ownership includes all the rights and protection of ownership as are enjoyed by private owners under this law, but the community does not have the right to dispose of any communally-owned property that is State public property to any person or group" (Article 26a). Ambiguity lies in the fact that protective language in the law to prevent alienation of community land has, in turn, limited the community's right of disposal. Within the communal rights, individual rights over the community ownership are also generally recognized: "For the purpose of facilitating the cultural, economic and social development of members of indigenous communities and in order to allow such members to freely leave the group or to be relieved from its constraints, the right of individual ownership of an adequate share of land used by the commu-

nity may be transferred to them" (Article 27). Thus, although alienation of communal land to outsiders (whether individuals or communities) is prohibited, limited alienation of communal land to individuals to own as private property within a community is generally accepted.

The Land Law of 2001 acknowledges the existence of traditional land administration authorities, but it subordinates the protection of indigenous community rights to land to "the laws of general enforcement", which include the regulations that protect the environment. This is similar to Agenda 21 in the Rio Declaration on Environment and Development, which subordinates indigenous peoples' rights to environmental protection (K. von Benda-Beckmann 1997). On the other hand, the exclusivity of the indigenous community rights is well recognized by the state under the Land Law of 2001: "No authority external to the community may acquire any rights related to any immovable properties belonging to an indigenous community" (Article 28).

The rights of highland indigenous peoples to communal land are reconfirmed by the Forest Law of 2002. Article 45 of the Forest Law protects areas of cultural or religious significance to indigenous peoples, such as "spirit" forests, from logging. This is important in the context of a draft sub-decree on "Land and Property Acquisition and Addressing Socio-Economic Impacts Caused by State Development Project", which allows involuntary acquisition of land for the purpose of state development projects. The draft sub-decree specifically grants indigenous peoples protection against involuntary acquisition (Article 7) by providing them with a veto power that can be revoked only by the prime minister (Article 10e).

Despite the favorable provisions for indigenous peoples provided in the Land Law of 2001, its inefficient implementation and enforcement have left indigenous peoples vulnerable to commercial and state interests. The government has granted numerous "economic land concessions" to private companies on land belonging to indigenous communities, and the majority of such concessions are granted on 99-year leases. The NGO Forum on Cambodia reported in 2008 that at least nine economic land concessions, each of which is larger than 10,000 ha—the limit set by the Cambodian 2005 sub-decree governing the concessions—had been awarded. The UN Office of the High Commissioner for Human Rights (UNOHCHR) raised

a concern regarding the granting of such concessions (UNOHCHR 2007). About 50,000 ha of forest land in the Mondulkiri Protected Forest have been reallocated as an economic development zone for rubber plantation concessions. During 2007, there has been a dramatic increase in the number of small-scale (less than 1,000 ha) concessions that began operations in areas where indigenous peoples live. Many of these new concessions have been actively resisted by local indigenous communities on the grounds that they were not consulted. The reality so far for the majority of Cambodia's indigenous peoples is that they have not only been affected disproportionately by the negative impacts of these concessions but have also shared very little in the expected benefits (UNOHCHR 2007).

As development interventions proceeded in the northeastern provinces of Cambodia where most indigenous peoples live, dwindling access to land and natural resources increasingly weakened their ability to secure a livelihood and safeguard their identity and culture (Singhantra-Renard 1998). Land grabbing from indigenous communities was widely reported (International Working Group on Indigenous Affairs and Tebtebba Foundation 2007). Massive grabbing of indigenous peoples' land has been associated with the construction of a road from Mondulkiri to Ratanakiri Province and from Kratie to Stung Treng Province. The news of a planned road development to be funded by the World Bank in Preah Vihear Province increased land grabbing in Kui communities. There were stories that large mining concessions had been granted to foreign mining companies without prior consent of indigenous peoples. Furthermore, logging on indigenous peoples' forests has been approved without adequate consultation with them. Although the Land Law of 2001 includes a chapter on registration of communal lands of indigenous communities, no such title granting mechanism has yet been established in Cambodia.

International Influences

The influence of transnational, international, and supra-national law and governance institutions has modified the sovereignty of the state as an autonomous legislator. Initially, transnationalization of law occurred

through legal transfers during the colonial and postcolonial periods. More recently, it has occurred through international development cooperation and programs. International development cooperation has particularly treated good governance, human rights, indigenous peoples' rights, and environmental law as prominent development issues (Benda-Beckmann and Benda-Beckmann 2007). Multilateral development banks such as ADB and the World Bank, for instance, play a quasi-legislative role not only through the laying down of credit conditionalities and the imposition of their environmental and social safeguards policies on all projects they supported but also through direct funding for legal, judicial, and administrative reforms in borrower countries. From 2001 to 2003, for example, ADB supported a Law and Policy Reform Program in Bangladesh, Cambodia, Indonesia, the Lao PDR, Nepal, Pakistan, the Philippines, Thailand, and Viet Nam. As mentioned earlier, ADB's Agriculture Sector Program had a loan covenant that required the revision of the 1992 Land Law to bolster farmers' legal certainty with respect to their rights to agricultural lands.¹² As a follow-up, ADB provided a technical assistance to the Cambodian government to formulate the draft Land Law of 2001. As ADB is also bound by its Safeguard Policy on Indigenous Peoples of 1998, any ADB-supported country policy development affecting indigenous peoples will have to consult indigenous peoples and incorporate their concerns accordingly. It is in this context that the Land Law of 2001 included a chapter on immovable property of indigenous communities.

Cambodia felt the strong presence of international communities since the Peace Accord of 1991 and the arrival of the UN Transitional Authority in Cambodia in March 1992 (Findlay 1995; UN 1995; Hourn 1998). The UN's mission was to assist in governing the country until the general elections were held and a new legitimate government was sworn in. The UN era from 1992 to 1993 was also a watershed in the emergence of civil society in Cambodia. Large numbers of international nongovernment organizations (NGOs) began their work in Cambodia, and local NGOs sprang up rapidly, many in response to the availability of funding from aid agencies rather than concern over genuine grass-roots issues (Kato et al. 2000). At

¹² ADB Loan 1445-CAM-SF, approved by the ADB Board of Governors on 20 June 1996.

the same time, the Cambodian government continued to depend heavily on foreign agencies to spearhead the recovery program and to perform routine tasks (Curtis 1998).

Both ADB and the World Bank have played an important role in the reconstruction of post-conflict Cambodia and in inculcating the principle that development processes should benefit indigenous peoples and protect their interests. In terms of safeguarding their rights, the World Bank adopted an indigenous peoples policy in 1991. ADB followed suit by adopting a similar policy in 1998. The most notable safeguard requirement that was built into the indigenous peoples policies is that the borrower should formulate and implement an “indigenous peoples development plan” for any project that affects them positively or adversely. Such a policy requirement is imposed on a borrower regardless of whether the borrower recognizes the rights of indigenous peoples. However, the formulating of such a plan may not necessarily be compatible with the country’s internal process of processing a project. As a result, it may happen that two similar projects affecting indigenous peoples may follow totally different processes of consultations with the affected people, apply different measures in dealing with similar adverse impacts on indigenous peoples, and provide different standards of compensation to the different groups of affected people, simply because one project is funded by ADB or the World Bank and the other one is funded by the state.

While Cambodia’s Land Law of 2001 was being enacted, the World Bank was conducting extensive consultations with indigenous peoples’ representatives, government representatives, and civil society organizations worldwide regarding the revision of its indigenous peoples policy. This was the time when the processing of the draft UN Declaration on the Rights of Indigenous Peoples and global discussions on indigenous peoples issues had also begun. Such consultation processes had enhanced the visibility of indigenous peoples, their issues, and demands. All these developments directly influenced the formulation of the Land Law of 2001.

For indigenous peoples, the state is both an ally and an adversary depending on the context (Renderia 2002). They need the state to protect their rights vis-à-vis multinational corporations or any other economic interests

that could encroach on their territory and livelihood. At the same time, they use the international arena, multilateral development agencies, and transnational space to challenge the state, arguing that the state often depends on multilateral development agencies for development interventions. Indigenous peoples demand that such multilateral development agencies establish stricter environmental and social safeguards so that they can benefit from such development projects and protect their economic, social, and cultural space. The external pressure on the state from the international community and NGOs is a major drive and justification for severely curtailing lower-level regulatory powers, especially regarding natural resources, rights to ancestral land, physical relocation, and indigenous peoples (Benda-Beckmann and Benda-Beckmann 2007).

There were two major occasions when internationally driven moves toward the recognition of indigenous peoples' rights in Cambodia took place prior to the inclusion of the chapter on indigenous communities in the Land Law of 2001. The first was the creation of the Inter-Ministerial Committee for Ethnic Minorities Development as the principal government agency with the responsibility for formulating policies and programs for the benefit of ethnic minorities (ADB 2002a, 2002b). The committee was formed in 1994 at the same time that the Highland Peoples Program was established by the UN Development Programme, in response to the UN Year of Indigenous Peoples in 1993. The main contribution of the Highland Peoples Program was to help the committee form its policy guidelines for highland peoples' development through a participatory process. With technical assistance from the ILO, the committee prepared a draft policy for the development of highland indigenous peoples in September 1997 (Inter-Ministerial Committee for Ethnic Minorities Development 1997). The draft policy states that all highland indigenous peoples have the right to practice their own cultures, adhere to their own belief systems and traditions, and use their own languages. It also requires the government to strongly encourage and support the local institutions established by the highland indigenous peoples. For all legal and administrative matters, all persons belonging to highland indigenous communities should be considered and treated as Cambodian citizens, with the same rights and duties. However, as of spring 2009, the National Assembly has not approved the draft policy.

The second major occasion of the move toward the recognition of indigenous peoples' rights was the action of the UN Commission on Human Rights (UNCHR) to specifically include indigenous peoples' issues in the Report of the Special Representatives of the UN's Secretary General for Human Rights in Cambodia to UNCHR in February 1999 (Horvath 1999). This report, together with the previous two reports to UNCHR of 26 February 1996 and 20 February 1998, focused international attention on Cambodia's record for human rights and placed heavy moral and political pressure on Cambodian government to pay particular attention to indigenous peoples' rights.

The incorporation of a chapter on immovable property of indigenous communities in the Land Law of 2001; took place only after a long and tedious process of negotiation and consultation between the government, multilateral donor agencies, and civil society organizations, especially the Cambodian NGO/International Organization's Land Law Working Group.¹³ This group played a major role in ensuring that the drafting of the law would be open to public scrutiny. It discussed the content and processes with government offices, ADB, the World Bank, the UN, and several other agencies. At the global level, an NGO based in the United Kingdom, Global Witness, launched a worldwide campaign against logging activities in indigenous peoples' territories in the Ratanakiri Province and called for serious attention to the plight of the indigenous peoples. At the local level, several international NGOs have actively promoted indigenous community rights in natural resource management (International Cooperation for Development and Solidarity et al. 2001; Colm 1997b). The international NGOs sponsored conferences and workshops for both government representatives and indigenous peoples to discuss indigenous peoples' issues. On 7 July 2000, ADB, the land law working group, and a representative from a Ratanakiri NGO negotiated a compromise over the indigenous community land rights provisions with the Ministry of Land Management, Urban Planning, and Construction.

¹³ The land law working group was established on 29 November 1998 by the Kingdom of Cambodia Bar Association, composed of legal aid and human rights NGOs and international organizations and supported by a secretariat provided by the Oxfam Great Britain Cambodia Land Study Project. The group's objective was to increase public participation in the revision of the Land Law.

The consultation process was a success. As Shaun Williams, the secretary to the land law working group, puts it: "This process has been extremely constructive and has set a benchmark for policy and legislative development in a country that has been trying to improve its governance practices after years of despotic rule and civil unrest" (ADB 2000).

Conclusion

Although many specific events, actors, and processes have influenced the formulation and recognition of the land rights of indigenous peoples in Cambodia, their current situation is typical for indigenous peoples throughout Asia. Indigenous peoples have to depend on the state to protect their rights to communal lands and resources, but it is precisely the state that often denies them such rights. Even where legal instruments to protect indigenous peoples' rights to land exist, indigenous peoples may still be disadvantaged in the development process because of the lack of law enforcement and the failures of governments to develop rules and regulations for implementing such legal instruments. Perhaps the most significant challenge that indigenous communities encounter is the encroachment on their ancestral lands by outsiders, by commercial interests, and by state agencies in the name of development.

While statewide legislation and law enforcement are prerequisites to strengthening indigenous peoples' rights to land, at the local level, community-based resource management strategies and actions are essential in the "ongoing legal action and negotiations between indigenous communities and dominant cultures and institutions about rights to land and resources" (Baker et al. 2001). The struggles to maintain control over ancestral land and natural resources are becoming urgent in Southeast Asia, as indigenous peoples deal with accelerated deforestation, commercial pressure to exploit natural resources, the growth of market-based economic activity, and the loss of traditional lands (Minority Rights Group International 1999).

Especially after the adoption of the Declaration on Rights of Indigenous Peoples by the UN General Assembly in September 2007, the recognition

of indigenous peoples' land rights has become a global requirement. Many Asian countries voted for the declaration, and none of them were against it, reflecting political support at high levels. Although not legally binding, the declaration has set high standards worldwide for the recognition of the rights of indigenous peoples. In the future, the human rights and development standards of any multilateral development bank or an international donor agency will be judged by their compatibility and consistency with the provisions in the declaration. The challenge is how to make the standards and requirements increasingly part of a country's legal framework rather than a burden imposed by foreign donors, international NGOs, and international networks of indigenous peoples.

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Chapter 4

Access to Natural Resources: Case Studies of Cambodian Hill Tribes

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Oeur II**

The region of northeastern Cambodia that includes Ratanakiri, Mondulkiri, Kratie, and Strung Treng provinces has historically been a crossroads of diverse influences. As early as the 13th century, Khmer and Cham people living along the Mekong River in Stung Treng Province are thought to have been in contact with the indigenous inhabitants of the forest areas through the Sesan and Srepok rivers. Trade was conducted through these river systems to secure forest products such as elephant ivory, hides, feathers, wood, wild spices, and herbs. In addition to the trade in goods, there was also a trade in slaves, which lasted until the 19th century. In the late 19th and early 20th centuries, the French colonialists operated rubber plantations and gem mines in the area. For centuries the Khmer and Cham, the Vietnamese and the Lao, and later the Thai and the French have been in contact with indigenous peoples of the highlands.¹⁴

¹⁴ The terms “indigenous peoples,” “indigenous groups,” “indigenous communities,” and “hill tribes” are used synonymously throughout this chapter to refer to the national minorities such as the Tampuan, the Phnong, and the Stien in northeast Cambodia who were involuntarily incorporated into the larger state and who did not participate in the process of state formation. By contrast, ethnic groups in Cambodia such as the Chinese, the Vietnamese, and the Muslim Cham were voluntarily incorporated into the state through migration (Kymlicka 2002 cited in Ehrentraut 2004).

While indigenous peoples of Cambodia's northeast highlands maintained trade relations with lowland groups, they were nevertheless able to assert domain over their own territories. This began to change during the French colonial period with the establishment of permanent settlements around plantations and mines. After independence in 1954, the Sangkum Reastr Niyum regime took decisive steps to incorporate the indigenous hill tribes of the northeast into mainstream Khmer society. Inhabitants of the plains regions of the country were encouraged to resettle in the northeast highlands and teach the hill tribes how to follow Khmer ways. This in-migration was curtailed in the 1970s as a consequence of the civil war and later the Khmer Rouge regime. After 1979, the indigenous peoples who had been relocated by the Khmer Rouge began to return to their own villages.¹⁵ In the 1980s, the in-migration of Khmer settlers into the northeast remained limited with the exception of Kratie Province.

Since the 1990s, the opening up of Cambodia's economy has had far-reaching consequences for the indigenous peoples of the northeast region. The pursuit of forest concessions and economic land concessions granted without the involvement of indigenous groups has occasioned a major shift in the use and ownership of land resources.¹⁶ Traditionally, indigenous peoples used land and forest resources as communal property to support their own subsistence. Now, private commercial interests exploit such natural resources to increase their own wealth.

¹⁵ The village is the smallest administrative unit in Cambodia followed by the commune, the district, and the province. In some instances, the district is followed by the municipality.

¹⁶ The Forestry Laws of 1988 and 2002 govern the granting of forest concessions. Between 1994 and 1997, the Government of Cambodia granted 33 forest concessions to companies encompassing an area of almost 7 million hectares, equal to more than half of Cambodia's forest area. In December 2001, the logging permits of the forest concessionaires were suspended pending the approval of their Strategic Forest Management Plans. However, as of June 2007, 40% of the 59 economic land concessions in Cambodia covering one-third of the total 943,069 hectares under these concessions were located in the four provinces of northeast Cambodia (United Nations Cambodia Office of the High Commissioner for Human Rights 2007). Global Witness (2007) reported that economic land concessions had been used as a pretext to cut timber in forests. The Land Law of 2001 envisages "other kinds of concessions...such as mining concessions, port concessions, airport concessions, industrial development concessions, [and] fishing concessions," which do not fall within its scope (Article 50).

The granting of forest concessions in Cambodia in the mid-1990s sought to eliminate illegal logging and generate more state revenues from forest exploitation. In 2001, the government banned excessive logging operations under large-scale forest concessions. But illegal logging continued unabated under the concession regime and was often abetted by it (Global Witness reports 1997 to 2002). Similarly, the forest concessions never generated the state revenues expected because they were unable to capture the proceeds from illegal logging controlled by the major political factions. From 1992 to 1998, the estimated value of Cambodia's timber exports reached a staggering \$2.1 billion, while the estimated government revenue during the same period was only \$98.8 million (Le Billon 2000). With respect to northeast Cambodia, Forest Concession Review (Fraser 2000) gave the Hero Taiwan Company operating in Ratanakiri Province the lowest performance score of all inspected forest concessions and detailed several contractual breaches by the Malaysian Samling company operating in Mondulkiri and Kratie provinces.

The impact of illegal logging that continued unabated and the effects of forest concessions on local communities were devastating, including severe forest deforestation and degradation. Logging operations on indigenous peoples' land diminished their access to non-timber forest products such as resin. Concessionaires also destroyed "spirit forests", which constitute sacred sites in indigenous villages (Colm 2000; McKenney 2002; Evans et al. 2003).

In northeast Cambodia, efforts to establish economic land concessions involved the takeover of large tracts of land in villages of indigenous peoples. In Ratanakiri Province, economic land concessions were initially established in the mid-1990s for growing palm oil, coffee, and cashew nuts on the rich, volcanic red soils of indigenous villages along national road 78 from the provincial capital of Banlung to the border with Viet Nam (Colm 1997). At the beginning of the 21st century, economic land concessions in Ratanakiri Province were awarded in indigenous villages for the production of rubber and teak. Also in Ratanakiri Province, gem mining concessions were granted in 2003 in Lumphat and Bokeo districts. In Mondulkiri Province, the Chinese Wuzhishan L.S. Group requested a 199,999-hectare (ha) pine tree plantation in Sen Monorom and Ou Reang districts. Development of the 10,000 ha initially approved by the Council

of Ministers began in September 2004 despite complaints from Phnong villagers. In 2006, large-scale mining development began in Mondulkiri Province with the Australian companies, Oxiana and BHP Billiton, exploring for gold and bauxite (Kinetz and Yun 2007). In Kratie Province, six economic land concessions, awarded to companies in 2006, encroached upon land of Phnong, Mil, and Kuy indigenous peoples in Sambo District. In Stung Treng Province, five economic land concessions, granted to companies in 2005 and 2006, encompassed forested areas in Sesan District in violation of the law. These included evergreen forests under the traditional use of Phnong, Prov, and Kuy indigenous peoples. Concessionaires in Stung Treng's Sesan District also cut down resin trees tapped by local villagers, contrary to the 2002 Forestry Law (United Nations Cambodia Office of the High Commissioner for Human Rights [UNCOHCHR] 2007).

The opening up of Cambodia's economy, which included the construction of roads by logging concessions and the government, likewise spurred a new in-migration of Khmer settlers to the northeast and the growth of market centers. From 1992 to 1998, the population of Ratanakiri Province increased by 41%.¹⁷ Accelerated market activity in Ratanakiri Province led Khmer settlers to buy up land from indigenous peoples for the cultivation of cash crops or for future speculation. In one notorious case, a high-ranking general in the military obtained title to 1,250 ha of land in Bokeo District in Ratanakiri Province from Jorai and Tampuan indigenous villagers in exchange for bags of salt. With the support of nongovernment organizations (NGOs), the villagers filed a complaint with the Ratanakiri Provincial Court. After 2 years of legal disputes, the Provincial Court in 2001 upheld the general's title to the land. After Prime Minister Hun Sen and King Norodom Sihanouk intervened, the Appeals Court reversed the decision and invalidated the land titles sold by the Jorai and Tampuan plaintiffs. In Mondulkiri Province, the construction of a new road early in the 21st century through Keo Seima District into the provincial capital of Sen Monorum precipitated land speculation and the incursion of economic land concessions.

¹⁷ The United Nations Transitional Authority of Cambodia Population Census of 1992 records the population of Ratanakiri Province at 66,764, while the General Population Census of Cambodia 1998 documents the population of Ratanakiri Province at 94,243.

Although the Land Law of 2001 made the sale of indigenous land illegal, a 2004 study found that extensive sales and seizures of indigenous land had taken place throughout Ratanakiri Province in direct contravention of the law (NGO Forum 2004). A follow-up study undertaken in 2006 revealed that the severity of land alienation had accelerated in almost one-third of the provincial communes (NGO Forum 2006). In all likelihood, the trend of land usurpation in indigenous communities will worsen. The government has indicated on several occasions its plan to develop by 2015 the four provinces of northeast Cambodia into the fourth development pole of the country, after Phnom Penh, Siem Reap, and Sihanoukville. Mining, agro-industry, and eco-tourism are seen as the drivers of this growth. The government's plan for economic growth in northeast Cambodia appears to sanction and foreshadow further alienation of indigenous land (UNCOHCHR 2007).

Communal Land Titles and Forestry Rights

While indigenous groups in northeast Cambodia struggle to adapt to the rapid depletion of their natural resource base, progressive legislation enacted in Cambodia in recent years provides a legal framework for preventing further decline of the natural resources base. Paramount among such legislation is the Land Law of 2001, which enables indigenous communities to gain collective title to their "traditional land", variously known as residential land, agricultural land, and the "reserve land" kept for swidden or slash-and-burn cultivation (Blackstrom 2006). The Land Law of 2001 protects the rights of indigenous communities to use and manage their traditional lands, even before their rights are recognized and collective titles are granted.¹⁸ As such, the sale of indigenous land since the promulgation of the Land Law of 2001 is deemed illegal. The sale of individual and communal land is prohibited after the issuance of communal titles, although individual possession rights under communal land ownership are allowed. This is consistent with the traditional allocation of use rights on communal land to individuals and families.

¹⁸ The 1992 Land Law previously in force primarily dealt with land-use practices of lowland Cambodians and did not reflect the communal land management practices of indigenous peoples (ADB 2002).

In 2003, the Ministry of Land Management Urban Planning and Construction initiated a pilot land-titling program in two indigenous communities in Ratanakiri Province and in an indigenous community in Mondulakiri Province.¹⁹ Procedural issues in this process were to be addressed in a sub-decree issued to clarify the provisions contained in the law. In March 2004, the ministry formed an inter-ministerial national task force to coordinate the work in the three pilot villages and to oversee the development of the sub-decree for communal land titling.

Efforts to develop and implement the indigenous land provisions of the Land Law of 2001 involved the participation of indigenous peoples. Leaders of indigenous peoples consulted on the proposed law in 1999 expressed the view that communal land titling is more in keeping with traditional land-use practices than individual titling. At a series of provincial consultations convened in 2004, indigenous peoples in different parts of the country strongly supported communal land titling that respected individual user rights under collective land ownership. It was significant that NGOs, the United Nations (UN), and several international financial institutions promoted indigenous law reforms in Cambodia (Simbolon 2004).

Despite the auspicious start, the process of drafting and adopting the Sub-Decree on Communal Land Titling stalled. In May 2005, an independent legal review announced that the framework for registering indigenous collective titles was largely complete. The review recommended that the sub-decree be drafted and adopted even in a simplified form to set out a process for the recognition of indigenous communities as legal entities. The review noted that Article 23 of the Land Law of 2001 provided a sufficiently clear legal definition of indigenous communities based on four criteria: (i) residing in the territory of Cambodia; (ii) manifesting ethnic, social, cultural, and economic unity; (iii) practicing a traditional lifestyle; and (iv) cultivating the lands in their possession according to customary rules of collective use. The review argued that these four criteria formed the basis for the recognition of indigenous communities as legal entities for the purpose of land ownership (Brown et al. 2005).

¹⁹ The pilot land-titling villages in Ratanakiri Province were La' In village in Toeun Commune, Kon Mom District; and L'eun Kreang village in Ou Chum Commune, Ou Chum District. The pilot village in Mondulakiri Province was Andong Krolung village in Sen Monorum Commune, O'Reang District.

The land titling program remained in its pilot phase even though the Land Law was enacted in 2001. Moreover, the Sub-Decree for Communal Land Titling also remained as a draft. As a result, indigenous minorities, particularly those in the northeast Cambodia, continued to lose their ancestral land rapidly to outsiders. Some of them, to obtain at least an interim protection for their ancestral lands, attempted to register such lands under Article 7 of the Sub-Decree on Sporadic Registration.

While communal land titling under the Land Law of 2001 provides a legal basis for curtailing encroachments into lands in indigenous communities, the Forestry Law promulgated on 31 August 2002 reaffirms the protection of resin tapping rights of local communities contained in the Forestry Law of 1988. In contravention of the common practice of forest concessions operating before the 2001 logging ban, the law prohibits the cutting of trees that local communities have tapped to extract resin for customary use (Article 29). The 2002 Forestry Law likewise recognizes and guarantees the traditional user rights of local communities to collect forest by-products. In addition, the Sub-Decree on Community Forestry Management approved by the Council of Ministers on 17 October 2003 enables local communities to enter into community forest agreements with the Forestry Administration for a period of 15 years. These leases temporarily transfer the management of forest resources to local communities. They are different from community forestry agreements that local communities have entered into with the Ministry of Environment in protected areas. Because security in land tenure and access to forest resources are inextricably linked with the lives of indigenous peoples, the signing of community forest agreements should be done at the time of communal land titling.

Disharmony: Two legal cultures in conflict

In August 2006, the Legal and Judicial Reform Programme of the UN Development Programme and the Ministry of Justice completed a study on indigenous traditional legal systems and conflict resolution in Ratanakiri and Mondulakiri provinces (Backstrom et al. 2006). The study revealed that preserving community solidarity was a core objective of customary law, which sought to reach agreement between the two parties so that the aggrieved was compensated, the guilty party punished, the two parties reconciled, and harmony restored. The study found that indigenous

communities overwhelmingly supported their customary legal system, although it lacked the authority to deal with the increasing number of disputes over land and natural resources. It also found that indigenous communities are marginalized within the formal legal system, which is often used as a tool by powerful interests to further exclude them. The study recognized that the formal and customary legal systems often address different kinds of conflict and that the latter cannot substitute the former. Therefore, reform of the formal legal system is urgently needed to accommodate customary rights of indigenous peoples.

The clash between customary legal systems and the formal legal system is evident in the Phnong indigenous community's conflict with the Wuzhishan L.S. Group over the pine tree plantation in Monduliri Province.²⁰ As mentioned earlier, Wuzhishan began operations on the 10,000 ha initially approved for its plantation in September 2004. As a result, six villages in Sen Monorom and Dak Dam communes in Ou Reang District were adversely affected.²¹ The lack of clarity in concession plans led more than 400 Phnong villagers to submit a petition to the Ou Reang district governor. The petition asserted that the plantation would affect Phnong rice fields, cemeteries, spiritual sites, and grazing land. A large demonstration erupted on 16 June 2005, when more than 650 Phnong villagers affected by the plantation protested in front of the company's office in the provincial capital of Sen Monorom. This led the Council of Ministers to issue a notification on 17 June 2005, ordering Wuzhishan to suspend planting immediately in all areas of the concession. An inter-ministerial committee was appointed to resolve the problem. Despite this, the company continued to plant, and villagers protested by setting up roadblocks for about a week in late June to prevent company trucks from going to the sites. Dismantling of the roadblocks was overseen by Monduliri's second

²⁰ Among the hill tribes in northeast Cambodia, the Phnong are known for their unbroken record of opposition to foreign incursions. White (1996) reports that the Phnong's resistance to French rule in Monduliri Province erupted in attacks against several colonial posts; as a result, from 1914 to 1933 the French abandoned their control over some areas following the killing of French civil servants and Khmer militia and settlers.

²¹ McAndrew et al. (2003), which constitutes the Monduliri case study in this chapter, was researched in Dak Dam and Srae Preah communes. One year after the study, Dak Dam Commune became a principal site of the Wuzhishan pine tree plantation.

deputy provincial governor, who promised the protesters that a solution to the dispute would be found (Environment Forum Core Team 2006; UNCOHCHR 2005a).

On 5 July 2005, the special representative of the UNCOHCHR called for the cancellation of the Wuzhishan concession. The commissioner pointed out that environmental and social impact assessments had not been conducted prior to the establishment of the plantation and that the local people and authorities had not been consulted in public discussions (UNCOHCHR 2005b). The high commissioner's report stated, "The provisions of domestic law and the international human rights treaties and ILO [International Labour Organization] conventions that bind Cambodia apply to both the government and the Wuzhishan L.S. Group. Many breaches of the law and of human rights have been committed" (UNCOHCHR 2005a). Retired King Norodom Sihanouk supported the high commissioner's statement, calling the Wuzhishan operation "an illegal and inadmissible violation of the Phnong's rights, human rights and constitutional rights" (Vachon 2005).

On 9 July 2005, about 200 village demonstrators met with Cambodia's secretary of state of the Ministry of Interior in the provincial capital of Sen Monorum. It was agreed that a provincial committee would be formed to conduct field research reporting to the inter-ministerial national committee and that Wuzhishan would immediately suspend planting in Sen Monorum and Dak Dam communes. On 26 July 2005, the inter-ministerial committee, in reporting the provincial committee's findings, said that negotiations with villagers in the two communes had been difficult and that at present it had been agreed only that the company would be required to build fences around its concession to avoid encroachments. On 18 August 2005, Wuzhishan began planting activities once again with permission from provincial government authorities, who asserted that conditions required by the Council of Ministers had been met (Environment Forum Core Team 2006). In December 2005, the government signed a long-term contract with the Wuzhishan Company. In 2007, a report from the UNCOHCHR (2007) noted that the Wuzhishan concession continued to operate although its activities had desecrated the spirit forests and ancestral burial grounds of Phnong villagers and had affected their reserved land, grazing land, and farmland.

The Wuzhishan case in Mondulkiri cogently illustrates the difficulty encountered by indigenous peoples in northeast Cambodia in adopting traditional conflict resolution approaches to a modern legal system that is strongly subject to political influences. In the Wuzhishan conflict, agreement was not reached between the two parties, the aggrieved were not compensated, the guilty party was not punished, and the two parties were not reconciled. Despite strong support from the UNCOHCHR, the Phnong villagers involved in the Wuzhishan land dispute were unable to assert their rights under traditional law or under the Land Law of 2001.

Expanding Economy and Shrinking Natural Resources: Three Case Studies

This chapter draws on three studies of changes among indigenous peoples of northeast Cambodia as a result of increased market activity and diminishing natural resources.²² Data were collected from two Tampuan villages of Ratanakiri Province (McAndrew 2000), two Phnong communes of Mondulkiri Province (McAndrew et al. 2003), and two Stienng villages of Kratie Province (Analyzing Development Issues 2004). This chapter traces broad emerging trends in the three provinces and documents how indigenous groups response to these trends. The chapter also assesses livelihood strategies and market participation of indigenous groups. The authors argue that indigenous peoples who retain control over their communal land and natural resources are in a stronger position to adapt to the rapid and inevitable changes brought on by the market economy than those who do not.

Field research was conducted in Ratanakiri Province at the Tampuan villages of Kahoal (Andong Meas District) and at Kamang (Bokeo District). Field research in Mondulkiri Province was undertaken at the Phnong communes of Dak Dam (Ou Reang District) and Srae Preah (Keo Seima District).

²² The authors, who work with the Analyzing Development Issues Project of the Cooperation Committee for Cambodia, acknowledge the contributions of the following in developing this paper: Maria Backstrom, Graeme Brown, Susie Brown, Jeremy Ironside, Megan Macinnes, Russell Peterson, Katrin Seidel, Maly Seng, Thany Seng, Todd Sigaty, and Peter Swift.

Field research in Kratie Province was completed at the Stieng villages of Mil and Thmar Hal Veal (both in Snoul District) (map).

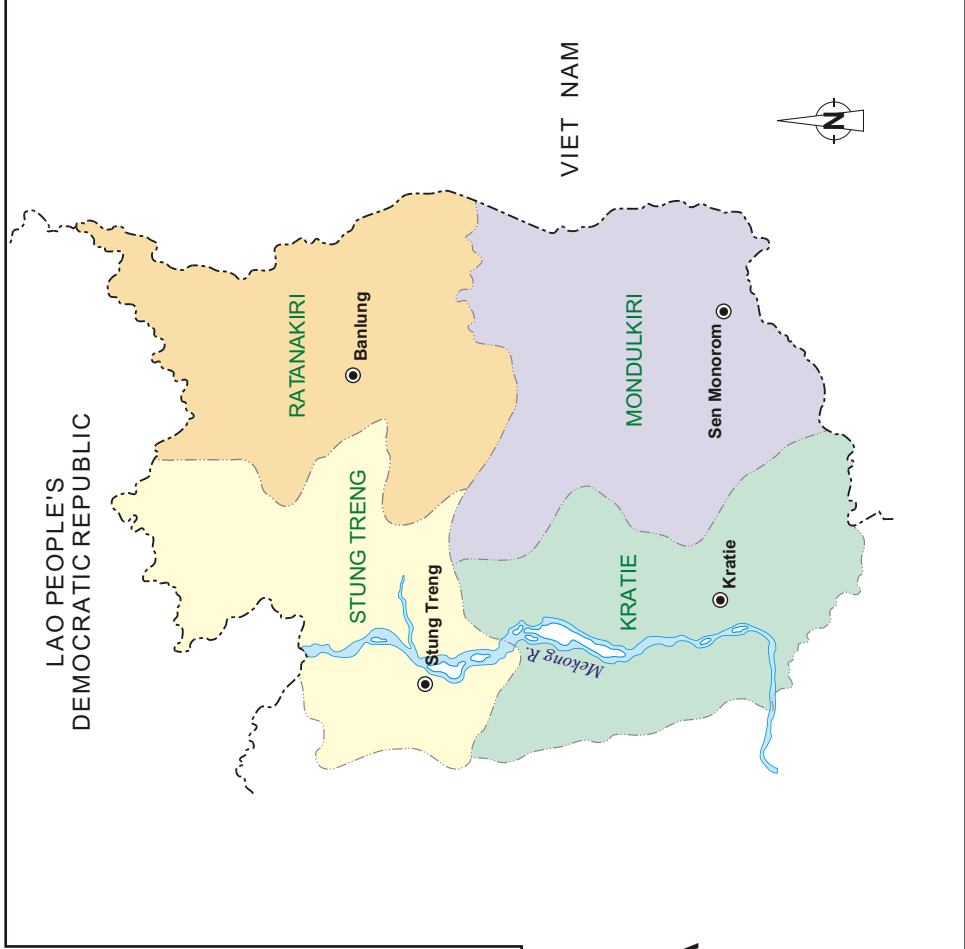
Natural Resource Depletion

Many forces have put pressure on the shrinking natural resources of the region, including an influx of Khmer settlers with money to buy land for cash crops, the relocation of a district center, the illegal logging of resin trees, and large-scale deforestation that has caused soil erosion and loss of wildlife. The six villages studied have responded in different ways.

Tampuan responses in Kahoal and Kamang villages

Despite the rapid increase of market activity in Ratanakiri Province, the growth of Andong Meas District had been slow, albeit steady. As of May 2000, none of the 67 households at Kahoal village had sold their land rights. But even then the reach of the market was evident. The residents of Kahoal reported that Khmer buyers had come to the village desiring to purchase land. Prices offered for 1 ha of swidden land already cultivated reportedly reached as high as 10 *chis* of gold (\$400). Prices for 1 ha already cleared but not cultivated reached up to 4 or 5 *chis*. Prices for 1 ha of forest area not cleared ranged from KR100,000 to KR200,000 (\$25 to \$50). The buyers did not make their offers through the village chief or elders. They talked directly with individual villagers, undermining communal approaches to decision making .

As a result of these inquiries, Kahoal villagers formed their opinions about land sales in the village. The central position they took was that villagers did not have the right to sell their land. If an individual household sold land without the knowledge of the others, that household would be forced to leave the village and would not be allowed to open up new swidden plots within the village boundaries. A variation of this course of action was that Kahoal villagers would not permit the land buyer to cultivate the land. The villagers would force the Tampuan seller to remain on the land and return the money received from the land sale to the Khmer buyer, even if this meant selling a buffalo or borrowing money from relatives. While Kahoal villagers had yet to reach consensus on how to deal



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with those involved in land sales, they were in agreement that communal rights took precedence over other rights in all land transactions. As the most respected elder in the village stated resolutely, "The land in the village is communal land. It should be used for communal purposes and not for personal gain."

In Kahoal, local governance had evolved incorporating various leadership roles into a collaborative process. The elders were looked upon to resolve disputes between different families and between husbands and wives. If the conflicts were serious, the elders would discuss them with the village chief and include him in the imposition of sanctions. Similarly, the village chief would inform the elders before calling a village meeting to talk about directives that came down from commune or district officials. For his part, the village development committee chief kept the village chief informed about the progress of the development activities. As a result of the close interaction and mutual respect that existed among village leaders, Kahoal was able to deal effectively with communal issues such as land use and land sales.

In contrast to Kahoal, the rapid growth of the Bokeo market and district center had far-reaching effects on Kamang village. The transformation began in 1988 when the district center of Bokeo was transferred to its current location along national road 78. According to Kamang village leaders, government workers employed in Bokeo District cultivated farms along the national road within the boundary of Kamang village. Permission to cultivate these lands was given by a former district governor. No permission was sought from, or given by, the Kamang villagers. When the government workers left the district, they sold the parcels they had acquired to Khmer buyers, who planted them in cash crops. The government workers who sold the first parcels were police officers. They claimed that the district had the authority to allocate the lands to them. The Kamang villagers countered that the parcels were old swidden plots under crop rotation. But there was little they could do to get them back.

After the initial land sales along the road in the mid-1990s, the Khmer population of Bokeo town center increased steadily along with the expansion of the Bokeo market. With large numbers of Khmer migrants seeking to acquire land for the cultivation of cash crops, the pressure on Kamang

villagers to relinquish their land rights was severe. The land parcels most desired by the Khmer buyers were those located along the national road because they were accessible by motorcycles and are linked to the Banlung market and the Vietnamese border.

According to the chief of the Kamang Village Development Committee, land sales along the national road brought about KR200,000 (\$50) per hectare. At some locations, land was sold for as little as KR50,000 (\$12.50) per hectare. Some Khmer buyers bought land parcels and then extended the boundaries of those parcels without purchasing any more land. Few others occupied and cultivated land without buying it. Most land sales took place between 1997 and 1999. By the end of 1999, there were few parcels of land along the national road that had not been sold. Kamang villagers transacted independently with land buyers without consulting the village chief or elders. As a result, it was not precisely known how many villagers were involved in land sales or how much land they had sold. The village chief identified between a third-and-a-half of the 67 Kamang households as having sold land to Khmer buyers. The village chief, who himself had sold 1 ha of land in the interior of the village, argued that Kamang villagers with plots along the national road feared that their land would be taken free, if they did not sell it. This argument expressed the sense of powerlessness and resignation that had come to characterize Kamang villagers in their property dealings with Khmer people.

Individual decisions of households to sell land parcels to outsiders without consulting the village chief or the elders or the village community as a whole eroded the communal approach to decision making that had long characterized Tampuan villages. Most households that sold land along the national road were reluctant to admit it and harbored a sense of shame. Those who had not sold land resented those who had. The narrative of one elder graphically illustrated the situation. The elder said he personally did not have the right to sell his land, for the Tampuan people in the past had never sold land. He likewise confided that he did not want other villagers speaking out against him, questioning why he had sold land and demanding to know where villagers would cultivate swidden crops in the future. The elder was acutely aware of the resentment villagers held

against those who had sold land. Only later did the research team learn that this elder had been named by the village chief as someone who had sold land.

Since the village chief had sold rights to a parcel of land, he was in no position to generate communal resistance to other land sales. If anything, his participation in the land sales deepened resentment. Nonetheless, a sense of resignation emerged among many Kamang villagers that they really had no choice but to sell their land. True, the market pressure was formidable, but it also provided an excuse for villagers to act in their own short-term interest rather than in the interest of the larger village community. Land sellers made small cash gains, but they were left with feelings of self-pity and diminished self-respect. Villagers could no longer trust one another to act in the communal interest. With households acting on their own behalf, looking after their own immediate interest, it was difficult for them to foster communal solidarity and cooperation.

The land parcels sold to Khmer buyers along the national road were small compared with the sale of a 100 ha tract of communal land in the interior of the village. Much like the negotiations over individual plots, the sale of the 100 ha of Kamang communal land in late 1999 and early 2000 was done without the full consultation among all village residents. The transactions started when police officers came to the village with an offer to purchase the land. They claimed that they represented a police commander from Banlung and that they had already discussed the matter with the village chief. The buyer was reportedly willing to pay \$50 per hectare or \$5,000 for the entire 100 ha. Subsequently, two officials from the provincial land title office traveled to Bokeo and called the village chief to the district headquarters to receive payment for the land. The village chief objected, saying that he could not receive the money alone. Eventually, a group of five village leaders (which included the development committee chief but not the three village elders) went to the district headquarters to collect the payment. At the district office, the two provincial officials offered them \$2,500 for the 100 ha. The officials reportedly told them that if they did not accept the money, the land would be taken without any payment. The district authorities advised them to take the money.

While the village chief and development committee chief insisted that everyone in the village agreed to the sale of the 100 ha, this actually was not the case. Several villagers remarked that they learned about the land sale only after it had been concluded. Only one of the three village elders expressed agreement with the sale of the 100 ha. This elder belonged to the extended family of the development chief. The two other elders were not in agreement with the land sale and resented the fact that they were excluded from the deliberations and decision making. One elder expressed his objections this way: "People in Kamang will encounter difficulties if they continue to sell land, for the land is becoming smaller and smaller and the population is getting bigger and bigger. If the land sales continue, future generations will have no land to cultivate their crops. How will they survive?"

The sale of the 100 ha plot of interior land further eroded communal decision making in the village. The provincial buyer worked through government agents, who in turn worked through the village chief. The village chief relied on a small group of village men and effectively excluded the elders and others. As members of the negotiating team, the village chief and development chief insisted that they acted in the best interests of the village. But by excluding the elders and the village community as a whole from the negotiations, they deepened mistrust and resentment among many villagers. The situation appeared beyond remedy. The Kamang villagers were unable to rely on their own resources to deal effectively with the forces that were driving the land market. At the same time, they were unable to depend on the commune and district officials for assistance.

Phnong responses in Dak Dam and Srae Preah communes

Logging of Mondulkiri forests diminished natural resources in both Dak Dam and Srae Preah communes, although the immediate impact of logging was felt more severely in Srae Preah than in Dak Dam because of the loss of resin trees. In Dak Dam commune, villagers from Pou Less, Pou Chob, and Pou Ontreng observed that forest cover had steadily declined in the commune since their return from Khmer Rouge resettlement in Koh Nhek District in the 1980s. The most severe decline occurred after 1998. The Phnong villagers attributed the loss of timber resources mainly to the

operations of the Khmer Construction Company in the late 1990s, illegal logging by people with chain saws, and the building of homes to accommodate the growing commune population.

Dak Dam villagers reported that the Khmer Construction Company represented itself as a legal entity that had a contract with the government. Early on, company representatives convened a meeting with the villagers and told them that they could benefit from the logging operations. The officials encouraged the Phnong to cut and sell logs to the company, and several of them did just that. Village residents, both men and women, were also hired at \$10 per month to work at the company sawmill. By the time it closed its operations, the company had cut and left a large number of logs in the forest. Villagers noticed that illegal loggers later came into the commune and hauled this timber away.

Illegal logging in Dak Dam was conducted on a large scale. Villagers remembered that truck convoys used to pass through the commune taking logs across the border into Viet Nam. The illegal loggers were armed and at times accompanied by border police and soldiers from Ou Reang District. In recent years, the once rampant illegal export of logs to Viet Nam had been considerably contained. Nevertheless, some illegal logging ventures continued. Villagers mentioned that people from Sen Monorum sometimes logged at night, using trucks to transport the timber. Provincial officials, too, had reportedly made requests for wood to build homes. Within the commune, a few households had chain saws and still cut trees for sale. Dak Dam villagers were not legally allowed to cut trees to build houses, but as long as they used handsaws, commune officials did not object.

In Srae Preah commune, Phnong residents of Pou Kong, Ochra, Pou Ya, Gati, Srae Ampil, and Srae Preah villages described a decline in timber resources and linked this directly to logging activities. In several Srae Preah commune villages, large-scale logging was carried out from 1993 to 1996 by members of the Royal Cambodian Armed Forces, working in collusion with Vietnamese loggers. In Pou Kong, villagers remembered the Khmer soldiers telling them, "The trees belong to the government. We are the government." While some villagers resisted the felling of their resin trees, they soon realized that district officials would not support their protests.

In 1997 and 1998, the Samling Company, whose forest concession covered most, if not all, of Srae Preah, accelerated the pace of logging in the commune, cutting down large resin trees as part of their operations. When villagers protested the cutting of their resin trees, the loggers often replied derisively, "Why do you complain? We are not cutting the tapping hole of the resin tree. We are cutting above the tapping hole." Since armed guards protected the Samling loggers, the villagers could do little to prevent their resin trees from being cut. Villagers present when their resin trees were felled received KR5,000 (\$1.25) per tree. Others received no compensation at all. In Gati, resin tappers protested by seizing the chain saws of the company and bringing them to the district center. During a meeting shortly after with the district governor, Samling officials promised the protesters that the cutting of resin trees would stop. The Gati villagers relented, but the cutting of resin trees continued.

By the time Samling ceased its operations in early 1999, the loss of resin trees in Srae Preah commune had severely affected the incomes of most local inhabitants. Key informants interviewed reportedly lost from 20 to 80 trees; one Khmer tapper in Srae Ampil village lost 600 trees. Estimates of average resin tree losses in the six villages were around 50%. These estimates were higher than those of a study conducted by the Wildlife Conservation Society, which recorded a 20% resin tree loss in Pou Ya and a 26% resin tree loss in Gati (Evans et al. 2003). But by any of these measures, the losses were severe. One villager in Pou Kong observed, "If the forest is destroyed, my life and the life of my family will also be destroyed." A widow with three dependent children in Gati lamented, "My resin trees provide the rice in my rice pot. They are my family's major source of income." Another villager in Pou Ya expressed this concern: "Our children are increasing but not the number of our resin trees." By the late 1990s, resin tappers had staked ownership claims to almost all of the large resin trees found in Srae Preah commune. As a consequence, households were not able to offset the losses incurred from logging by expanding resin tapping into new areas. In several villages, resin tappers sought to compensate by making more than one hole in their resin trees. Small immature resin trees were also tapped, although the quantity and quality of the resin they produced were low. Commune residents also linked low rice yields to soil erosion and droughts brought on by deforestation.

Stieng responses in Mil and Thmar Hal Veal villages

From 1960 to 1975, forest resources were plentiful in Kratie's Mil village. Stieng villagers reported that timber was abundant during this period, as were rattan, honey, medicinal plants, vegetables, and fruits. Wildlife, including tigers and elephants, inhabited the surrounding forests. Villagers also had ample lands to clear and cultivate paddy rice, and practice swidden cultivation. The soil was fertile, rains were regular, and rice yields were sufficient for household consumption. Under the Khmer Rouge regime, Mil inhabitants were forced out of the village to work for the revolutionary government in another area of Khsim commune. Since the Khmer Rouge focused its efforts on irrigated rice cultivation, forest areas remained largely untouched.

Under the Vietnamese-supported governments of the 1980s, the population of Mil increased, as did the exploitation of forest resources. In Mil, people returning to the village cut timber for houses, cleared forests for cultivation, collected forest foods and products, trapped wild animals, and fished in nearby rivers and streams. The growing needs of villagers increased the level of forest exploitation but not to an unsustainable extent. By contrast, logging activities controlled by the military and police ushered in a rapid decline of forest resources. In an attempt to counter the deleterious effects of logging, the Snoul Wildlife Sanctuary, which encompassed Mil village, was established in 1993 by royal decree under the jurisdiction of the Ministry of Environment.

From the 1993 national election to the present, forest resources in Mil suffered a severe decline as the Samling concession and illegal loggers conducted major logging operations in Snoul District, including areas located within the wildlife sanctuary. In Mil, the loss of resin trees that resulted from Samling's operations substantially reduced the cash incomes of many villagers. This occurred precisely at the time when Mil villagers were coming to terms with the expanding market economy. Loss of income from resin trees reduced the buying power of villagers. At the same time, the price of rice went up because of scarcity due to low productivity and high demand from a growing population. Meanwhile, ferns, vegetables, and other edible forest products except for bamboo shoots became more difficult to find. Wildlife also became scarce as animals moved farther into

the forests. Fish supplies were depleted as villagers and outsiders resorted to illegal practices to catch fish. Villagers reported that in recent years, deforestation had caused floods and soil erosion and that soil fertility had declined. In short, villagers had less food to eat than in the past.

In an effort to counter the decline of natural resources in Mil and two nearby villages, the residents established a community-protected area of 2,459 ha within the wildlife sanctuary in March 2004 with the approval of the Ministry of Environment. The impetus for the protected area came from the Cambodian NGO Satrei Santepheap Daoembei Parethan, or Women of Peace for the Environment. The people were given the responsibility of monitoring the area and reporting any illegal operations within it. Mil villagers with the permission of the three-village Forest Committee were allowed to collect non-timber forest products for family use and cut timber for community purposes. They were likewise able to gather resin as permitted by the Ministry of Environment. However, they were not allowed to clear and expand farm areas; trap or hunt wildlife; cut trees for poles, firewood, or charcoal; or engage in illegal fishing. This limited opportunities to expand farmland, particularly as the protected area bounded the Samling concession.

From 1960 to 1975 in Thmar Hal Veal village, forest laws were respected and only old logs were cut for timber. Forest foods were also plentiful. Wildlife such as rabbits, musk deer, large lizards, wild chickens, and pigs roamed close to the village, and their sounds could be heard from inside village houses. Villagers had easy access to land for rice farming and cleared forest areas for swidden cultivation. In Thmar Hal Veal, villagers were also displaced under the rule of the Khmer Rouge. At the same time, the closed borders with Viet Nam precluded the trade of forest products, which minimized forest destruction.

In Thmar Hal Veal, people returned to the village after the Khmer Rouge era to rebuild their lives. Similarly, in the 1980s, the population of Thmar Hal Veal increased, as did the exploitation of forest resources. The growing population cleared forests for cultivation and cut trees for house construction. Villagers gathered forest food and forest products and trapped wild game. As Vietnamese traders came across the border to buy forest products and wildlife, an incentive grew to exploit forest resources beyond the needs of consumption. The local illegal logging for sale to Vietnamese

businesses proved particularly destructive. Decimated forests reduced habitat for wildlife and the abundance of forest foods.

In Thmar Hal Veal, forest resources from 1993 to 2004 were rapidly depleted by Samling operations and by illegal logging continued by the military and police. Thmar Hal Veal's proximity to the Vietnamese border made illegal logging lucrative. Even after the issuance of the logging ban in 2001, illegal logging continued in this area, with border guards acting in collusion with Vietnamese loggers. The Thmar Hal Veal villagers found it more difficult to find timber for constructing their houses and began to construct thatched houses. The gathering of forest food and products and the trapping of wild game became infrequent and less critical in villagers' daily subsistence. Fish resources were virtually exhausted by illegal fishing. While villagers took no steps to reverse the decline of forest resources, the Provincial Department of Rural Development with the support from the World Food Programme constructed a \$120,000 reservoir in the village in 2003 to increase rice production. Although the long-term benefits of the reservoir could offset the losses in forest income, its immediate contribution to increased agricultural productivity remained unclear because of the limited supply of water and the lack of irrigation canals. The construction of the Samling logging road through the village opened up the village to further incursions from outsiders.

In contrast to Mil, the depletion of forest resources in Thmar Hal Veal left the villagers despondent and immobilized. When officials from the Provincial Department of the Environment requested the help of Thmar Hal Veal villagers to reforest the degraded areas, the village leaders replied, "Let those who cut the trees replant the trees." Without strong support from community forestry NGOs and government officials acting together to ensure the enforcement of community statutes, it was unlikely that Thmar Hal Veal villagers would take active steps to reverse the natural resource decline as illegal logging, backed by powerful actors, was just too pervasive.

Livelihood Strategies

Despite the rapid depletion of natural resources, indigenous residents were still largely dependent on land cultivation and forest resources to sustain their livelihoods. This was true of villages located close to market centers.

Tampuan livelihood strategies in Kahoal and Kamang villages

Although Kahoal was more remote than Kamang, and more removed from the exigencies of Khmer in-migration and a burgeoning land market, the livelihood strategies in the two villages were similar. All sample households in both villages were involved in swidden cultivation. Few Kahoal households and no Kamang households cultivated rice. In Kahoal village, a majority of households raised pigs and chickens; in Kamang village, about half of the households did so. In both villages, a large majority of households gathered food from the forest and went hunting and fishing. Neither the making and selling of goods nor the buying and selling of goods enjoyed wide appeal in the villages. Wage work was a very common source of income in Kamang and much less so in Kahoal, although more than two-fifths of the Kahoal households earned income from wage work.

Despite the rapid growth of the market economy, Kahoal and Kamang households remained subsistence swidden cultivators who supplemented their livelihoods by gathering, hunting, and fishing. In Kamang village, the numerous sales of land rights had yet to transform the basic livelihood strategies. Because most of the land sold had been lying fallow under crop rotation, the long-term effects of the land transfers had yet to be fully appreciated. Similarly, the consequences of opening up of forest areas for cultivation had yet to be felt on the sustainable yields of food gathered and hunted. Meanwhile, the proximity to the market had created few Kamang entrepreneurs or traders. By contrast, more than 80% of the Kamang sample households earned income from wage work, mainly from seasonal farm labor. Kahoal households were predominantly engaged in swidden cultivation and gathering, hunting, and fishing. Many Kahoal households raised chickens and pigs to sell to Khmer middlemen who regularly visited the village. About 40% of Kahoal sample households earned their income from wage work, mostly as short-term farm laborers.

Phnong livelihood strategies in Dak Dam and Srae Preah communes

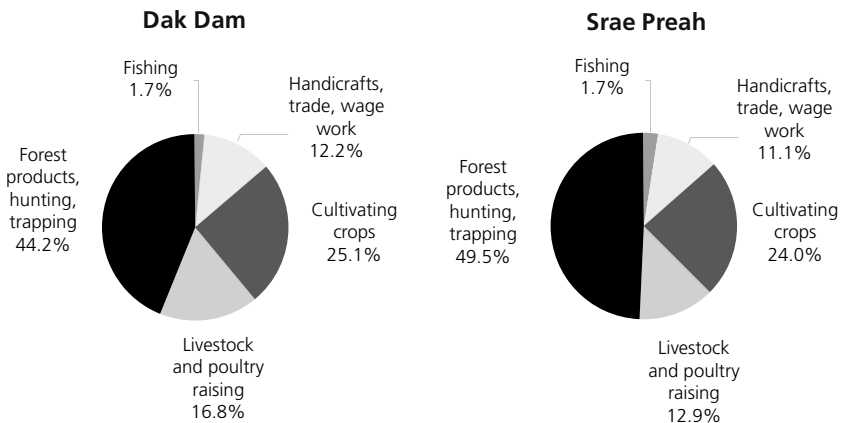
Household livelihoods in Dak Dam and Srae Preah communes were supported by a multiplicity of productive activities. Almost all sample house-

holds in Dak Dam and a large number of sample households in Srae Preah were involved in swidden agriculture. While only a few households cultivated rice in Dak Dam, more than half of the households in the lower areas of Srae Preah cultivated rice. The raising of pigs and chickens was prominent at both communes. The majority of households in both Dak Dam and Srae Preah hunted and trapped wildlife and gathered food and other products from the forest. Fishing was likewise prevalent in both communes. By comparison, neither the making and selling of goods nor the buying and selling of goods were pursued by residents in both communes. Wage labor was common to both Dak Dam and Srae Preah but was not a major livelihood source in either.

A comparison of household income shares by source at the two communes reveals noticeable differences and similarities. The Dak Dam sample households earned their largest share of income from hunting and trapping and from swidden cultivation. By contrast, the Srae Preah sample households earned their largest income shares from forest gathering (particularly resin tapping) and from rice cultivation. But to both communes, forest and land resources were critical (figure).

The incidence of poverty in both communes was high. In 2003, the Government of Cambodia in consultation with the World Food Programme

Household Income Shares by Source



Source: McAndrew et al. 2003; Ministry of Planning 1999.

set the poverty line for rural Cambodia at KR1,036 per capita per day (\$95 per capita per year). In Dak Dam, 54% of the sample households fell below the poverty line; in Srae Preah, the number was even higher at 63%. The incidence of poverty in the two communes was considerably higher than the national rural average of 40%.

Stieng livelihood strategies in Mil and Thmar Hal Veal villages

Livelihood strategies in Mil and Thmar Hal Veal show diverging patterns. Nearly all sample households in both villages cultivated crops. In Mil, 92% of sample households cultivated rice, and 36% of households engaged in swidden cultivation. In Thmar Hal Veal, rice and swidden cultivation were equally pursued by 72% of the sample households, with some families doing both. Raising pigs and chickens was important in both villages. Despite the decline of forest resources, gathering forest food was done by 83% of Mil households and 72% of Thmar Hal Veal households. Similarly, collection of other non-timber forest products was practiced by 93% of Mil households and 66% of Thmar Hal Veal households. Hunting was not a major livelihood source in either village, but fishing was very prominent in Mil and much less so in Thmar Hal Veal. Wage work was more common in Thmar Hal Veal than in Mil.

Market Participation

Indigenous households in the study villages were well integrated into the market economy. Large numbers of the households bought and sold cash crops, livestock, forest products, and wildlife. These transactions and the sale of labor provided them with income to buy rice in periods of annual shortfalls and purchase manufactured goods for everyday use. While indigenous groups in the study areas had embraced many opportunities brought about by the market economy, their lack of tenure security over land and forest resources made them more vulnerable to other impacts of that economy.

The expansion of the market economy had far-reaching consequences for indigenous communities. In both Kahoal and Kamang, for example,

villagers demonstrated that they were eager to share in the benefits created by the growth of local markets. By raising pigs and chickens, by cultivating cash crops such as black sesame, and by hunting wild animals such as squirrels and python, villagers were able to barter or buy manufactured goods that they desired. Daily wages supplemented their household incomes. By living close to roads and district centers, villagers also were able to take advantage of development projects introduced by the government and NGOs. The villagers did not consider the changes that were brought about by improved roads and expanded trade as detrimental to their way of life.

The market forces that were operating in Ratanakiri Province demonstrated nonetheless the potential to drastically undermine the well-being of indigenous communities. This was dramatically highlighted in the experience of Kamang village. In Kamang, the market economy, particularly the market for land, seriously eroded local governance structures and communal solidarity. Land sales not only diminished natural resources required for sustainable livelihoods but also debilitated cultural and social resources needed to deal with the exigencies of change itself. By comparison, the experience of Kahoal illustrated how a village, while collectively resisting land sales, could build capable local governance structures and maintain communal cooperation.

In Monduliri Province, despite the destruction of forest resources through forest concessions, illegal logging, and unregulated hunting, indigenous Phnong inhabitants in Dak Dam and Srae Preah communes remained largely dependent on forest resources for their subsistence. The adaptation to the decline in natural resources had been to subsist on smaller quantities and to exploit further their diminishing resource bases. This led to intensive hunting in Dak Dam and the tapping of young resin trees in Srae Preah. Losses of income from forest resources encouraged the cultivation of crops and the raising of livestock and poultry. But declining soil fertility and irregular rainfall were directly linked to deforestation, which in turn limited crop production. Market demand for cash crops such as cashew nuts was also less than expected. Meanwhile, increased market activities that were controlled by outsiders had not transformed the local residents into entrepreneurs or traders, nor had it provided them with remunerative and sustained opportunities as wage workers.

Given the inward orientation of household subsistence strategies and the lack of viable short-term alternatives, access and control over natural resources remained critical for household survival. A resumption of logging activities in the two communes would be devastating for both communities, but especially for the resin-tapping households in Srae Preah. As almost all resin trees were currently tapped in Srae Preah Commune, its households would not be able to expand into new resin tapping areas to offset losses incurred by renewed logging activities. As a result, already declining levels of income and food security would fall even further. Higher percentages of Dak Dam and Srae Preah sample households fell below the poverty line, compared with the average of all rural households in Cambodia.

In Kratie Province, legally sanctioned operations of the Samling concession and the illegal logging activities perpetuated by military and police had devastating impacts on villages in Snoul District. Mil and Thmar Hal Veal villages revealed a downward trend in the availability of natural resources for earning their livelihoods. This decline exacerbated the incidence of poverty in both villages. But although natural resources had diminished in both areas, villagers were still dependent on land and forest resources for their subsistence.

Mil village in the Snoul Wildlife Sanctuary had responded more creatively to the challenges in natural resource management. By forming supportive links with NGOs and the Ministry of the Environment, Mil villagers established a community-protected area within the sanctuary. They also had received support from some district officials.²³ These interactions helped them to deal more effectively with illegal logging and the deterioration of natural resources.

By contrast, Thmar Hal Veal village, located within the forest concession along the Samling Road and close to the Viet Nam–Cambodia border, failed to respond proactively to the decline of natural resources in the area. The villagers of Thmar Hal Veal lacked contacts with NGOs and gov-

²³ McKenney et al. (2004) pointed out it is essential to identify community forest “patrons” within government who can ensure tenure security and the enforcement of community forest rules for the benefit of the villagers.

ernment officials and as a result were unable to stop illegal logging in the area. The downward slide in the quality of their resource base was likely to continue.

Conclusions

After Cambodia became independent in 1954, the Sihanouk regime took deliberate steps to incorporate the indigenous peoples of the northeast into mainstream Khmer society. Inhabitants of the country's lowlands were encouraged to resettle in the northeastern highlands and teach hill tribes Khmer ways. This resettlement was cut short in the 1970s by the civil war and the Khmer Rouge regime. In the 1980s, Khmer in-migration into the northeast remained circumscribed with the exception of Kratie Province. In the early 1990s, Cambodia's transition to a market economy and the increased mobility of its population came to have far-reaching consequences for the indigenous peoples of the region.

The granting of forest concessions in the mid-1990s had devastating outcomes for indigenous groups in northeastern Cambodia, including severe forest deforestation and degradation. Logging operations in indigenous areas diminished access to non-timber forest products and resin trees that had been traditionally tapped by indigenous communities and were now illegally cut down. Concessionaires also destroyed "spirit forests", which were sacred sites in indigenous cultures. Despite the logging ban imposed in 2001, illegal logging activities continued unabated in hill tribe areas. Commercial exploitation of indigenous lands in the northeast provinces also occurred through economic land concessions awarded to companies for agro-industrial plantations. Detrimental impacts of economic land concessions on indigenous groups included encroachment on agricultural and grazing land and encroachment on forested areas, which included the felling of resin trees. The construction of roads by forest concessions and the government also precipitated a new in-migration of Khmer settlers to the region. Immigrants bought up indigenous lands along roads and near market centers for the cultivation of cash crops or for future speculation. Government officials and military and police officers took advantage of their positions to grab large tracts of land from indigenous communities. Indigenous peoples have responded to the corporate and settlement

incursions in northeast Cambodia in different ways, as discussed in the case studies of the six villages.

The government's development program for northeast Cambodia, which involves the granting of forest, mining, and economic land concessions and the encouragement of Khmer resettlement, disadvantages indigenous peoples. At the same time, the government's ratification and adoption of progressive legislation concerning indigenous peoples indicate that it has not completely disregarded the significance of indigenous rights. Cambodia's vote to adopt the UN Declaration on the Rights of Indigenous Peoples marks an important step forward in the country's recognition and commitment to the protection of indigenous peoples' rights. This vote paves the way for Cambodia's ratification of the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries. It also provides an impetus for Cambodia to adopt its own General Policy for Indigenous and Highland Peoples, which has been in draft form for more than 10 years.

The Land Law of 2001 enables indigenous communities to gain collective title to their traditional land. However, after 6 years the Sub-Decree for Communal Land Titling has still to be finalized and adopted. Meanwhile, the provision in the Land Law of 2001 that prohibits the sale of indigenous land, even before rights are recognized and titles awarded, is rarely if ever enforced. Provisions of the 2005 Sub-Decree on Economic Land Concessions similarly lack strict enforcement and compliance. Economic land concessions have violated Article 29 of the 2002 Forestry Law, which prohibits the cutting of trees tapped by local communities to extract resin for customary use. The judicial system in Cambodia has generally failed to provide adequate protection for indigenous peoples under the law and to hold concessionaires and land grabbers accountable for their actions.

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Land Development Policies and the Impoverishment of Indigenous Peoples in Sarawak, Malaysia

Jayantha Perera

Western colonial powers attempted to superimpose their own land tenure systems on native customary tenure systems in their colonies. In doing so, the colonizers often failed to grasp the principles and inner logic of native land tenure systems, and how they had evolved in their own unique sociopolitical environments. They thus believed that their own land tenure systems were intrinsically superior to those of their colonies. As a result, they treated customary land tenure as an impediment to land development based on individual entrepreneurship and investment in productive land use.

In the mid-20th century, most colonial powers in South and Southeast Asia granted independence to their colonies. In this process, they chose one or a few ethnic groups in a colony to transfer power to while ignoring the diverse ethnic and cultural character of the colony, thereby depriving other ethnic groups of participating in the political process. "This is often the case where the colonizers managed to forge something approximating their idea of a nation state out of those they ruled, while systematically disinherit non-state-oriented societies such as hunter gatherers and shifting horticulturalists" (Sullivan 1998).

The newly independent states, in an attempt to de-link themselves from their colonial past, sometimes pronounced plans to restore at least some

land rights usurped by their colonial rulers from various native groups. However, in practice, instead of restoring native land rights to their original owners, the new states usually adopted colonial land policies and laws without much change. The main reason for this was the new states' aspiration to become "modern" as fast as they could, believing that this could best be achieved by following their ex-colonial rulers.

A major indicator of modernity is economic growth, which is inseparably linked with efficient land use, as land continues to be the primary production asset in most new Asian states. Political leaders are reluctant to reinstate traditional land tenure systems or revoke colonial land laws as promised for fear of stalling the modernization process. A good example is the large-scale commercial plantations, which were originally condemned as exploitative vestiges of the colonial past. Governments now do not want to uproot them because they are productive.

This chapter discusses how a succession of governments in Sarawak, now a constituent part of modern Malaysia, has during the past 150 years progressively impoverished and displaced Ibans, a major indigenous community in Sarawak, from their ancestral lands in the name of modernization and land development. The chapter will demonstrate the incongruence between the land development policies of the modern state government and the indigenous land tenure system among the Ibans and, using two case studies, show how the indiscriminate application of those policies has marginalized the Ibans, making them resentful of any state activity. The main thrust of the chapter is that the weaknesses in land development policies in the recent history of Sarawak were not for lack of experience but the result of two persistent assumptions of the rulers: that indigenous peoples' economic, social, and cultural practices have been a major obstacle to the modernization process and that if they were "mainstreamed", they, too, could contribute to the realization of national development goals. The frequent changes of land development policies without examining the consequences of such changes or possible implementation difficulties have misdirected many land development programs. Nor has there been any systematic attempt by the state or development agencies to learn from such mistakes to avoid them in future development ventures.

A Short Historical Overview of Land Development Policies

The native land tenure system in Sarawak

By the time British adventurer James Brooke established a loose state in 1861 in Sarawak on the island of Borneo, the Ibans possessed a customary land tenure system, governed by local *adats* (customary laws and practices). The land tenure system revolved around a “longhouse”, which had a clearly demarcated land territory called *pemakai menoa* for cultivation, fishing, hunting, and collecting jungle products. “Each longhouse community is an autonomous entity, not subject to the control of any other group” (Freeman 1992). The Ibans were primarily shifting cultivators of rice—paddy farmers—who tried to improve their food security by cultivating vegetables in their home gardens, gathering jungle-products such as ferns and fruits, and hunting animals in surrounding jungles. Such communal lands were not marketable commodities but common resources that each family could access as a member of the longhouse. The boundaries of a longhouse were usually rivers and streams, ridges, old trees, and watersheds. When a longhouse was overburdened with increasing population or running out of fertile lands for cultivation, some of its families would move out and form a new longhouse community with its own territorial boundaries. If the entire longhouse decided to move to a new location, the members sometimes kept a portion of their current *pemakai menoa* to maintain the longhouse’s continuity in the area.

Each family (“door”) of a longhouse was expected to live following the *adats* to preserve its allodium, or common property (Rew 1986). The families of a longhouse elected its *tuai rumah* (chief). Under his guidance, family heads as a committee managed the longhouse’s territory, land cultivation, and external relations. Traditionally, the *tuai rumah* resolved land disputes and arbitrated claims to the longhouse territory. Within a longhouse, community land disputes were infrequent because of well-developed *adats* that governed land ownership and operations and the resolution of disagreements. Land disputes between two longhouses were more common, sometimes taking a violent form if not resolved early by the chiefs of the two quarrelling longhouses.

Within a longhouse, each constituent family was an independent economic unit with equal rights to the longhouse's territory. However, the area a family could cultivate in the longhouse territory varied according to the labor power it possessed. According to the adats, a family established its cultivation rights on the longhouse territory by felling the primary forest. A family could claim possessive rights over such lands and the trees that it first harvested or planted. Such widely accepted adats regarding possessive rights encouraged Ibans families to improve the land they cultivated.

The subsistence economy of the Ibans revolved around the cultivation of hill paddy. Rain-fed hill paddy was cultivated on a "cyclic-shift or forest-fallow system of land use, involving the continual re-cultivation of young secondary forest" (Cramb and Wills 1990). Hill paddy and its cultivation cycle had great significance for Iban rituals, as it connected them with their ancestors and the environment. Elaborate ceremonies were performed at various stages of paddy cultivation to bring this interconnectedness into focus.

A longhouse, whenever possible, clustered its land parcels into a large tract to coordinate efficiently its cultivation of hill paddy. This helped reduce production costs and increase the exchange of labor among families. Cash crops such as pepper were also planted in blocks to achieve possible economies of scale. Invoking the "moral community" principle, members donated free labor to rescue a fellow farmer who could not complete his cultivation because of an illness or death in the family. Such group farming encouraged farmers to work with others and reach the expected crop targets. Generally, all adults of a family applied their knowledge and managerial skills in making farming decisions. However, the longhouse chief was always vigilant to check how the families of the longhouse cultivated their lands. The chief did not allow a family to operate its farm in a manner that would impact others' land cultivation adversely. In addition, the committee of the longhouse family heads monitored such farmers and advised them on how to avoid community and family losses. In short, the traditional Iban land tenure combined the features of modern smallholder and cooperative farming systems, which are conducive to production efficiency and distributional justice.

A longhouse often could accommodate its growing population pressure within its own territory. One way was to shift farming decisions from the family level to the community level, thereby pooling management and physical resources for better use. Another was to regulate crops by assigning areas for different crops, ensuring that every family would have a hill paddy plot before it expanded into other crops. This was done especially when newcomers joined the longhouse. If a longhouse could not cope with the population pressure anymore, a pioneer group of families would leave the longhouse voluntarily in search of a tract of unoccupied land to start a new longhouse. In a limited way, some young men practiced the traditional migration known as *bejalai*—going away from their homes in search of employment in faraway places, sometimes for several years. This helped reduce land pressure on longhouses.

The Ibans' traditional land tenure and production systems were enmeshed with their social organization, so that they did not have to develop extra regulations to administer individual and community land-use practices. If an individual misused his rights in a manner detrimental to the community, the community intervened to correct it. On the other hand, as a community with a distinct territory, a longhouse had the authority to promote entrepreneurial farmers to cultivate commercial crops such as pepper in addition to hill paddy, without disturbing the equal-access rights of other longhouse members, even in the face of population pressure. Such accommodation of individual and community rights within the land tenure system helped to maintain the longhouse community and its cooperative behavior, which in turn guaranteed subsistence to each family.

The Brooke rajahs period (1862–1946)

The Brooke rajahs, who captured Sarawak in 1862, followed the European approach to land development, which derived its legitimacy from the 19th-century physiocratic philosophy that considered land “the prime source of capital, wealth, and employment” (Cleary and Eaton 1996). The physiocrats held that “property, title, and individual ownership” were concepts that should be considered “givens”, as natural as life itself. This line of thinking was attractive to the colonial rulers and European middle classes who benefited from it. They developed two major colonial land

policies based on this philosophy. The first is the state proprietorship over all land in its domain, and the other is the superiority of private (individual) property over communal ownership of land. The Brooke rajahs introduced these two policies in Sarawak by “commodifying” and “codifying” land resources through land registration or titling programs (Cleary and Eaton 1996; Scott 1998). They wanted to establish a land-use system based on private property to replace the customary native land tenure systems. The rationale for this shift was that the former would benefit the natives and help them modernize their traditional, backward economy embedded in the latter.

Although new land regulations (such as the Land Order of 1863 and its amendments of 1871, 1882, and 1899) limited the native customary rights over unoccupied land, the Brookes until the turn of the 20th century intended no interference with native land-use customs. Instead, “the Brookes were interested in maintaining the *status quo* of the traditional land tenure system, while subordinating them to an implied claim of ultimate state proprietorship in land” (Cramb and Wills 1990). In fact, the Land Order of 1875 recognized the native customary right to cut down virgin jungles for cultivation.

The Timbers Order of 1899 was the first order that had a direct impact on the Ibans’ traditional land tenure system. It required any person who wanted to cut or collect forest timber to obtain a permit from the Resident’s Office. At the same time, the Brooke rajahs introduced several rules regarding cash crop cultivation. They insisted that farmers obtain quasi-titles from the government such as “permits to plant,” “rubber garden registration certificates,” or “occupation tickets” to have their plantations considered legitimate. Although such permits were not based on any land survey, the incipient courts in Sarawak recognized such titles as legally valid and also as superseding former customary land rights. The Land Settlement Order of 1933 also had direct impacts on the Ibans’ customary land tenure system and social organization as it authorized the government to award an individual the user rights of a piece of land through a 99-year state lease. This order neither recognized a family of a longhouse as the basic right-holding unit in the Iban society nor recognized the longhouse as the basic unit of land administration.

Although numerous orders did not abolish the Ibans' native customary land rights, they certainly restricted their free movement in finding new land to cultivate. As a result, the application of the cardinal customary land management principle of equal access to land among all families of a longhouse became difficult. However, the temporary transfer of cultivation rights among families and clear demarcation of land for each family to some extent helped to maintain their equitable access to land. Sometimes, a longhouse pooled its land resources and allocated plots for hilly paddy cultivation on the basis of each family's subsistence needs. Where most of the territory was cultivated with commercial crops, particularly with rubber, the principle of equal access required that all households be involved in the plantations, and all of them shared equally in the benefits.

In fact, when land for paddy cultivation was difficult to find because of the restrictions on movement imposed by various orders, the Ibans began to cultivate rubber as an economic safeguard against a paddy-land shortage. Rubber had a steady market demand from the beginning of the 20th century, and the Ibans began to barter rubber for household goods and cash. This introduced them to other cash crops such as pepper and vegetables. Thus, the Ibans began investing in commercial agriculture on their own initiative as early as the 1930s, demonstrating the resilience and suitability of traditional community-based land tenure for modern, intensive cash-crop farming.

The Ibans' response to alien land tenure principles and institutions introduced by Brooke rajahs was first to resist and later, when resistance became too costly, to exploit the principles and institutions to their own advantage, without accepting them as fair or legitimate. Such individual responses sometimes clashed with values of the customary land tenure system. This threatened and weakened the communal aspect of the traditional land tenure system. Furthermore, it created ambivalence among the Ibans, with some preferring their traditional land tenure system and others who had benefited from the new tenurial arrangements preferring the latter. And the colonial administrators were unwilling either to consider traditional and western land tenure systems as two separate land tenurial systems or to merge them so that Ibans could benefit from both. "The end result was that, instead of community-based land tenure being

successfully incorporated into the wider institutional structure of the state, it was distorted and rendered less efficient, the more so as the state extended its control" (Cramb and Wills 1990).

The Brookes encouraged both individuals and feuding communities to accept the colonial legal system as the legitimate arena where they could take their individual and communal disputes for resolution. The government used the arbitration of land disputes not only to maintain law and order but also to claim its ultimate proprietorship over all lands within its jurisdiction. Although the court structure and adjudication system were alien to the Ibans, they soon realized that they could use them as the final source of legitimizing individual, family, and community claims to the land. The Ibans thereafter did not hesitate to use the courts to legitimize their claims over land, especially their community land, in the eyes of the state.

Frequent land litigation during the Brooke period bears ample testimony to the popularity of the colonial court system as a means of contesting valuable territory. The court sometimes acted as a land secretariat where traditional land claims had to be revalidated or ratified to be secure. Thus, legal arbitration became an important part of the Iban land institutional system. The Brookes could, therefore, have developed "laws out of customs, by the common-law method" (Parsons 1962) and used the customary law as the base for the enunciation and development of Iban land tenure institutions. This would have helped to incorporate Iban adats pertaining to land tenure into the wider policy and institutional structure of the state. But the Brookes made little use of this opportunity.

The British land tenure system gradually expanded into many divisions of the rajah's territory in Sarawak, replacing communal land tenure systems that had facilitated the smooth and low-cost enforcement of land rights and provided a framework for cooperative behavior among the Ibans. If the Brooke rajahs had properly understood how the Ibans' communal land tenure system functioned, they could have effectively used it to legitimize the new rules in the eyes of the natives. Instead, they attempted to replace the traditional rules with new rules, not realizing that in the interest of modernization, they were actually destroying a comprehensive land tenure system that had been built up over several centuries through

adats. The state-enforced land regulations system that replaced the communal land tenure system was costly and difficult to operate and was unpopular among the indigenous peoples as it challenged their social and cultural identities in addition to weakening their control over their communal lands.

Postwar revisions (1946–1963)

Soon after the Second World War, Sarawak became a crown colony of the British Empire. The British colonial government pursued more explicit development goals, but within the given smallholder framework. The colonial officers, seeing the traditional Iban land tenure as an obstacle to development, wanted to remove it through land laws and regulations. The government was also determined to eradicate shifting cultivation and promote intensive rice farming and smallholder cash cropping to make the colony economically viable and realize its particular vision of rural progress. The promulgation of the Land Code of 1957 was the peak of this policy.

The main aim of the Land Code of 1957 was to provide individual title to land and seize the remaining land from community use. Another aim was to break up longhouse communities to create independent peasant proprietorship on consolidated holdings, thereby fulfilling (in the colonial rulers' eyes) a necessary condition for modernizing the Iban society. The new land policy expected that individual peasants would cultivate rice and other crops on a commercial scale with the help of the Department of Agriculture, so that the surplus could be extracted to boost the economy of the colony.

With the introduction of "titled native land documents" under the Land Code of 1957, the Ibans were prohibited from encroaching on state land. This was the culmination of the progressive narrowing down of their access to communal land. The main principle behind the Land Code is that individual land rights are the basis for land development. The Land Code classified land into several categories, indicating who could use the land under what conditions. It introduced the category of "freeholding", which is the pivotal concept of peasant proprietorship, with the court system appointed as the land administrator and final arbitrator. The thinking behind this was to promote stable smallholder land cultivation without

resorting to shifting cultivation on state lands. Such smallholder cultivation allowed the state to collect taxes without much investment in land development. Thus, with one stroke, communal lands disappeared from land laws. Instead of the communal land area that was the territory of a longhouse, the longhouse was allowed to keep only a “reasonably demarcated” land area as its territory without any access to land beyond those boundaries. This forced the longhouse dwellers to zealously guard against any encroachment into its demarcated area by outsiders. The curtailing of free access to nearby jungles to cultivate paddy and other crops not only shrank the land-base of subsistence but also posed a major subsistence problem in the face of a growing population. This problem, however, was at least partially mitigated by a migration from the down-river areas (where the Ibans tended to establish their longhouses) toward remote jungles in the up-river areas, where virgin forests were waiting to be farmed.

The State of Sarawak

In 1963, when independent Malaysia was created, the State of Sarawak became one of its constituent territories. The Malaysian government left largely unaltered the land policies that the Brookes and the colonial administrators had applied. It continued with the colonial policy of transforming community-based Iban land tenure into an individual-leasehold system. The Sarawak government expected that individual leaseholds would promote intensive paddy and cash crop cultivation, which in turn would generate state income and help promote economic progress in the countryside.

Sarawak adopted the Land Code of 1957 in its entirety and, despite some efforts in the early 1960s to revoke it, the code has survived largely unaltered. The Land Code provided a land classification system that inevitably leads to land titling and registration. It has helped to convert native customary land (considered to be held by license from the state but effectively administered by autonomous longhouse communities) into “titled land” (held by individual on lease without any recourse to the traditional authority of the longhouse community). It also provided a legal base for consolidating the land laws of the colonial period.

The new concept of managing resources to maximize production brought in the rapid expansion of state-owned oil palm plantations on the native

customary land. For this purpose, the Sarawak government not only had to take over large areas of the native land but also had to transfer a large number of Ibans from their ancestral territories to state plantations as laborers. The government appointed various semi-autonomous development agencies with enormous powers and budgets to promote large-scale commercial farming and relocation of people, particularly on the native lands. The three important agencies are the Sarawak Land Development Board, the Sarawak Land Consolidation and Rehabilitation Authority, and the Land Custody and Development Authority. Their general mandate was to change the “wasteful” shifting cultivation among the indigenous peoples and motivate them to become resettlers in the plantations.

One basic characteristic of Sarawak’s land development policy is its internal incongruence. On the one hand, it attempts to upgrade the lifestyle of the Ibans without displacing them from their customary land, while on the other, it tries to resettle them so that they can become farm laborers on large-scale oil palm plantations. From the government’s perspective, large tracts of land were idle or inefficiently used by indigenous communities; reallocation of those lands for plantation crops would achieve the goal of making money.

The table (next page) shows how land use has changed from a communal system to one imposed from outside that emphasized the value of private property. As a result, the land development policies in Sarawak have not been designed to accommodate local needs, nor have they evolved to realign themselves with local cultural systems. They have instead accommodated various needs of successive governments that were alien to the local populations and their cultural systems. The imposed changes have had a significant impact not only on land rights and subsistence but also, and especially, in the spheres of moral community, ethics, legitimacy, and acceptance of governance rules.

Development in the 1970s: Two Case Studies

Two case studies demonstrate the manner in which the Sarawak government adopted colonial land development policies without paying much

Iban Land Tenure and Use: Four Phases From Traditional Times to Contemporary

Characteristics	Traditional	Brooke Period (1861–1946)	Postwar (1946–1963)	Post-Independence Sarawak
Ownership ethics	Shared morality	State ownership	Private property	State plantations
Land-use patterns	Access for all	Regulated access	Freeholding	Freeholding and regulated access
Operational ethics	Cooperative	Competitive	Private enterprise	Development partnership
Conflict resolution	Community	Courts	Courts	Specialized agencies and courts
Outcome	Infrequent land disputes	Delays and cost	Increased land litigation	Disputes between Ibans and state
Productive efficiency	Low	High	Low	Low on private land; high on state land
Farming coordination	Community	Community	Government	Multiple government agencies
Benefit distribution	Equitable at longhouse level	Producer-focused	Producer-focused	Producer-focused

Source: Rew 1986; Cramb and Wills 1990; Freeman 1992; Porritt 1997.

attention to the indigenous peoples who were also the citizens of the new state, and how such policies led to the impoverishment of the Ibans.

The first case study analyzes the impacts of a regional development project in the early 1970s that resettled 33 Iban families from four longhouses in the Batang Ai area. The second one examines the plight of about 600 families from the same area who were displaced as a result of the construction of a reservoir for a hydropower project in the 1980s. In both projects, the objectives of the government were the same. The government stated that its main goal was to improve the lifestyle of widely scattered indigenous populations by bringing them into the mainstream of modernization. In addition, it stressed the importance of discouraging the

“wasteful”, uneconomical, and nonviable shifting cultivation of hill paddy on native customary land, which kept people poor and malnourished. The only way to combat these dangers, the government said, was to introduce a new pattern of land resource management through large-scale cash crop plantations, within which the Ibans could be resettled.²⁴

The government considered the affected families in the first case to be the *beneficiaries*, while the second group was treated as the *victims*. This difference could be seen in the manner in which compensation was paid for property losses. The first group surrendered their native customary land *voluntarily* and received new land in its place, while the second group surrendered their customary land *involuntarily*, for which they were to be compensated in cash and also were to be given new land with basic amenities to restart their livelihoods.

Case Study 1: Bukit Peninjau Miri Resettlement Colony

The Sarawak Land Development Board (SLDB), modeled on the Federal Land Development Authority (FLDA) in peninsular Malaysia, was established in 1972. Its main objectives were to develop rural lands and distribute them among indigenous peoples to improve their income and livelihoods. Another objective was to stop the widespread shifting cultivation, which the government considered wasteful. The strategy was to select a group of families and give each family a 10-acre plot of developed land with title and resettling assistance. The policy makers reasoned that once a group of Ibans had resettled in a large plantation and had been encouraged to start commercial cultivation, they would have a very high chance of becoming partners in plantation management and improving their socioeconomic status.

SLDB developed extensive oil palm and cocoa plantations in the northern part of Sarawak to resettle indigenous peoples. One such plantation was Bukit Peninjau Miri, started in the early 1970s. When the government

²⁴ The government was also keen to resettle the Ibans in Sri Aman Division because their longhouses were too close to the Indonesian border, where the government had border security problems. The communist insurgents' threat to the people in the area also encouraged the government to resettle people elsewhere (Ngidang 1995).

decided to establish the plantations, it asked government officials in several areas, including the officials of the Labok Antu District in Sri Aman Division, to find Iban families willing to move to Bukit Peninjau Miri. These officials frequently visited Iban longhouses on the banks of the Batang Ai and Engkari Rivers and encouraged them to move to the newly opened plantations. The officials told them that the government was concerned about their socioeconomic well-being and would like to move them into developed lands, where they could improve their livelihoods substantially. This, in turn, was expected to help the government achieve its objective of economic development and social modernization.

About 33 families from four longhouses (as a group) agreed to take the risk of moving to a new location more than 420 kilometers from their ancestral lands, as they were confident that their new location would provide everything they expected. The majority of them were at that time in their youth, and some of them had small children. At least 10 out of 33 families joined the group mainly because they could not find sufficient fertile land in their longhouse domains to cultivate. Others, at that time, had sufficient land to cultivate hill paddy, rubber, pepper, and *illipe* nuts but were willing to take the risk of resettlement far away to improve their life chances.

The officials promised the families that they would get modern amenities such as electricity and pipe-borne water at the plantation and that the government would help them secure a better future for their children. The group thought of its relocation to Bukit Peninjau Miri as a movement that was similar to *pindah* (self-managed resettlement in a new area). One longhouse leader who took part in the exodus said, "We wanted to change our life. New development was good for us. It would have given us more income and more amenities. It was a good decision on our part at that time to move away from our remote, difficult forest areas. We wanted better medical and schooling facilities for our children. Therefore, when the government offered this golden opportunity, we gladly took it."

Based on the negotiations, and driven by the need to improve their lives, each of the 33 families signed an agreement with the district officials to give up their native customary land in the Batang Ai area and move to

Bukit Peninjau Miri.²⁵ Each family signed the agreement in the presence of its longhouse chief; no family, however, received a copy of the agreement. No compensation was paid for their land, as they had surrendered it to receive the developed plantation land in Bukit Peninjau Miri.²⁶ At that time, the voluntary resettlers thought that the land-for-land compensation was fair, as they were to receive free housing, developed land, and other facilities as part of the voluntary resettlement package. The officials told them that each agreement would be kept at the Land Survey Office in Sri Aman. The resettlers did not show much interest in obtaining a copy of the agreement at that time.²⁷

Resettlement package. The government promised each resettled family a 10-acre holding to cultivate oil palm, 1.5 acres to develop a home garden, and a free house with all modern amenities such as free electricity and piped water. The government also promised better public infrastructure—an access road, medical clinic, and schools in the plantation. The officials who negotiated the agreements told them that the 10-acre holdings would initially be pooled together so as to constitute an oil palm plantation managed by SLDB and that, after 10 years, the entire plantation would be handed over to the resettlers to manage. Until then, SLDB would pay “allowances” for their labor and share with them the profits from the plantation.

Upon their arrival in Bukit Peninjau Miri, they soon found that they had been misled by SLDB and that its promises were false. SLDB resettled the

²⁵ One added reason for them to believe the district Officer of Labok Antu was that he was an Iban. A resettler said that “he was one of us; we believed him” (personal communication).

²⁶ According to the senior regional planner of the Regional Planning Strategy and Research Unit of the Land and Survey Department, these resettlers were entitled to compensation for the land they surrendered despite the fact that they were given land in the Bukit Peninjau Miri plantation (personal communication).

²⁷ A longhouse chief in the Bukit Peninjau Miri plantation once met the resident (government agent) of Sri Aman to discuss the land titles. The resident had shown him the agreements signed by the state secretary, M. Tajol Rosh. The resident had told the chief that if he wanted to examine the agreements, he could do so, as they were public legal documents. The chief regrets, however, that he did not copy the full reference number of any of the documents that he examined. But he remembers the first three letters of the documents: “SDO” (personal communication).

Iban families in small hamlets in single-family homesteads dispersed within the estate—a residential pattern not compatible with their traditional long-house lifestyle. SLDB did not give them land to cultivate paddy, vegetables, and other food crops. Housing was not free; each family had to pay the house cost in 10 years, and installments were deducted from their daily wages.²⁸ The Ibans found that they were brought to Bukit Peninjau Miri to work as laborers and not to become landowners who would participate in plantation management. Nor did SLDB initiate a profit-sharing program with the resettlers, as promised.

Wages and profits. A male worker in 1982 was paid M\$4 (\$1.78) a day; a woman earned M\$3.50 (\$1.60).²⁹ In 1999, a man was paid M\$8 a day. (If a man worked for 20 or more days a month, his daily rate was upgraded to M\$9 (\$4). Ten years after the resettlers arrived at the plantations, SLDB introduced a new payment plan. A worker would receive M\$52 (\$20) per ton of harvested oil palm fruits. The Ibans soon found that SLDB failed to honor this agreement, too, as they were actually given M\$40 (\$15.33) per ton. SLDB kept the remaining M\$12 to be paid later as a “bonus”, but that bonus was never paid.

Privatization and clashes with management. In 1986, the government directed SLDB to hand over the plantation management to Sime Darby, a private plantation company in the peninsula, on the grounds of malpractices, poor management, and the inability of SLDB to repay large loans taken from the government. The new company did not honor any of the clauses of the original agreements the resettlers had with SLDB.

²⁸ When they arrived in Bukit Peninjau Miri, they lived in barrack-type temporary huts for a year before the individual houses were built. Neither SLDB nor Sarawak Electricity Supply Corporation provided electricity to the houses. They had to pay for the electric sub-line from the main road and for all the expenses of installing electricity supply (personal communication).

²⁹ The Malaysian dollar (M\$) was the name of the currency at the time, before the adoption of the ringgit. The resettlers inquired about the low rates of wages from the corporation. It told them that a portion of their wages was being spent on various materials to develop the plantations; if they were to buy all those materials, it would cost a lot of money. Therefore, as a concession to them, the corporation bought the necessary items and deducted the cost from the wages. The resettlers did not accept this explanation, as they were paid only wages without any share of profits (personal communication).

It refused to accept their demand that the plantation should be handed over to them together with land titles for homesteads, as agreed by the government in Batang Ai about 15 years earlier. Sime Darby declared that it was not bound by resettlers' agreements with SLDB or district officials in Labok Antu and Sri Aman. The resettlers were challenged by the company to produce copies of the agreements, which they could not, as they did not have copies.

In October 1986, the resettlers went on strike, demanding better facilities and compliance with the original resettlement package. The police intervened to abort the strike by intimidation including the use of tear gas, firing, and threats of imprisonment. When the police failed to abort the strike, the management sought to evict the workers from their houses on the plantation. Lawyers acting on behalf of the resettlers challenged the eviction order in court in April 1987. Meanwhile, the management brought in Bugis from Indonesia to work on the plantations as migrant laborers. The dominant Dayak Party, the Parti Bagsa Dayak Sarawak, promised to bring relief to those who suffered. The widespread unpopularity of the land schemes combined with the political party's agitation against the plantations at Bukit Peninjau Miri generated statewide unrest in October 1987. As part of the crackdown on the upheaval in the project area, the Sarawak government arrested four individuals (two from the Bukit Peninjau Miri plantation) under the Internal Security Act and held them for about 6 weeks without trial.

In 1991, Sime Darby bulldozed about 1,100 acres of land in the vicinity of oil palm plantings in Bukit Peninjau Miri (where the resettlers cultivated hill paddy without license) to expand the plantation. When the resettlers protested against the intrusion and damages, the company told them to show their title deeds to those lands.³⁰ The resettlers protested and attempted to burn the bulldozers. The police arrested and detained a few of them. This was the main incident that made them realize "not only

³⁰ The company told them: "This is not grant land but state land. We have permission to clear the land. If you have any rights over these lands, show us the title deeds. You do not have any right to cultivate these lands. Go to the district or resident's office and check whether you have any rights over these lands" (personal communication with two chiefs).

that the government cheated us, but also that it mistreats us.”³¹ Many of the resettlers wanted to go back to their ancestral lands in Batang Ai. The company told them that if they wanted to go back to their old habitat, they should first obtain permission from the government—which was unlikely to happen. However, they could not return to the Labok Antu area, as most of their native customary lands were already under the water of the Batang Ai reservoir or incorporated into the Batang Ai National Park.

In 1995, the company in consultation with FLDA prepared a working paper on how to expand its plantations. As a part of the expansion plan, the company offered each resettler family 0.25 acres of homestead elsewhere and 30% of profits from the plantations. The resettlers did not accept this offer, as they knew from their previous bitter experience that they could trust neither the company nor the government.³²

The resettlers thought that because they were weak they could not convince the company or the government about their rights. Therefore, they wanted to form an organization to represent their views and protect their rights. But they could not form a workers’ union, as the government prohibited such associations. Thus, instead of a workers’ union, they established a community association called the Dayak Association (Persatuan Dayak Bakong Tinjar), with 24 families as members. The Canadian International Development Agency assisted the association in

³¹ One chief said, “Only now we are mistreated like this. Just before we came here, we were showered with many promises. Only after our arrival here to live in barracks for over a year as laborers in the plantation we realized that those were empty promises. If the company wants, it can clear our cultivated lands without any consultation or compensation. Police and district officials support them. Thus we are very vulnerable. This is our fate. We wish we knew it before deciding to come here” (personal communication).

³² They still could not get land titles for the land that was allocated to them in the plantations. When they applied for the land deeds, they were told that “the documents are being processed” and they should wait for a while to get them. The resettlers visited the minister-in-charge at the Agriculture Ministry to discuss their problems. He told them that they should consult the Land and Survey Department to get the necessary information and relief. But the department refused to help them. “We are like a football kicked by various players,” one resettler said (personal communication with two resettlers).

1998 in starting a fishpond with the help of local nongovernment organizations. This is a community development project for the benefit of the two longhouses.³³

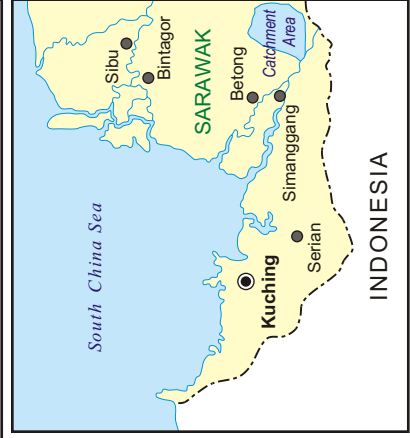
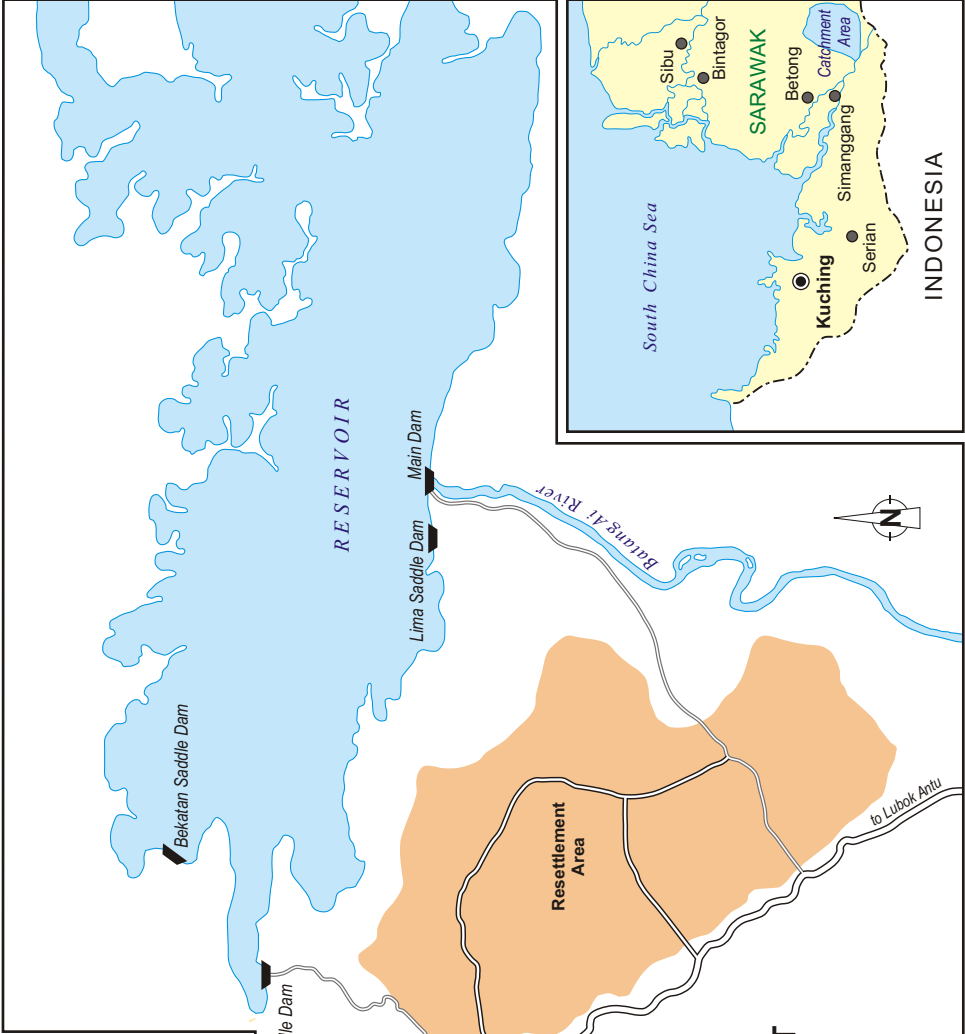
The relocated families at Bukit Peninjau Miri still agitate for the land that the government had promised them as a part of the resettlement package. "We do not ask for more. Our only demand is to fulfill the promises which led us to leave our ancestral land and longhouses," one of the Ibans said. They do not want to be branded as "criminals", although many of them have several court cases pending against them. "We are not against the government; we want to live peacefully without interference from the company," a longhouse leader said. "If we get the land that was promised to us 25 years ago, we will be happy. We know that the government cannot take us back to Batang Ai. Therefore, we want to resolve our land problem amicably. We trusted the government. Why cannot the government trust us and fulfill its promises to us?"

Case Study 2: Batang Ai Hydropower Project and Displacement

The Batang Ai Hydropower Project was the first integrated regional development project in Sarawak. The Asian Development Bank (ADB) funded the project.³⁴ Unlike the Bukit Peninjau Miri land development project, the displacement and resettlement scheme associated with the Batang Ai Hydropower Project was well planned and supported by several international donors. The Sarawak government appointed a high-powered State Steering Committee, with the state chief secretary as its chairman, to coordinate the functions of various government departments and agencies engaged in the project. The departments and agencies conducted in-depth studies in 1978 and 1979 on different aspects of the Iban land tenure, native customs and traditions, native land rights, commercial crops, soil, forestry, agriculture, and fisheries hydrology. Based on these studies, the steering committee prepared a comprehensive compensation

³³ The Canadian ambassador in Malaysia declared the project open on 29 January 1999.

³⁴ Loan 521-MAL: Batang Ai Hydropower Project, for \$40.4 million, approved on 17 September 1981.



BATANG AI HYDROPOWER PROJECT

and resettlement plan in 1980 that aimed at promoting the well-being of the 3,600 involuntarily displaced Ibans who lived in 26 longhouses in Batang Ai.³⁵

The Land and Survey Department paid M\$350 (\$156) per acre of land as compensation to each displaced family and M\$600 per acre to their host families downstream who provided land for resettling the displaced families. However, the displaced Iban longhouses demanded M\$200,000 (\$88,900) as compensation for each family, regardless of the size or value of the land and other property it possessed prior to displacement. This claim was made on the grounds that all Iban families of a longhouse had equal rights to its resources including land; hence, any differentiation between families in the land holding or use was temporary, conditioned only by the availability of family labor for cultivation. The calculation of compensation according to the holding size at the time of displacement would, therefore, artificially create social and economic inequality among them. "The misgivings are not so much concerned with the basis of appraisal as with the impact on survival in a monetized economy, the cultural emphasis on equity, and the highly contrasted life chances of independent family units in an otherwise egalitarian society" (Rew 1986).

The different strategies applied in paying compensation discriminated against the host community. A displaced family was compensated for its lost land and was also given new land, thereby combining the land-for-land and cash-for-land strategies. Thus, in addition to cash compensation, a displaced family was entitled to 11 acres (5 acres of rubber, 3 acres of cocoa, 2 acres of hill paddy, and 1 acre of orchard). But a host family received only cash. When host families demanded more compensation for their land, the government pointed out that they were paid M\$600 (\$267) per acre instead of M\$350 to correct the discrepancy, if any. This contradicts the steering committee's statement that it authorized a higher compensation rate for the host's land because it was more fertile than the land acquired from the displaced families.

³⁵ The steering committee carefully considered the strong attachment the Ibans had to their land and initially proposed to resettle them in the catchment area of the proposed reservoir. However, only 943 acres of suitable land could be found in the catchment. Therefore, the committee decided to acquire 7,630 acres of land in the Sebangki/Bui/Intong/Nyemungah region below the proposed reservoir by the Batang Ai River.

The mixed farming at the resettlement scheme was expected to generate a cash income of about M\$6,300 (\$2,880) per year per family in 10 years. The Sarawak Land Consolidation and Rehabilitation Authority (SALCRA) estimated that from mixed farming of 11 acres, a family could earn twice the income it had earned from its native customary land.³⁶ Thus the resettlement plan was “a comprehensive and very carefully prepared statement giving an excellent initial basis for the strategic planning of resettlement and any associated regional development” (Rew 1986).

During public consultations, the steering committee and the land rehabilitation authority told the displaced Ibans that they would get fully developed land at the Batang Ai resettlement site (BARS) and that they would become the “owner-managers” of the plantation 10 years after their resettlement. Those displaced Ibans who arrived at the resettlement site to start their new life as the owner–managers soon learned that they were actually expected to work as laborers at the dam site and in the plantation. This was not a late change in direction on SALCRA’s part; the agency had actually made plans to employ them as laborers but had never discussed this vital piece of information with the displaced families *before* they arrived. This was a complete reversal of the state land development policy.

Although their resettlement package included a 2-acre hill paddy plot for each resettled family, the Department of Agriculture and SALCRA failed to find suitable land for this purpose at BARS or in its vicinity. This frustrated the new arrivals and also deprived them of their staple food—rice. The nonavailability of land for hill paddy cultivation radically changed the Iban social and ritual practices. “The subsistence economy of the Ibans, and indeed, their whole way of daily life is based upon the cultivation of hill rice.... Iban absorption in the growing of *padi* is complete, for each year *bilek* (family) produces its own crop of rice; and it is upon skills in farming that the prosperity, and the very existence of an Iban family depends” (Freeman 1970).

³⁶ The senior planner of the Land and Survey Department pointed out that of the 11-acre land package, only 1 acre of home garden would receive land title; the rest belongs to the state and is being cultivated by SALCRA on behalf of the resettlers who “possess” the land as a community. This principle is congruent with the concept of native customary land (personal communication).

The displaced families began to arrive at BARS in 1982. They were shocked at the poor conditions they found; SALCRA had not even cleared the land for them to build their temporary huts. The planting of crops did not start for another 3 years as the BARS Farm Plan, prepared by the Department of Agriculture, went through several revisions. In the end, SALCRA decided to cultivate cocoa instead of oil palm at the resettlement scheme, as it had already planted large areas of oil palm in the district. Neither the government nor the donor agencies checked the suitability of the revised farm plan, on the assumption that SALCRA was competent to decide it. The cocoa plantation was not completed until 1985, and the rubber plantation was not completed until the end of 1987. By 1989, 7 years after the first batch of displaced families arrived at BARS, farm development had still not been completed. Cocoa failed as a crop to generate any profit. This forced SALCRA to replace cocoa with oil palm several years later, causing many difficulties for the resettlers, including uncertain and poor family incomes. As a result, most of them survived during this prolonged transition period on their compensation payment and on the crops they had cultivated illegally in their former native lands. In addition, a large number of them, especially the young, practice bejalai. This was mainly because SALCRA hired only one member per family to work on the plantations on a daily wage basis.

The tactics used by the Sarawak government to implement its land development policies could be compared with that of the Brooke rajahs. As the two case studies show, the government introduced some development policies that were harmful to the indigenous peoples. Some agency officials withheld information from the resettlers and ignored their lawful request for project benefits. Disagreement among government agencies and departments regarding the appropriateness of land development policies, the manner in which they were implemented, and their anticipated outcomes makes it difficult to estimate their actual impacts on the Ibans. But it is clear that, because of the lack of adequate information and alienation from the state agencies and their difficulties in getting adjusted to the drastic changes in their way of life, the displaced indigenous peoples were left resentful, impoverished, and hopeless, not able to see their way forward.

Different Perceptions of Development, Development Policies, and Laws

Perceptions of the Ibans

During the colonial period, Sarawak witnessed radical land tenure changes. However, the Brookes did not systematically apply such changes over the whole territory, as they could extract the surplus from commercial ventures without intervening in indigenous peoples' territories. Moreover, they believed that by following the principle of least intervention and allowing the traditional ways of living of the indigenous people to continue, law and peace in remote areas could easily be maintained.

Land policies introduced during the Brooke period were at best abstract and known only to the government officials and native leaders. Indigenous people felt the impact of laws and regulations only when they were implemented. The officers who implemented the new laws and regulations were somewhat reluctant to explain them to the Ibans because of the ferocity and quick temper for which the Ibans were notorious among the white officials. Therefore, the officials usually obtained the services of the missionaries or local loyal chiefs to disseminate information about land laws and to communicate with the Ibans. These proxies directly affected the Ibans' views on land policy and strategy by not telling the full story or the truth to the Ibans because of their fear of them. Rumors and third-hand reports about other people's experiences formed an important part of the local knowledge of the new rules and programs. As a result, what the government wanted to do (policy), what it told people that it intended to do (partial or distorted policy), what it actually did (reality), and how the people perceived it were often different from one another.

In general, the Ibans were not concerned about land laws and regulations until the enactment of the Land Code in 1957. The land classification introduced by the Land Code effectively curtailed the Ibans' claim over large tracts of undeveloped "state lands".³⁷ Although both individu-

³⁷ Land was classified into five types: (i) mixed-zone land, with no restrictions on who could acquire title to land; (ii) native area land, where only legally defined natives such as the Ibans and Malay could hold a title; (iii) native customary

als and communities utilized the British court system to legitimize their claims over land, the Ibans did not pay serious attention to registering their lands or to obtaining government permits to cultivate cash crops. Thus, for the Ibans, the security of a land title (conferred by the state) was an artifact, imposed on them by an external power. From their point of view, it would not add anything to their sense of security within their longhouse community.

The record of restoring, let alone improving, incomes of resettlers has been unsatisfactory at BARS. Each resettler family was expected to earn an annual income of M\$2,960 from the first year of resettlement until the fourth year. This was considered to be 20% more than the average annual family income before the project. From the fifth year to the 10th, a family was expected to earn M\$6,828 a year. But 16 years later (1998), the plantations generated an average annual family income of only M\$2,760, which was even less than the expected income during the first year at the plantation. This compared unfavorably with the average annual family income of M\$8,100 of those who continued to live on the native lands upstream of the Batang Ai River.

The construction of the Batang Ai reservoir displaced the Ibans in two ways. A group of them were physically resettled as their lands were inundated by the reservoir, and these lands were known as a danger zone. The second group owned land above the inundation line of the reservoir, which is known as full-service level, and were advised to move to resettlement sites because of possible landslides. But most of them refused to move out and continued to live on their lands. This area came to be known as the partial-danger zone of the reservoir.

Among the three groups of Ibans—those who opted to stay in the partial-danger zone, those who opted to become resettlers at a new location, and those who received them in the host community—perceptions of the displacement and resettlement converge in some regards. Generally, all three groups felt that they had received less than what they should have as

land, where land was not held under title but was subject to native customary rights; (iv) reserved land, held by government, principally as forest reserves; and (v) interior area land, a residual category.

compensation and other resettlement assistance. All of them complained that they were not informed sufficiently of their losses and benefits and were not consulted before the project began.

The host community complained that because of the arrival of resettlers, they lost ancestral land, especially where they hunted and gathered ferns and other jungle products. In Batang Ai, the host community lost 35% of its ancestral lands to resettlements. But that did not make the host poorer compared with their own pre-settlement income or compared with resettlers. One reason for this is that host communities also got some benefits from resettlement programs. The main advantage was relatively generous compensation for land. The state government paid a host double the amount that a resettler was paid for an acre of land as compensation. In addition, host communities, too, have access to new employment and business opportunities generated by the project. Their children also attend new schools built as a part of the resettlement package. But they felt that they did not have sufficient room for themselves and were resentful at having to share their ancestral land with the resettlers. This friction sometimes manifested as an open confrontation during the initial phase of resettlement. The Batang Ai hosts imposed injunctions on the resettlers, prohibiting wild fern collection and hunting in nearby jungles that belong to them; those who broke the injunctions were fined. This led the resettlers to feel that they were encroachers on other Ibans' land, and they therefore longed for the return to their ancestral land.³⁸ Delays in compensation payment and the adoption of the two different compensation rates for resettler and host land contributed to the friction.

But now, the two groups are integrated well. They have intermarried, and visits and participation in mutually important functions such as Christmas are common. However, in agricultural matters, particularly in paddy cultivation, each group tends to depend more on its own neighbors. This exclusivity in participation does not have any significant cultural or religious meaning; the rituals traditionally associated with paddy cultivation

³⁸ Some managed to go back to their ancestral land in the partial-danger zone. Others frequently go to their uninundated land to cultivate paddy and pepper.

have gradually been dropped by the Ibans with the growth in their practice of Christianity.

Perceptions of government officials

On major issues such as development partnership, communication, and consultation with the displaced Ibans, the majority of government officials surveyed in 1998 thought the performance of their respective departments and agencies had been on some occasions harmful to the Iban resettlers.³⁹ On several issues, some officials were critical of the government policy on indigenous Iban society. For example, the Land and Survey Department, which was involved in the compensation calculation for the acquired native lands, disagreed with the government's view that the displaced Ibans were starving or suffering from malnutrition on their ancestral lands prior to displacement. The Land and Survey Department's statement was supported by an ethnographer who participated in the 1978–1979 socioeconomic survey in Batang Ai Project area. The land survey officials were also critical of the acquiring of land in the partial-danger zone, which was done to raise the reservoir level from 111 to 115 meters. They pointed out that land acquisition was done without proper surveys and without adequate notice to the inhabitants in the area. The decision to raise the reservoir level was taken by the project engineers (with the support of the steering committee). It resulted in many problems for the inhabitants as well as for the survey department. The land survey officials pointed out that they could not survey the standing crops of paddy and permanent cash crops such as rubber for the purpose of compensation, nor could they identify the graveyards because of the rapid rising of the water level in the reservoir. This caused delays in compensation calculations and payments. As a result, some losers of lands did not get compensation for their lost land and crops until 1997—15 years after displacement.

SALCRA acknowledged that it did not have sufficient know-how and resources to manage a large and complex resettlement site such as Batang

³⁹ Chief, State Development Policy Division; chief, Sarawak Electricity Supply Corporation; director, Department of Forests; senior planner, Land and Survey Department; planning officer, SALCRA; ethnographer, Sarawak Museum, Kuching; and chief, State Environmental Division.

Ai. It was established in 1976 to develop plantations on native customary lands. After taking adequate steps to ascertain the views and suggestions of the users of such land, SALCRA declared a tract of land to be a "development area". After this declaration, it was SALCRA's duty to develop the land without affecting the native customary land rights. It gained experience in small community development projects based on agricultural development, which were known as "social projects".

The State Steering Committee requested that the agency take over BARS on behalf of the resettlers because the land there belonged to the resettlers. SALCRA's task was to manage the land and plantation on behalf of resettlers and, with their participation, improve their socioeconomic status and increase their sustainable income by introducing cash crops, so that they did not fall into poverty and malnutrition.

SALCRA was at that time ill-prepared to manage a large resettlement site as it had neither experience nor resources in resettlement management. Moreover, the government did not train SALCRA personnel in resettlement management nor in how to deal with resettlers who had different psychological and economic needs. Instead, it was expected to learn on-the-job resettlement management and especially how to deal with the resettlers.⁴⁰

The government gave the resettlers poor quality land, which meant that SALCRA started with a major handicap.⁴¹ The agency personnel found that the most suitable crop in the resettlement area would be oil palm.⁴² But the State Steering Committee requested that SALCRA cultivate rub-

⁴⁰ If the government had divulged this fact to ADB at the project appraisal stage (1981), SALCRA could have obtained training assistance from ADB in resettlement planning. ADB provided funds to train engineers and technical personnel for the hydropower project.

⁴¹ The Land and Survey Department, on the other hand, justified its payment of M\$600 (\$267) per acre to host families on the grounds that the land they were losing to the resettlers was fertile and well-developed.

⁴² According to the Department of Agriculture, SALCRA refused to plant oil palm at BARS because it had doubts about the capacity of the processing plants. Also, SALCRA by that time had large-scale oil palm plantations in the area. The Agriculture Department said that until 1990, its farm plan for the cultivation of oil palm was not implemented (personal communication).

ber and cocoa instead. The Batang Ai Task Force, which succeeded the steering committee, insisted on cocoa, as its price was high. Until 1990, the indirect cost of the plantation was M\$30 million a year. Only after the failure of cocoa did the task force allow SALCRA to cultivate oil palm in the resettlement plantation.

In 1990, SALCRA carried out a socioeconomic survey among the resettlers with the help of the University of Malaya. Based on the findings, a panel discussion was held to discuss the progress on the promised 2-acre hill paddy plot for each resettled family. The panel found that there was no suitable land for paddy cultivation in the vicinity of the resettlement site and suggested that in lieu of such land, resettlers should be paid compensation, as if they had lost those 2 acres of hill paddy. SALCRA took part in these discussions and talked on behalf of resettlers, as it was keen to improve their economic development and social well-being. In fact, the agency had attempted to obtain hill paddy land from outside for the resettlers, but the locations proved to be too far from the resettlement scheme. The agency also informed the minister of agriculture about the importance of finding land for hill paddy, since it knew well that Sarawak Electricity Supply Corporation had not paid compensation for not providing paddy land at the resettlement site.

Resettlers work as laborers, although they are the landowners of the plantation.⁴³ They hated working as laborers. Therefore, SALCRA introduced a piecework payment system in 1993 for oil palm and rubber. After this system was introduced, the resettlers felt that they could manage their daily plantation work schedule, and they complained rarely. They work from 7 a.m. to 2 p.m. After that they rest and then attend to their home and tree gardens for 2 to 3 hours in the evening. Earlier, the regular work program irritated them, and they displayed their unhappiness by boycotting work regularly or by not paying attention to their allocated tasks.

⁴³ Iban resettlers were too proud to cultivate "others'" land. They asked, "Why should we help others to make money?" This attitude was quite widespread, and as a result, resettlers hated to work on plantations. In general, they preferred oil palm to cocoa and rubber. They also wanted to cultivate pepper, if sufficient land was available (personal communication with 20 resettler families and agricultural officers).

Resettlers are also employed in the transplantation of oil palm trees and estate maintenance. In addition, SALCRA pays them dividends from profits. The agency says that it “knows” that the resettlers get a good income and that all of them are above the poverty line. A resettler could earn as much as M\$30 (\$11.50) a day, especially during oil palm harvests. On average, on the plantation, a resettler can earn about M\$2,400 (\$920) a year.⁴⁴ In addition, the families earn money from peppers, rubber, fruits, and vegetables. A few of them cultivate hill paddy on the reservoir banks, selling these items to traders. A substantial number of the resettler families are engaged in cage-fishing in the reservoir. SALCRA estimated that a resettler family’s total income was M\$3,600 (\$1,380) a year.⁴⁵

Resettlers are members of a development committee, along with representatives from SALCRA. Its role on the committee is to create awareness among resettlers about how to work and share responsibility with the management. Problem solving and acceleration of work to gain more profits are its other functions. The chairman is a SALCRA manager, and the vice chairman is a resettler.

SALCRA summarized its relationship with the Batang Ai resettlers as follows: “In early 1980s, they refused us; but in the 1990s, they want us.”⁴⁶ The SALCRA managers said the resettlers are lazy, arrogant, and need serious training in handling money and learning work discipline. The managers claimed that “the most important training the resettlers had received from the SALCRA is work ethics—to work at least six to eight hours a day according to a plan.” The agency believes that its relationship with the resettlers is “cordial.”⁴⁷

⁴⁴ This is less than 40% of what the project expected a resettler family to earn from their lands after 10 years: M\$6,300 a year. At issue is whether the project has managed to restore their pre-displacement incomes, in addition to maintaining their income above the poverty line (personal communication with resettlers).

⁴⁵ This is about 30% of the income a resettler family was expected to earn in 1995.

⁴⁶ Planning officer, SALCRA (personal communication in 1998).

⁴⁷ Personal communication with SALCRA officials in 1998.

Perceptions of ADB

During the project completion mission conducted in 1986, ADB congratulated the engineers who built the reservoir and the power plant. “[W]ith its relatively large, but well-proportioned and superbly finished structures...the project is an impressive example of a hydropower scheme that attracts visitors both from Malaysia and overseas” (ADB 1986). But it had to mention in the project completion report (1986) that “the overall positive picture is marred by several deficiencies of the resettlement program related to the Project which were experienced despite a considerable outlay of about \$15 million.” Therefore, the report recommended that ADB “should ensure in future major hydropower schemes with resettlement requirements, provision for social analysis is made during the preparatory phase, and at subsequent stages as necessary, by including suitably qualified and experienced sociologists or anthropologists in the project processing and administration missions. A similar provision should be made in the consulting services for such projects.”

The project completion mission recruited an external anthropologist as its resettlement specialist after ADB received many complaints about poor resettlement management and the resettlers’ plight. The anthropologist wrote a separate report on resettlement (Ruw 1986). His findings proved to be very different from the findings of the others involved in the mission, who praised the project for its engineering success. His findings highlighted the plight of the resettlers. He pointed out that although the resettlement agency was confident that it had addressed all the social and resettlement issues, it had failed to find paddy lands, the most important component of the resettlement package. The search for paddy lands for resettlers came to a halt as soon as the project became operational. The shrinking supervision from the government and ADB and the lack of adequate funds and trained personnel contributed to this situation. The juxtaposition of the two reports in the project completion report—the engineering review and the social review—provides an interesting contrast. Whereas the engineering view said Batang Ai should be considered a model of a well-conceived and implemented hydropower project, the social view pointed out the gaps in the resettlement planning and implementation that caused much hardship to the resettlers.

A special ADB study in 1998 at BARS confirmed the project completion report's finding that the failure to provide paddy land to resettlers was a major mistake in resettlement planning (ADB 2000). In fact, this failure arose from the reluctance of the host community to sell paddy land to resettlers. ADB found that this failure triggered several critical adverse impacts on the resettlers. One was the identity crisis among the resettlers. As Ibans, they had been traditional paddy cultivators. At resettlement sites, they became "laborers" of a plantation agency. They were also confused as to their land-tenure status. Land belonged to them but was managed by SALCRA. Some of them have entered "protected" land areas of the reservoir, the danger and partial-danger zones, when the reservoir's water level was low and have attempted, with little success, to recreate their traditional livelihoods by cultivating short-term hill paddy on reservoir banks and hunting in the nearby lands (ADB 2000). Another adverse impact was women's loss of their role as the custodians of the *padi pun* (sacred rice), which gave them a prominent position in the traditional Iban community.⁴⁸ Without their own paddy land, protecting *padi pun* became meaningless. This in turn lowered the social status of women in the resettler community. Third, the resettlers were unhappy that they had to leave their ancestral land, as they found it difficult to adjust their care-free lifestyle to a disciplined and regimented estate-type of living, which they had never experienced before. For example, they had to undergo the traumatic experience of living in temporary sheds before their longhouses were built. One educated son of an original resettler compared them to slum dwellers in urban areas. These findings came too late to make a major revision of resettlement management, because by 1998, more than 20 years had passed since the displacement.

The perception that prevailed among ADB staff in the late 1970s and early 1980s that the Batang Ai Hydropower Project was essentially an engineering exercise changed drastically in the late 1980s and 1990s. This was evident in the project completion report, which discussed at length some social adjustment problems of the resettlers and their impoverishment at plantations (ADB 1986). The project completion report and the special study (ADB 2000) emphasized the importance of adequate consul-

⁴⁸ The cultural and religious ceremonial rites associated with paddy cultivation traditionally were the exclusive domain of women.

tation and communication, adequate institutional capacity to run resettlement programs, and planning an economic development program for the resettlers by paying special attention to the sociocultural aspects of their communities.

Conclusion: Many Lessons, No Learners

In deciding a policy and in planning strategies to implement it, the successive governments in Sarawak have consistently failed to learn from the past or to tap local knowledge. Instead, they have tended to distort or undermine the principles of indigenous social organization and traditional land tenure, which would have provided a stable base for new laws and regulations.

To polarize “traditional” and “modern” land tenure systems can be misleading, and to attempt to replace one with the other can be unhelpful. Land tenure systems are complex and flexible and are difficult to classify as distinct models. A contemporary “traditional” land tenure system such as the Ibans’ can be more adaptable, efficient, and productive than a single land tenure system created out of the historical accident of European physiocracy. Thus, even if a government opts for a policy of individual land titles and freehold as the basis of a modern land tenure system, it can still consider how to build the new policy on the well-tested, community-based, traditional tenure systems. Furthermore, the policy makers who are building new systems should consider the operational principles behind the traditional ways, which have been developed and tested over a long period of time.

A key reason for the failure of SALCRA and SLDB was that they were modeled on FLDA schemes designed for different conditions in peninsular Malaysia, not compatible with the indigenous land tenure systems in Sarawak. But these land development agencies could have profited by adopting relevant local-level perceptions and institutions into their management models and land development policies. In this regard, the government could have played a major role by distilling the core tenure principles through a careful study of traditional land tenure systems in their historical context. If the government had recognized the longhouse

authority over its community's land, and if the resettlers had been treated as comanagers instead of laborers in the plantations, both projects discussed in this chapter could have won the support of the Iban communities and could have had a very high chance of becoming successful plantation programs.

The distortion of facts and concealment of actual reasons for proposed land tenure changes often baffled the Ibans, thereby increasing their distrust and resentment of the government and its agencies. As a result, the Ibans considered the state and government as alien and often harmful to them. On the other hand, the state and the government treated the indigenous peoples as weak, lazy, and engaged in wasteful farming methods such as shifting cultivation. These feelings mutually reinforced the distance between the government and the Ibans, which in turn impoverished and marginalized the indigenous people.

Two decades after their displacement, the land development projects have failed even to restore the incomes of the Ibans at Bukkit Peninjau Miri and the Batang Ai site. The resettlers still suffer from all the risks associated with displacement and resettlement, such as marginalization, disarticulation, landlessness, and malnutrition. Ironically, these were the problems that the government pledged to resolve by resettling them in the plantations. Thus, instead of redeeming them from these ills, the land development and resettlement programs have only succeeded in impoverishing and marginalizing them further.

It is difficult to fathom why the Sarawak government decided to allocate land title on the basis of private property and individual ownership, while rejecting the traditional role of the longhouse in land administration, which is communal. The two projects could have easily incorporated this traditional role of the longhouse. They could also have utilized the available and well-tested communal land tenure principles to smooth the rough path of transition from native customary tenure to a commercial plantation economy. Ironically, the State Steering Committee did actually intend to formulate the resettlement policy on these lines. For example, as the senior town planner of the Land and Survey Department said in 1998, only 1 acre of land out of 11 acres was given land title, while the rest

was held as native customary land under state ownership.⁴⁹ If the resettlers had been told that the land they received was native customary land and that they should cultivate it as longhouse communities, the resettlers would have accepted the alien state proprietorship because for a century or more, they had actually lived and cultivated land under the state proprietorship of land.

The government should have paid sufficient attention to the important components of resettlement planning such as “consultation” and “communication” with persons affected by development projects. The Ibans maintain that they were not told about the actual reasons for their displacement for the Batang Ai hydropower project nor of hidden agendas behind the land development policies pertaining to the Bukkit Peninjau Miri Resettlement Colony. The majority of government officials interviewed 20 years later in 1998 acknowledged that their consultation and communication strategy with the project-affected people was poor.⁵⁰ Sometimes, the government officials did try to use the idea of consultation and communication to achieve their own objectives—even though such objectives were detrimental to the indigenous peoples’ well-being. For example, the Department of Forestry justified its own decision to exclude the resettlers from land use and product gathering in the Batang Ai Wildlife Sanctuary as a *joint* decision with the non-resettler Ibans. The director of the department said that the leaders of the remaining longhouses in the sanctuary and its vicinity had *requested* him to protect them from “outsiders”. But actually, those longhouses did not request him to do so. Honesty and openness usually pay great dividends in the governance of citizens.

At the preparation and implementation stages of the BARS project, the gender dimension of its impacts was largely ignored. As discussed earlier, the Ibans’ adats bestowed upon women a high social status, as they were the custodians of the sacred paddy of the community. Emanating from this, the laws relating to marriage and divorce gave women a higher legal status than men. The failure to provide land for paddy cultivation at BARS seriously affected women’s social and religious status among the

⁴⁹ Personal communication in 1998.

⁵⁰ Four out of seven agreed.

resettlers. The material base of women's superiority disappeared, although it took 10 to 20 years for women to adjust their social position to a new environment and to accept their subservience to men. This triggered conflict as men and women tussled over dwindling resources and different interests. The women's contact with the outside world at the plantation encouraged them to work as wage earners and even to leave for jobs in towns such as Kuching and Miri. Some Iban women managed to improve their life chances. Others, pressured by the commercial economy of the plantation, became destitute.

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Chapter 6

Tribal Land Issues in India: Communal Management, Rights, and Displacement

Hari Mohan Mathur

In recent decades, indigenous peoples' issues have acquired an important place in the global development agenda. These issues no longer are only the concern of indigenous peoples, anthropologists, and bureaucrats but are also issues of public debate (Rath 2006; Wilmer 1993; Chatty and Colchester 2002; Blaser et al. 2004). The prominence of indigenous peoples' concerns stems from the realization that they have not benefited from development projects, while the mainstreamed societies have prospered at their expense, pushing them deeper into the poverty trap (Mahapatra 1991).

Concentrated in remote and inaccessible areas, usually hills and forests, indigenous peoples are not homogenous groups. They differ from one another not just in terms of their ecology, cultural identity, economic organization, and social and religious practices but also in terms of the nature of their relationship to national political and economic systems (International Labour Organization 1994). One important characteristic they share is that wherever they live, they are at the bottom of economic and social ladders—they are among the disadvantaged groups in any society. In India, where indigenous peoples are known as "tribal people" or "tribals", they are at the bottom of society: they are the poorest, most marginalized, oppressed, and deprived people in the country (Nathan 2004a; Rath 2006).

This chapter focuses on land-related issues in tribal India. The importance of these issues lies in the fact that the tribal people are deeply attached

to their ancestral lands. Davis (1993) refers to this close attachment to the land and the environment as the defining characteristic of indigenous peoples. The discussion is divided into the following sections: (i) who are tribal people? (ii) their communal land management system, (iii) tribal rights to forests, (iv) how the legal system undermines their communal rights, (v) their displacement by development projects, and (vi) conclusions.

Who Are Tribal People?

India's population of over a billion includes 70 million tribal people (8.6%). They are scattered throughout India, but most live in two contiguous areas. The first is the forested hills and mountains of the northeast, and the second is the broad belt of hilly, forested country across north-central India from Gujarat and Rajasthan in the west, through Madhya Pradesh and Chattisgarh, to Jharkhand and Orissa in the east.

The definition of the term "tribe" has long been a subject for discussion among anthropologists, but so far, there is no generally accepted definition (Naik 1968). This leaves unresolved a basic question: Are there peoples who can be identified as tribal? For some scholars, identifying a tribal from a non-tribal is easy. Weiner (1978) claimed that "everyone in Chotanagpur can recognize a tribal. A distinctive racial type, known by physical anthropologists as belonging to the proto-Australoid stock, they are somewhat darker than other Indians and have features that are sometimes Mongoloid in appearance. They live in their own villages, many of which are wholly homogenous....Perhaps the most distinctive feature of tribal life is the very attitude toward life itself. In contrast with their Hindu neighbors, the tribals are a carefree people, hedonistic in their simple pleasures."

Several anthropologists hold the view that a tribe is no different from a caste (Ghurye 1943, 1959; Beteille 1974; Bailey 1960). Tribe as a category, separate from the mainstream caste society, is an invention of the British administrators. As Singh put it, "[T]he notion of a tribe was introduced by colonial administrators. It was part of the universal trend to dichotomize the indigenous peoples and colonizers, the savage and the civilized, the tribals and non-tribals" (1995).

Beteille (1974) discusses four key criteria that have been used to distinguish a tribe from the rest of population: size, isolation, religion, and means of livelihoods. He points out that these criteria fail to support the contention that distinct tribal communities do exist in India. Beteille first considers the criterion of size and notes that anthropologists usually define tribal societies as small-scale social systems. For example, according to Lewis (1968), “[I]deally tribal societies are small in scale, are restricted in the spatial and temporal range of their social, legal and political relations, and possess a morality, religion and world view of corresponding dimensions.” Beteille (1974) agrees that this may be true of many tribes in Africa and elsewhere, but in India, he points out, tribes such as the Santhals, Gonds, and Bhils are large segments of the population, each numbering over a million and scattered over vast territories.

Beteille notes that the second criterion—that tribal societies are isolated and lack contact with non-tribals—is not true of Indian tribal communities, as most of them have long been living in close contact with Hindu castes and other communities. The third criterion—religion—also lacks validity, because India’s major tribal groups do not practice an animism that is distinct from the country’s mainstream Hinduism. In India, animism and Hinduism are often intertwined at the community level. Risley (1905) said that “no sharp line of demarcation can be drawn between Hinduism and Animism. The one shades away insensibly into the other.” This is one reason why some Indian anthropologists identify tribal people as “Backward Hindus” (Ghurye 1959).

Regarding the fourth criterion, livelihood, Beteille notes that the archetypical tribal society lacks a clear division of labor; it does not split up tasks the way settled agriculture and family farming systems do. But Indian tribal populations do not fit that model. For example, the Birhors may follow a hunting and gathering way of life, but even they rely on some specialized households to supply baskets and utensils for daily use. In Jharkhand State, among the Mundas, the Hos, the Santhals, and the Oraons, settled agriculture is widely practiced, and, as Beteille pointed out, the family farm is key to these tribal social systems.

Beteille concluded that in India, “there really is no satisfactory way of defining a tribal society” (1974). On his first contact with tribal people in

an Oraon village in Ranchi district, Bihar (now Jharkhand), he wrote: "I clearly remember my initial disappointment in discovering that, although we had come to investigate proper tribals, the people who confronted us were outwardly no different from the poorer villagers one might find anywhere in rural Bihar or West Bengal."

Tribes in the Indian Constitution

The view that there are no tribal societies in India, as described in the anthropological literature, has now gained many adherents. This raises the question of why the Government of India came up with a list of "Scheduled Tribes" and wrote it into the Constitution. One argument is that historically, the invention and perpetuation of tribalism in India owe everything to the calculations of the governing elite. British administrators with their "classificatory urges" were the pioneers in preparing a list of "primitive tribes", with especially elaborate detail that was based on a 1931 census (Ghosh and Sengupta). In this regard, Beteille says that "it cannot be too strongly emphasized that the list of Primitive Tribes reflects the demands more of administrative and political circumstance than of academic or logical rigour" (1974).

The Indian Constitution refers to tribal people as the Scheduled Tribes, but it does not define tribe. Article 342 of the Indian Constitution declares that the scheduled tribes are "the tribes or the tribal communities or parts of or groups within tribes or tribal communities" that the President may specify by public notification. They were duly specified by the President through the Constitution (Scheduled Tribes) Order of 1950.

In addition to the "Scheduled Tribes", the Indian Constitution names other groups who are considered in need of special protection, such as "Scheduled Castes" and "Other Backward Castes". These communities, which occupy low ranks in India's caste hierarchy, have suffered through the ages socially, culturally, and economically. To uplift these castes, the Constitution provides certain protective measures such as reserving slots for them in education and employment. Some castes have sought recognition as "Other Backward Castes", feeling that they, too, deserve constitutional guarantees. A recent example of accession to that status is the politically powerful Jat community of Rajasthan.

The following were originally used as characteristics for awarding a community the status of a scheduled tribe: (i) the primitive way of living, (ii) habitation in remote and less accessible areas, and (iii) nomadic habits and love for drinks and dance. In 1962, the Dhebar Commission took note of the fact that “the term tribe is nowhere defined in the Constitution and in fact there is no satisfactory definition anywhere” (Dhebar 1962). It proposed a definition of a “tribal area”, recommending that an area be considered eligible if it met the following criteria: (i) preponderance of tribal people in the population, (ii) compact and reasonable size, (iii) underdeveloped nature of the area, and (iv) marked disparity in economic standards of the people. As with earlier criteria, these meet administrative and political decision-making purposes but are rather vague as distinct characteristics of a tribal community.

In independent India, successive governments have continued with the policy of “scheduling” areas, tribes, castes, and other backward classes despite the weaknesses and difficulties embedded in the process. This is primarily because political parties have found that it is easier to win the voters of “Scheduled India” than the voters of mainstreamed India. The scheduled tribes and castes usually have specific demands, and each political party presents solutions to their demands in its campaign in every general election. In several elections, the Congress Party greatly benefited from the support of scheduled castes and scheduled tribes in rural areas because of its elaborate schemes to assist such castes and tribes, listed in its election manifestos.

Race for the tribal status

In recent decades, a view has emerged that there are many more communities that still need to be declared as scheduled tribes, and that the task of identifying such tribal groups should be done by the tribal people themselves. Such self-identification exercises, where carried out, have not only swelled the number of tribal people but also added groups that cannot be considered as tribes by the tribal characteristics discussed above. For example, the scheduled tribal population in the State of Karnataka has increased from 400,000 in 1980 to 2 million in 2000. This increase will continue as many more tribal communities still aspire to become scheduled tribes (World Bank 1999). The main reason is to gain political favors.

In several other Indian states, many non-tribal communities have staked their claims to be listed as scheduled tribes and have even resorted to violence when denied. The current agitation of Gujjars in Rajasthan is a good example.

Scheduling has been criticized for its lack of a systematic and sound basis (Beteille 1986; Baviskar 1995). While certain communities who do not possess tribal characteristics are included in the list of scheduled tribes as a political favor so that they can benefit from the special constitutional guarantees, others who are more deserving have been left out. This is the view of the Gujjar community in Rajasthan, which regard itself as better qualified to be a tribal community than the Meenas, who were among the first to get listed.

A World Bank consultation workshop held in Karnataka in 1998 recommended a list of characteristics that distinguish tribals from others (World Bank 1998):

- Isolation from the urban population
- Tracing of their origin to the oldest sections of the population
- Place of residence confined to scheduled areas
- Separate dialect that does not have a script
- Primitive and animist religious beliefs
- Distinct cultural features
- Particular name for identity
- A simple life
- Few or no links with the market
- A higher status accorded to women
- Production for consumption, not for sale

Communal Land Management

For aeons, tribal people have cultivated land and managed natural resources. Land and forest for them are essentially communal resources to be used according to their present and future needs. The judicious use of common property resources on which they depend heavily has become an integral part of their way of life. "Most indigenous peoples do not view

land as a 'commodity' which can be bought or sold in impersonal markets, nor do they view the trees, plants, animals, and fish which cohabit the land as 'natural resources' which produce profits or rents. On the contrary, the indigenous view is that land is a substance endowed with sacred meanings, embedded in social relations and fundamental to the definition of a people's existence and identity. Similarly, the trees, plants, animals, and fish, which inhabit the land are highly personal beings (often a kinship idiom is used to describe these beings) which form part of their social and spiritual universes. This close attachment to the land and the environment is the defining characteristic of indigenous peoples" (Davis 1993). In a similar vein, a United Nations Development Programme (UNDP) report noted, "Indigenous people often have a special relationship with the land—for many it is still their source of livelihood and sustenance and the basis of their existence as communities. The right to own, occupy and use land collectively is inherent in the self-conception of indigenous people, and this right is generally vested not in the individual but in the local community, the tribe or the indigenous nation" (UNDP 2004).

The traditional communal land system, based on *jhum* (shifting cultivation) of common land, once flourished extensively in tribal areas but now survives only in some remote, inaccessible tracts, mainly in northeastern India among the Khasis, Garo, and Jaintia. It is generally believed that among these tribal communities in the northeast, all lands are necessarily communally owned. But this is a partial truth. There are lands that are owned by the entire village tribal community, but there are also some lands that are owned by the clan members within a village or by individual households (Bordoloi 1998). In several northeastern states, some *jhum* lands are not communal lands but are household property. Among tribes such as Adis, Noktes, and Mihomis, each household owns several plots of *jhum* land. For a few years, a household cultivates a plot and keeps the other plots fallow. Once the soil fertility of the plot diminishes, the household moves to the next plot. This movement lasts over several years. At the end of the shifting-cultivation cycle, a household returns to the first plot of *jhum* land that it had cultivated and starts the cycle again (Bordoloi 1998).

The *jhum* cultivation is also found in some parts of central and eastern India, especially among the Munda, Ho, and Khonds. The Khond society is based on group solidarity (Nayak and Soreng 1993). They have a socialistic

concept of property, and their creed of mutual help is based on the strong conviction that unity is their greatest strength. Their survival down the ages has been achieved by building up this rich community life. Even the layout of their villages reflects it. Houses are built in rows, with shared roofs and verandahs. They say, "We are in touch; we can call out to each other at night if a tiger comes down the street or anyone is ill" (Nayak and Soreng 1993).

The presence of communal land rights does not necessarily imply the absence of individual rights over land in a community. Communal land rights exist in various forms, and in each form, there is room for individual land rights. An individual, however, has access to land resources in a community only as a member of the community. In Nagaland, for example, when timber is extracted for sale from land belonging to an individual, a commission is collected from the buyer by the traditional village council for common village development programs (Roy-Burman 1984). This indicates that communal land rights are primary and that individual rights over land emanate from them.

Traditional communal land tenure systems continue to exist even where formal land tenure systems emphasize individual property rights (Roy-Burman 1986; Mishra 1998). Tribal people in Nagaland State have retained some of their communal land rights even after its integration into the Indian state. In fact, "even the state government has tried to make a synthesis of [common property resources] and the communal system. It has set up Village Development Boards through the authority of the traditional village councils. This ensures that the Board is rooted in the community and at the same time administrative rationality in operations is secured" (Roy-Burman 1992).

The tribal communities continue to follow communal land management systems as long as they serve a purpose. In fact, there are elements in communal land management that can be usefully integrated into tribal development programs, which rely on the active participation by the community. In support of this viewpoint, an Indian government committee chaired by Roy-Burman stated, "There is lot to be said for the view that forests should be managed primarily by the forest dwellers and backed by technical guidance of the Forest Department. This implies that wherever

the community rights exist, they should be recognized and adopted to serve the urgent needs of soil and water management, and reforestation of the denuded tracts by suitable species" (Government of India 1982).

The tribal people face numerous hurdles in trying to maintain their traditional communal land use and natural resource management practices. Some of these obstacles come from demographic changes, resulting from the growth of their own populations and the reduction of their traditional territories, which then make it difficult to continue shifting cultivation. But there are other factors, such as the unhelpful attitude that forest officials adopt, although their job is to assist the forest people. Often, the tribal people know nothing about their rights, and the forest officials exploit their ignorance. As Human and Pattanaik reported: "Various surveys have been conducted to find out what people know of their rights. They reveal confusion at best and at worst complete ignorance. It almost goes without saying that it suits both Forest officials and traders to keep it that way: the more ignorant or confused that people are, the less likely they are to assert their rights and less likely they are to fight exploitation that is perpetually visited upon them" (2000).

The shift to private profit

According to a widely held view, the communal land system is incompatible with the requirements of development. For example, the National Committee on Backward Areas in its report on northeast India advocated the individualization of communal resources for the sake of progress (Government of India 1981). In such an approach to development, tribal peoples face a formidable challenge regarding their efforts to maintain communal land use patterns and natural resource management practices. "Often the lands they use for productive purposes and to maintain historical and spiritual links are not secure and so are being taken over for logging, mining, tourism and infrastructure....And not only their land is being coveted and taken—so is their knowledge. Multinational corporations have discovered its commercial potential, and the race is on to patent, privatize and appropriate" (UNDP 2004).

In recent years, national development processes and the emerging market system have influenced tribal life. One key factor is the conversion of land

under shifting cultivation into land under permanent cultivation or under horticulture or in plantations. In tribal communities of the northeast, this conversion has encouraged the formation of private property. Private land development, leasing, and labor markets are slowly coming into existence (Mishra 1990). As a result of the privatization of forest ownership in the Khasi Hills, there is a large class of farmers who own forests.

Tribal people in India are also experiencing the impacts of globalization, which encourages private ownership. Globalization reaches local communities largely through the market. New goods may be seen on the television or noticed in other ways. But it is through the market that they become available to people. It is also through the market that producers come to know what they can sell. In turn, this growth of the market has led to a process of privatization of formerly communal land, of devolution of ownership from community or clan to the family (Nathan and Kelkar 2004). Tribal communities will find it increasingly difficult to resist the impact of such external forces and hold on to their traditional communal land management system. They themselves are gradually moving toward private ownership of items that they acquire from the market, making class divisions within a community more visible.

Tribal Rights to Forests

The close relationship of tribal people with the forest was described by Elwin (1963) in a poetic yet accurate manner:

To a vast number of the tribal people the forest is their well-loved home, their livelihood, their very existence. It gives them food—fruits of all kinds, edible leaves, honey, nourishing roots, wild game and fish. It provides them with material to build their homes and to practice their arts. By exploiting its products they can supplement their meagre income. It keeps them warm with its fuel and cool with its grateful shade. Their religion leads them to believe that there are many spirits living in the trees. There are special sacrifices to the forest gods; in many places offerings are made to a tree before it is cut, and there are usually ceremonies before and after hunting. Tribal folk-tales often speak about the relations of human beings and the sylvan spirits and it is striking to see how in many of the myths and legends the deep sense of identity with the forest is emphasized....From time immemorial until comparatively recently the tribal

people have enjoyed the freedom to use the forest and hunt its animals and this has given them a conviction, which remains even today in their hearts that the forest belongs to them.

This happy state of affairs for the tribal people was not to last forever, however. From about the middle of the 19th century, people from outside began to move into the forest, lured by its wealth of natural resources, and the colonial government, sensing the commercial potential of forests, gradually extended its authority over them in the name of scientific management.

The first move in this regard came in 1855 when the colonial government issued a memorandum titled "Charter of Indian Forests", which decisively changed the status of large areas of land including forests into government property. Then came the creation of the Forest Department and the passage of the Indian Forest Act of 1865, under which any land covered with trees or brushwood could be declared forest, and the government laid claim to it all. With a stroke, common property resources became a thing of the past. A succession of laws was then passed with the sole purpose of curtailing the traditional rights of tribal people in forests.

In 1952, after independence, a new national forest policy added further restrictions on tribal peoples. For example, under the old policy the forest land could be released for cultivation subject to certain safeguards, and free grazing was allowed. The new policy barred cultivation and required a paid permit for grazing, which was difficult to obtain. Elwin (1963) very aptly depicts the position of the tribal people in the changed circumstances:

Thus the tribal who regarded himself as the lord of the forests, was through a deliberate process turned into a subject and placed under the Forest Department. Tribal villages were no longer an essential part of the forests but were there merely on sufferance. The traditional rights of the tribals were no longer recognized as rights. In 1894 they became "rights and privileges" and in 1952 they became "rights and concessions". Now they are regarded as "concessions".

At the same time, although the new policy expressed ecological concerns, vast forest lands in ecologically sensitive areas were destroyed to make way for big projects or clear-felled to raise revenue for the government.

The National Forest Policy of 1988 was a significant move in favor of both forest conservation and the livelihoods of forest communities. It endorsed the national goal of keeping one-third of the land area for forests, which had been recommended in 1952, and it incorporated specific provisions to safeguard the rights of tribal and other local people. "Indeed, meeting the needs of local populations dependent on the forest eco-system was held to be the first charge on the forest. This meant that forests could not be exploited to meet the raw material demands of industry, nor earn revenue for the state at the cost of the local populations. The policy was, therefore, a significant departure from long-standing forest management practices whose emphasis had been on commercial exploitation and revenue raising" (Human and Pattanaik 2000). However, rules to implement the policy were not put in place until much later, and state governments in the meantime progressively reduced the traditional rights of the tribal people.

The question of forest rights is related to the modern concept of ownership, but notions of the forest people in this regard are quite different. The forest is the pivot around which the tribal life revolves, but for the state, the forest is simply a source of raw materials for industry and revenue for itself. In some states the Forest Department is a major source of revenue for the government. It is no wonder that successive plans, policies, and legislation have resulted in restricting the rights and usage of forests by millions of tribal people for whom forests are their only refuge and source of sustenance.

A new deal for tribes and forest dwellers

In 2006, as a result of a long campaign by forest rights activists, the Government of India enacted a new act entitled "The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006". Those in support of the act regard it as the long overdue recognition of the rights of scheduled tribes and forest dwellers to the lands they have occupied for centuries. It will save them from being treated as encroachers and evicted for development purposes without compensation, as has often happened in the past. It is also contended by the tribal rights activists that secure tenurial rights will lead to sustainable management of land. Those who are opposed to the act fear that it will undermine

the fast-dwindling forests and sound the death knell for the endangered tiger population.

The implementation of this law is not going to be smooth. Tribal and forest-dwelling people will not get the rights to forest land automatically. Only those families who have been primarily residing in forest areas for three generations (nearly 75 years) will be entitled. The verification procedures to determine eligibility are not simple and could be quite time consuming, as disputes may arise among the forest-dwelling communities themselves.

The act also prevents the use of forest land for development purposes such as mining, reservoir construction, and industrial plants without the consent of the tribal people who live in forests or in the vicinity through *gram sabhas* (village assemblies). But there is a risk that politically connected commercial interests could manipulate gram sabhas to obtain such lands for commercial purposes. The tribal rights activists also warn against the machinations of some bureaucrats, especially those in the Forest Department who think that the department is the master of all forests in India. This could obstruct the implementation of the act and deny its benefits for tribal people.

Implementing the act is going to get further complicated as the law confronts legal challenges. Some who are opposed to granting tribal peoples forest rights have already filed public interest litigation in the Madras (Madurai Branch) and Andhra Pradesh high courts (Ramakrishnan 2008). The contention of petitioners is that large-scale distribution of forest land will be against the national forest policy, as it will become difficult to keep at least one third of the total land area under forest cover. Skeptical that the promised benefits for forest dwellers will come to pass, Ramnath (2008) concludes that "it is difficult to imagine that so many advantages to tribal peoples will actually be implemented."

Undermining Communal Rights

Land and territorial rights of the tribal people often receive no explicit legal recognition. When laws do recognize such rights, they are seldom

defended in practice, especially if they conflict with wider national development goals. The Panchayats (Extension to Scheduled Areas) Act of 1996, or PESA as it is commonly known, is a major move to recognize the rights of the tribal people over the natural resources that they manage, and on which they depend for their livelihoods. However, the act has not been implemented, and the communal management of forests remains a mere promise. In fact, despite the opposition from tribal people, the forest areas in Orissa and other mineral-rich states are being allocated to corporations to invest in mining and other projects.

Tribal people feel that development projects, especially those of large-scale corporations, will take over more and more of the lands that are in their possession. The most worrisome aspect is the leading role of the state, which is handing over tribal lands to industries and corporations in violation of the Constitution and national laws. The tribal people in Schedule V Areas as defined in the Constitution enjoy certain rights over land, forests, water bodies, and other resources. In September 1997, the Supreme Court of India delivered a landmark judgment upholding these rights of tribal peoples to life, livelihood, land, and forests in a case that dealt with issues of mining in tribal land. Samatha, a nongovernment organization (NGO) in Andhra Pradesh, filed the case on behalf of the affected tribal people. The Supreme Court held that forests and lands in scheduled areas, irrespective of whether owned by the government or by a tribal community, cannot be leased out to non-tribal people or to private companies for mining or industrial uses. It restricted mining activity in these areas to be carried out only by the State Mineral Development Corporation or a cooperative of the tribal people.⁵¹ All leases granted by the state governments were declared to contravene Schedule V of the Constitution and were declared null and void. The judgment, known as Samatha Judgment, is a significant check to restrain the state from encouraging indiscriminate exploitation of land, forests, water bodies, and other resources for commercial purposes, especially in tribal areas.

The central government and state governments, however, chose to file an application to the Supreme Court in early 2000 asking for a review of the Samatha Judgment. The court dismissed the request, but efforts to cir-

⁵¹ *Samatha v. State of Andhra Pradesh* A.I.R. 1997 S.C. 3297.

cumvent the Samatha decision—which reinforced constitutional protections for tribal people—are continuing. Under pressure from multinational corporations, the Government of India as well as state governments are still looking for an escape route. In July 2003, the Government of Orissa went as far as constituting a state subcommittee chaired by the chief minister to discuss the implications of the Samatha Judgment. The committee concluded that the judgment is not binding on the state. The reasoning was that there are enough laws in the state to ensure protection of tribal interests and that therefore, Orissa could stay outside the purview of the Supreme Court's ruling. On the basis of this interpretation, the government decided to allow the transfer of land in areas covered by Schedule V of the Constitution for mining and industrial purposes. This is a patently wrong inference because the ruling was applicable to all states (Down to Earth 2005).

After the Samatha judgment, the Government of India issued executive instructions in 1998 to set up systems for consulting with the gram sabhas and detail the procedure for land acquisition in Schedule V areas. But in Orissa, the state government circumvented the gram sabhas and gave their power to the *zila parishad* (divisional councils). This was a manipulation of the PESA that undermined its intent and effectively denied tribal people their rights to be consulted on land acquisition for projects (Mahapatra 2005).

Displacement by Development Projects

Tribal lands are rich in hydrologic, mineral, oil, gas, forest, and other resources, and this easily makes them the most attractive sites to locate development projects of various kinds. Thus, many development projects in India are located in areas that are densely inhabited by tribal people. For multinational companies looking for investment opportunities, these areas are fast becoming the most favored destinations (Centre for Science and Environment 2008; Mathur 2006). The fact is there is no such territory not coveted by some international corporation for its mineral wealth, its oil deposits, its pastures, its forests, its medicinal plants, its suitability for commercial plantation, its water resources, or its tourist potential (UNDP 2004).

One would normally expect a resource-rich region to be a boon for tribal people. In India, the rich natural endowment has, however, been of little avail to them. On the contrary, large-scale development projects undertaken in tribal areas have physically evicted significant numbers of tribal people. Tribal people constitute 8.6% of India's population, and about 40% of them have been displaced by development projects (Fernandes 2008).

Until recently, dams were a major cause of displacement, but projects in other development sectors are now quickly catching up. Urbanization and transport are among the development sectors that have seen a rapid rise in the number of persons displaced by development projects. In parks and protected areas, as many as 600,000 tribal people have been physically displaced (Society for Participatory Research in Asia 1993). One important aspect of parks and protection-area development is that such programs often do not physically displace communities but restrict their access to forest produce on which they have traditionally subsisted. Such communities lack other skills to survive in different environments. Giesler (2003) argues that displacement from conservation efforts contributes to impoverishment in multiple ways. Conservation refugees are often poor at the outset of their ordeal. They are victims of displacement in part because of their combined poverty and powerlessness, which is then compounded by forced removal.

Development projects tend to displace tribal people more than others. A United Nations Environment Programme report (2003) cites the examples of the Karjan and Sukhi reservoirs in Gujarat State that displaced only tribal people. The Balimela Hydro Project in Orissa State displaced a large number of people, 98% of whom were tribal people. Equally disastrous were the consequences for tribal people affected by the Upper Kolar Dam. In this project, they constituted 96% of the total affected population. According to the World Commission on Dams (2000), "Overall, 40 to 50% of those displaced are estimated to be tribal people, who account for barely 8% of India's total population of over a billion." A recent estimate is that at least 55% of those displaced by development projects in India are tribal people (Government of India 2004).

Much of the physical displacement could be avoided by careful planning. Large-scale displacement often occurs because of the callous attitude of

the project authorities who acquire land. Often, they acquire large areas of land, which then turn out to be much more than needed and remain unused. In some cases, large areas are acquired for intended industries without proper planning. Such acquisition of land leaves the evicted people landless, without giving them in return any employment. Appa and Patel (1996) recount similar cases of unnecessary displacements from Gujarat that tore many lives asunder.

Displacement from common property resources

Tribal people suffer from physical displacement mainly because of the laws that do not recognize communal customary rights of tribal people to their territories. The resettlement literature is full of case studies of how development projects ignore the customary rights of the tribal people and treat them as illegal occupants of government land. Such an approach invariably leads to the impoverishment of once settled communities, just the opposite of what development promises. For example, in the Upper Indravati Hydroelectric Project, the tribal people were forcibly removed from their lands despite having *patta* (legal title to land). In addition, they were given no compensation for losing their common resources—pastures, forest lands, water bodies, burial grounds, and quarries. Without those resources, their income and quality of life significantly deteriorated (Nath and Behera 2006).

Tribal people who are moved for development projects are impoverished by this loss of access to natural resources (Cernea 2006). “Such impoverishment is even more pronounced when people have to move from resource rich areas such as those targeted for conservation” (Fabricus and de Wet 2000).

For many tribal and forest-dwelling communities, grazing lands, forests, ponds, fisheries, wildlife, riverbeds, and other such shared resources are a major source of sustenance. For example, 70% to 80% of the non-timber forest produce that forms a major component of many households’ income comes from common resources (Beck and Ghosh 2000). Development projects that involve involuntary resettlement abruptly terminate access to these resources. Sometimes it happens because the relocation site lacks similar resources. More often, it happens because the

resettlement planners fail to consider the livelihood and social and cultural identities of the people they are moving. No thought is given to the important role of common resources in their lives. And because communal resources are considered government properties, the resettlers are given no compensation for losing access to them. For those without private land or other assets, the consequences generally prove catastrophic.

Displacement from common property resources has its harshest effects on women, because they are generally the ones who gather or are otherwise control the use of those resources. Firewood collection emerges as a major issue. In the Upper Krishna Irrigation Project, for example, nearly two thirds of the women reported the unavailability of fuel wood and fodder (Picciotto et al. 2001). In resettled areas of Kohadia villages in Korba in Madhya Pradesh State, women have no option but to buy firewood from markets instead of collecting it freely from nearby forests. This puts a serious drain on household budgets (Ganguly Thukral 1996).

In tribal areas, it is women who generally control farm production and household economy, and hence their dependence on common property resources for earning or saving income is greater than that of men. The loss of access to those resources "results in the emergence of an unemployed and unemployable 'housewife' who is increasingly not only perceived to be but becomes almost solely dependent on her husband. Additionally, access to resources in the post-displacement scenario is almost always mediated via husbands, who now assume the role of 'sole' bread earners" (Dewan 2008).

There is a growing realization that projects that relocate people must compensate those who are dependent on common property resources (Koenig and Diarra 2000). Not doing so will only lead to impoverishment among people who give up their livelihoods for the sake of development. That is not a happy development outcome.

Disastrous displacement effects

Involuntary resettlement worldwide seems to have been overwhelmingly disastrous for tribal people. Anyone would be harmed by displacement, but it is particularly disruptive of tribal livelihoods and cultures. They have

to leave behind their land and the forests that are their sources of livelihood. They have no skills to start any other activity for a living. Thus, development projects in most cases have impoverished them economically (Cernea 1998; Mathur 1999; Mathur and Marsden 1998).

The projects have also seriously wounded them socially and spiritually. People who are forced to relocate have to begin life anew in places that may be totally unfamiliar, if not altogether hostile. They have often lost their community, because the group they have been part of for generations is split up. With long-established social networks gone, economic recovery becomes doubly difficult, and people are left to face an uncertain future in straitened circumstances. The trauma of resettlement is exacerbated for tribal people because of their close spiritual ties to their homeland and their apprehension that once they move, their way of life will be lost forever (Padel and Das 2008).

As the World Commission on Dams (2000) pointed out, "Due to neglect and lack of capacity to secure justice because of structural inequities, cultural dissonance, discrimination and economic and political marginalization, indigenous and tribal peoples have suffered disproportionately from the negative impacts of large dams, while often being excluded from sharing in the benefits." They face relatively more risks of impoverishment because they rarely go to courts to vindicate their rights or get the wrongs redressed. The legal system is cumbersome, dilatory, expensive, and often weighted against them because of their poverty, illiteracy, and low social status. Officials tend to deny them even what they are due by law. It is common for the officials to keep the project cost low by calculating cash compensation for land that is below the real value of the property.

Displacement is rarely achieved without the use or threat of force. In projects where tribal people are involved, displacement is sometimes carried out in a ruthless manner. Any sign of resistance invites police intervention. In Kacheipadar and Sunger, two villages of Orissa, a study team found overwhelming evidence of excessive use of coercive methods by district authorities against the tribal population who refused to move. Hundreds of people, including young boys and girls, were arrested. Tear-gas shells were fired in Kacheipadar to disperse crowds. In the Sunger area, Utkal Alumina International Ltd. let loose security guards to harass the villagers.

An elderly woman in Sunger village informed the observers that she had never in her life seen police until this incident and that now, policemen were frequently knocking on her door.

Compensation, a critical issue in resettlement planning, is seldom addressed satisfactorily (Cernea and Mathur 2008). Impoverishment that tribal people encounter soon after displacement mainly arises from delayed payment of compensation and the exclusion from compensation calculations of the common property resources on which they largely subsist (Mahapatra 1991). In addition, tribal people have little or no experience in handling large amount of cash. As a result, compensation paid in cash rarely helps them regain their previous standard of living. It quickly slips through their fingers for weddings and other festivities or ill-planned business enterprises. Yet, there continues to be heavy emphasis on issuing compensation in cash. Perera (2000) found even NGOs in the Singrauli region supporting cash compensation rather than other options that would generate livelihoods. Not only is cash compensation culturally inappropriate, but it leads to underpayment because of flawed valuation methods. For tribal people, the best settlement strategy would be to receive land to replace the land lost. This alternative, however, often is rejected because land is scarce.

Cultural ignorance in resettlement planning

Many sites developed to resettle tribal people fail to attract them, as the communal character of their culture has not been taken fully into account. People are moved to an environment completely different from what they know. On arrival, they discover to their dismay that forests, pastures, and other common property resources that sustained them in their original environment do not exist. Additionally, resettlement disrupts their communal life when they are moved not as an integrated social unit but broken randomly into groups because there is no area large enough for the original community.

Tribal people leave the relocation site when they find that there is no forest land for collecting timber, firewood, and other forest products and no grazing land for their cattle. For example, the people of Karna-ka Bas from the Sariska Project Tiger Reserve who first moved to Sirsawas and Bandipal found that the resettlement site lacked any communal resources. When

they tried to return to their original village, the Forest Department would not let them in. They had to manage their own resettlement on the fringes of Kiraska and Kundelka, the two adjoining villages (Mathur 1997).

What makes resettlement sites particularly unattractive, often resulting in their complete abandonment, is the neglect of sociocultural aspects of tribal life in the planning process. Mathur found this to be the case in colonies built for the Bhil tribals displaced by the Kadana Dam on the Mahi River: "The colonies that the government agencies especially built for rehabilitation did not attract the Bhil oustees. The prospect of living in new settlements, with civic amenities not in accord with their lifestyle, was not very attractive. Like tribals elsewhere, the Bhils are deeply attached to their soil and their hamlets on forested hilltops, which are dispersed and separated from one another by long distances. Living in clustered colony conflicts with their traditional dispersed pattern of living on top of their own forested hills...No wonder, then, that the number of oustees actually relocated to colonies is small, except in the colony at Dungarsaran.... The popularity of Dungarsaran as a resettlement sites lies in the fact that it comes closest to the hilly forest setting of a tribal village" (1997).

Similarly, a lack of attention to the sociocultural concerns of the tribal people backfired in a resettlement colony set up in Andhra Pradesh. The Gond tribals from two regions found their customs and manners so incompatible that they could not live together at the same place. One group then left the colony. People brought together from antagonistic segments are bound to carry with them the traditions of their past antagonism, making living together an impossible arrangement. Roy-Burman (1968) reported that such ignorance of tribal histories is a frequent reason that resettlement sites fail.

Conclusion: Tribal People in a Globalizing World

In tribal areas, the communal management of land and other resources is facing a major challenge from markets and globalization. Communal systems are being rapidly transformed, with far-reaching consequences that Nathan and Kelkar (2004) have aptly described as "civilizational change."

Globalization, although seen as a threat to the survival of tribal people, could work to their advantage (Naim 2003). It has indeed made it possible for them to organize, raise funds, and network with other groups around the world, with greater political reach and impact than before (UNDP 2004). Without networking globally, the Narmada Bachao Andolan (Save the Narmada Campaign) against dams on the Narmada River could not have become a rallying point for attack against projects that displace people not only in India but all over the world.

Addressing the concerns of indigenous peoples will require global, national, and corporate policies that advance human development goals (UNDP 2004). International institutions are already looking for ways to mitigate some of the problems, including acknowledging the right of indigenous peoples to land in their territories and respecting their traditions and cultures. For example, the World Bank in 2001 commissioned a review of extractive industries to determine how such projects can assist in poverty reduction and sustainable development. Based on extensive discussions, the review recommended public and corporate governance that works on behalf of the poor, effective social and environmental policies, and respect for human rights as key pillars of poverty reduction and development in areas where such industries are concentrated (World Bank 2004).

In today's globalizing world, the concerns of indigenous peoples can no longer be ignored or suppressed. They have become better organized and capable of demanding equality in sharing benefits from development projects in both national and international forums, and they are searching for ways to overcome obstacles to the eradication of their poverty and underdevelopment (Gonzalez-Parra 2001). "Indigenous peoples have dynamic living cultures and seek their place in the modern world. They are not against development, but for too long they have been victims of development and now demand to be participants in—and to benefit from—a development that is sustainable" (Magga 2004).

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Chapter 7

Indigenous Peoples' Forest Tenure in India

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In India, the indigenous peoples are predominantly composed of the large and diverse tribal populations scattered across several states. Anthropological literature suggests that the tribal designation arose as a colonial construct, in which all those living on the margins of mainstream agrarian society but within the structure of the Hindu caste system were delineated as “primitive” and “tribal”. In Indian languages, there is no exact equivalent for the word “tribe”, but close synonyms are *vanavasis* (forest dwellers) or *adivasi* (original inhabitants).⁵² The *1891 Census Report* arranged different castes according to their traditional occupations, and forest tribes were assigned a separate category from that of agricultural and pastoral castes (Xaxa 1999a). Thus, both etymologically as well as spatially, the lives and livelihoods of tribal communities in India are intrinsically linked with forests.⁵³

This umbilical relationship of tribals with forests began to be disturbed during the British colonial era when large tracts of forests were regularly

⁵² It has been argued that the definition of indigenous peoples as “original settlers” is problematic in the Indian context. Sociologists like Dube (1977) and Beteille (1998) have pointed out that “tribal traditions themselves make repeated mention of migration of their ancestors. There is considerable evidence to suggest that several groups were pushed out of the areas that they were first settled and had to seek shelter elsewhere.”

⁵³ Today more than 50 million of tribal people live in and around forests. There is a clear overlap between the forest and the tribal maps of the country, as well as an overlap with poverty (Poffenberger and McGean 1996).

harvested for commercial purposes. After India gained independence in 1947, most of the forests were nationalized. The issue of tribal people's rights in those forests has been fraught with contention and is central to political and development policy questions in India.

This chapter examines the history of the debate and demonstrates how communal tenure over forest land is not only a pressing practical issue but a symbol of concerns over indigenous peoples' rights. And it analyzes how legal and policy changes have addressed those concerns.

The Tribal Forest Dweller: A History of Change

Historically, tribals living within and on the fringe of forest areas have derived their livelihoods from forests.⁵⁴ Forests in fact have influenced their collective imaginations, belief systems, and culture, thereby shaping their very identity. Even today, there is evidence of the coexistence of tribals and forests (Poffenberger and McGean 1996). Although romanticized to some extent, the dependence of Indian tribal people on the forest was characterized by customary rules of use and extraction, governed by religious beliefs and practices that ensured that forests were not degraded. Beginning with the arrival of colonial forestry, however, there has been unabated deforestation.

British administrators in the 19th century viewed vast tracts of Indian forests as impediments to the prosperity of the colonial exchequer, as these lands could otherwise be utilized as revenue-yielding property (Pathak 1994). Thus, forests were rapidly razed to the ground both for revenue earned from timber supplies and for maximizing land revenue by putting the cleared tracts into cultivation (Guha 1994). The growing ship-building industries in England in the 1800s and the expansion of the railway network in India in the 1850s further spurred the demand for timber, leading to rapid deforestation. The risks inherent in unregulated logging were noted by some imperial officials, and they created the Forest Department

⁵⁴ The term "tribals" is used in the day-to-day language of the state to denote the official administrative category of the state (scheduled tribes). Most scheduled tribes now refer themselves as adivasis.

to protect and govern the use of forests. They pointed out that continued exploitation of forests would severely impair the potential of forest stock to yield timber, and they advocated insulating forests from the pressure of local use. Toward this end, legislation to curtail the previously free access enjoyed by village communities was proposed. A debate ensued within the colonial bureaucracy, finally resulting in the passing of the Indian Forest Act of 1865.⁵⁵

A privilege, not a right

The Imperial Forest Department was established in India in 1864. State monopoly over forests was first asserted through the Indian Forest Act of 1865. This law simply established the government's claims over forests. Thirteen years later, however, it was reissued with far-reaching amendments as the Forest Act of 1878. This version curtailed centuries-old, customary-use rights of local communities over forests and consolidated the government's control over all forests. The Forest Act of 1878 established that forest use by villagers was not a right but a privilege of concession given by the government.

The Indian Forest Act of 1927 consolidated the existing laws relating to forests, the transit of forest produce, and the duty leviable on timber. It introduced three categories of forest distinguished by the degree of privileges enjoyed by communities over forests. Forests free from all claims were categorized as "reserve forests". These were exclusively designated for the use of the Forest Department, and forest-fringe communities had no rights other than the ones explicitly permitted by the state. The category of "protected forests" provided communities with certain rights solely for household consumption and not for commercial purposes. Their exclusion from forest management was, therefore, both physical and social—physical because they were denied or restricted access to forests and pasture, and social because as "right holders" they were allowed only a marginal and flexible claim on the produce of the forests. The act formed a third

⁵⁵ The government strongly felt that the task of curtailing communal rights over the use of forest was difficult. This is evident from the statement of Brandis that "in many cases, the proprietary right of the state in forests had been 'deliberately alienated' in favor of peasant and tribal communities" (Gadgil and Guha 1995).

category called “village forests”, which provided village communities with more concessions in using forests for their livelihood. According to the act, the state government may assign to any village community the rights of government to or over any land that has been constituted as a reserve forest. But the state government can cancel such an assignment. The government makes rules for regulating the management of village forests: how the villagers may use timber and village produce and pasture, and their duties for the protection and improvement of such forests.

The stereotypical attitudes of colonial administrators toward tribal uses of forests were most acutely captured in colonial policy on shifting cultivation, or *jhum* agriculture. Shifting cultivation, also known as swidden, is not an exclusively tribal practice, but it characterizes tribes, as it is different from the dominant culture of the plow that has been a key characteristic of the mainstream Hindu society. The prohibition of *jhum* in the Forest Act of 1927 led to an acute sense of deprivation among tribal communities, violating, as Guha puts it, “the aboriginals’ notion of property wherein forests and forest produce belonged to the community, every member of which had a prescriptive right to harvest what they needed” (Guha 1994).

When a forest settlement officer of the Forest Department decided to take over a forest as reserve or protected forest, the officer gave 3 months’ notice to the communities to contest this decision. If communities failed to respond and file a claim within this period, the forest was vested in the state, and communities lost any user-rights that they had. The official procedures for the settlement of claims and the demarcation of the forest boundaries were written in a way that was ostensibly favorable toward local communities. But in practice, the communities could not benefit from such processes because of their illiteracy and marginal social status. Their lack of capacity to negotiate effectively excluded them from benefiting from the complicated rules of notice, appeal, and settlement. As a result, most communities were physically displaced without appropriate compensation (Poffenberger and Singh 1996). Moreover, the local high-caste elite and landowning households exploited to their personal advantage the limited access to forests that the communities had.

The colonial state radically redefined the nature of private and communal property rights. While private property rights were limited to lands

that had been cultivated regularly, resource-use practices such as grazing, forest product collection, and swidden farming were not considered as a basis for land ownership, even if land taxes had been paid for such lands. The priorities of the new system of forest management and control, imposed by the colonial state, conflicted sharply with local systems of forest use and control. In short, the forests of rural communities were being taken over by the state, and the rights of the village communities to such forests were progressively eroded.

After India gained independence in 1947, a landmark policy to take over the princely states controlled by independent rulers impinged further on the customary rights of forest dwellers, although it did not eliminate them entirely.⁵⁶ And the decision to nationalize the forests in those areas created a rush of exploitation, as people tried to beat the deadline of the new governmental authority. As a result of these changes in control, over 20 million hectares (ha) of forest were either logged or converted to agriculture throughout India (Poffenberger and Singh 1996).

The forest policies of colonial India continued into the postcolonial period, as exemplified by the National Forest Policy of 1952, which further reinforced the right of the state to exclusive control over forest protection, production, and management. Just as the fulfillment of imperial needs was the priority of colonial forest policy, the demands of commercial industry became the cornerstone of postcolonial forest policy. While communities were excluded from using forests, many industries were granted raw materials at extremely low prices. Large tracts of forests were diverted for agriculture, hydroelectric projects, and other development projects in the years after independence. It is estimated that between 1950 and 1980, the rate of diversion of forests to sites of commercial industries was about 150,000 ha per year (Saigal et al. 2002).

⁵⁶ While the government took over control over the forests and banned cultivation on such lands, certain usufruct rights or privileges were in actuality granted to the village communities for the use of certain forest produce. These rights, also commonly known as *nistar* rights (forest usufructs established during Mogul period or under customary law), have gone through various changes in legislation whereby communities further lost the right to harvest and manage these resources themselves; rather, they could collect the listed forest produce from forest depots at subsidized rates (Poffenberger and Singh 1996).

An issue of survival

At present, about 95% of the total forest area belongs to the government, and the tribal population of India has been divested of much of its legal communal rights. This is a major practical concern, because the rural economy of India is largely biomass-based. People are directly dependent on forests and common lands for a variety of non-commercial-timber forest products for food and fuel, small timber for housing, and herbs and medicinal plants for meeting their subsistence livelihood needs. In the absence of alternative sources of livelihoods or an ability to eke out sustenance from marginal landholdings, there is a continued high level of dependence on forests for survival.

The relationship between ancestral land rights and tribals has perhaps been most acutely brought into focus in the forestry sector in India and continues to be fraught with contention as communities experience new forms of encroachment on their customary rights by developmental interventions such as large dams, mining, and conservation. Saxena (2005) states that “nearly [8.5 million] tribals had been displaced until 1990 on account of some mega project or the other reservation of forests as National Parks, etc. Tribals constitute at least 55.16% of the total displaced persons in the country.” This is visibly acute in a mineral-rich state such as Orissa, the developmental history of which is spattered with conflicts between tribals and the state on mining-related issues. The violence witnessed during tribal resistance to mining projects in the Kashipur area of the Rayagada district in Orissa is a grim example of this struggle. There has been a sustained and exacerbated threat to the rights of tribals to forest land that has been both a cause and a consequence of a larger process of political, economic, and cultural marginalization during the colonial and postcolonial eras.

Conflict and the Law

Xaxa (1999b) argues that the root cause of the tribals’ demand for “indigenous peoples” status is their complete loss of power over natural resources. The forest dwellers of India who have been so severely disenfranchised have seized on the term as a rallying point to gain development assistance and demand back their lost rights.

The adoption of the Declaration on the Rights of Indigenous Peoples was one of the key objectives of the First United Nations (UN) Decade of Indigenous Peoples (1995–2004). A long process of intense negotiations and discussions between states and indigenous peoples' groups took place over the precise text and clauses of the declaration. The most contentious of these was the issue of collective rights of indigenous peoples, including their ownership of lands and resources. Articulated by indigenous peoples in many parts of the world as the right to ancestral domains and self-determination, these principles posed a challenge to the very idea of territoriality that allows a state to imagine itself as a nation. The Indian government to date prefers to use the word "tribals". The debate over wording in the international forum was but a reflection of the prolonged and often violent struggles between indigenous peoples and states over land. In the Indian case, the locus of this struggle has been the forests—who owns them, who lives in them, and who can use them. It is for the same reasons that India has not ratified the International Labour Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries.

The encroachment of the state on forests and customary tenure rights of tribal forest-dwelling communities did not go unchallenged during the colonial and postcolonial periods. Environmental history in India has directed a significant amount of attention not only to the fate of forests in the country and its effects on forest-dwelling tribal/advansi peoples and their subordination but also to their resistance to increasing commercial exploitation and state control (Arnold 2001).

Undeterred by the provisions of the Indian Forest Act of 1927, many tribal groups have mounted a sustained challenge to the continued denial of their communal rights over forests. Gadgil and Guha provide us with one such example. "In 1957, a movement broke out among the Kharwar tribals of Madhya Pradesh, which called upon the people to stop payment of rent to revenue-collecting agents, utilize timber and forest produce without making any payment, defy magistrates and forest guards, and flout the forest laws which violated tribals customary rights. The movement slogan 'Jangal, zamin azad hai' (forests and land are free) succinctly expressed tribal peoples' opposition to state control and commercial use of forests" (1995).

However, until the 1980s, tribal resistance to the Forest Policy of 1952 had been sporadic, and as a result, the Government of India did not pay much

attention to tribal peoples' rights or the need for recognizing their communal rights over forests and other common property resources. In fact, it has been argued that tribal peoples' alienation and eventual physical eviction from forests in the post-independence era have become increasingly entrenched, as the postcolonial state has been even less responsive to tribal claims than the colonial government was. The example of the *van panchayats* (forest councils) demonstrates this point. In response to agitations, the colonial government gradually recognized the existence of some local community rights over forests and their resources, and these were incorporated in the Indian Forest Act of 1927. The act provides for constituting "village forests" to meet local needs, and this led to the creation of forest councils in Uttar Pradesh through a new state law passed in 1931. All the "de-reserved" marginal reserved forests were reclassified into Class 1 forests and placed under the jurisdiction of the *van panchayats*, in which local tribal communities play a key role in forest administration. More than 4,000 *van panchayats* were created, although the area under their control did not exceed 8% of the total forest area of India. Nonetheless, they represent an example of a forest tenure system in which communal tenure is recognized by law (Sarin 2003).⁵⁷ Moreover, as mentioned earlier, the India Forest Act of 1927 provides for declaring the intention of the state to reserve an area as forest. It also provides for the appointment of a forest settlement officer to arbitrate preexisting claims of occupants and users. These safety clauses, Sarin argues (2003), have often been dispensed with after independence whenever the state appropriates tribals' communal land. The issue of what is deemed by the Forest Department to be encroachment on forest land has been highly contentious. The state has taken over many areas that tribal people considered as their ancestral property and has classified them as state forests and labeled tribals as encroachers on state land. These actions have undermined the application of Article 338(9) of the Constitution of India, which places the protection and welfare of tribal people as a "sacred trust" of the state.

Tribal areas in India are governed by two separate schedules of the Constitution—Schedules V and VI—and by the Panchayats Extension to the Scheduled Areas (PESA) Act (1996). However, the constitutional guar-

⁵⁷ However, it is important to note that after independence, the state has attempted to dilute the *van panchayat* system by increasing bureaucratic control over the councils.

antee that tribal people could earn their living from forests was seriously eroded by the Forest Conservation Act 1980 and the Wildlife Protection Act of 1972 (Sarin 2003).⁵⁸ For example, in Andhra Pradesh, almost all tribal areas under Schedule V of the Constitution have been designated as “forests”. About 77,700 acres of land in Andhra Pradesh’s reserve forests were cultivated by tribals before the enactment of the Forest Conservation Act of 1980. A government memorandum in 1987 required the regularization of all cultivated lands by tribal communities. This memorandum remained unheeded for 8 years before it was superseded by another memorandum issued in 1995. The latter directed that all such lands should be brought under the World Bank-funded Joint Forest Management Project, a participatory forestry program. This effectively changed the legal status of such tribal lands into state-owned forest lands. Thus, environmental concerns regarding forests have clearly been accorded higher priority than tribal peoples’ communal rights, despite their constitutionally guaranteed right to use forests for survival.

Decline of the forests

Despite the increasing state control over forest areas in colonial and postcolonial periods in India, forest statistics reveal that the total size and quality of forest have declined. According to an assessment by the World Watch Institute, India lost 40 % of its forest cover between 1951 and 1991. The National Remote Sensing Agency of India estimated that the annual average rate of deforestation between 1975 and 1982 was 1.3 million ha, representing the degradation of 10.4 million ha of close forest (canopy cover) in 7 years (Rangachari and Mukherji 2000).⁵⁹ Thus, by the late 1980s, the failure of the “fences and fortresses” approach to forest conservation was acknowledged with a concomitant recognition that a reversal of the

⁵⁸ The Wildlife Protection Act of 1972 refers to a sweeping package of legislation enacted in 1972 by the Government of India. The act provides for the protection of wild animals and plants and for matters related to their protection. It extends to the whole of India, except the state of Jammu and Kashmir, which has its own wildlife act (Anon 1998).

⁵⁹ In 1980, the central government enacted the Forest Conservation Act with the intention of arresting the loss of forests. The act made it mandatory that state governments seek the central government’s approval before diverting any forest land for non-forestry use. This brought down the rate of forest land diversion to only about 25,000 ha per year between 1980 and 1995, with a further decline in the rate in recent years (Saigal et al. 2002).

situation would require the involvement of local communities as stakeholders in a system that legitimized participatory management.

The participatory approach is outlined in the National Forest Policy of 1988. One key objective of the policy is to provide in the forests the basic needs of fuel wood, fodder, and small timber of rural and tribal communities. Furthermore, in 1990, the Ministry of Environment and Forests issued guidelines for "joint forest management". This is a forest management strategy under which the state (represented by the Forest Department) and a village community enter into an agreement to jointly protect and manage the forest land adjoining villages and to share the responsibilities and benefits of such endeavors.

Joint forest management has been seen as an important innovation that benefits forest-fringed communities who have no rights or limited rights over forest usufructs or access to them. However, it could be considered as a step back for communities that have had legally recognized communal rights over forest products. A good example is the case of the van panchayats in Uttar Pradesh State. Although joint forest management has been widely practiced over two decades, it has not been institutionalized through legislation. Some critics argue that it has distracted attention from the injustices of the underlying property regime based on the government's claim of ownership over India's forests (White 2004). Others say it creates new obligations for communities without resolving their old claims over forests and forest produce. Thus, the joint management program is best seen as an incremental improvement in user rights of communities dwelling in and around forests.

The widely used state right of "eminent domain" allows the state to acquire private and common property for public purposes. The eminent domain right has remained supreme, overriding all other policies, laws, and regulations. It is under the right of eminent domain that the state acquires land to build infrastructure, mines, dams, and other projects. With an estimated \$30 billion proposed as investment in mining-related projects in the next decade, communal land will continue to be a site of intense conflict between tribal people and the state.⁶⁰

⁶⁰ *Protected Areas Update*. 2005, December. Editorial.

Recent Tribal Policies and Laws

India in recent years has witnessed some significant forest tenure reforms. The decade-long movement for a forest rights bill culminated in the enactment of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 (FRA). This law is an attempt to arrest “historical injustice” through the acknowledgment of tenurial rights of tribals and other forest-dwelling communities. It was the result of strenuous political advocacy involving a range of social and political actors, and it is still contentious. Along with this legislation, the Draft National Tribal Policy of 2006 acknowledges that there has been “no single policy which looks at the issue of protection and development of Scheduled Tribes in an integrated and holistic manner.” The government’s acknowledgment of historic injustice and policy neglect is a definite leap forward toward recognition and legalization of “third generation” rights.⁶¹

The main beneficiaries of the FRA will be scheduled tribes and other traditional forest dwellers who have lived in and depended on forests for their livelihood for three generations—75 years prior to 13 December 2005. Essentially, the act aims to provide a framework to record the rights of forest dwellers, allowing them to cultivate forest land that they occupy, up to a limit of 4 ha, guaranteeing them the right to collect, use, and dispose of minor forest produce, and ensuring rights inside forests that are traditional and customary, like grazing and maintaining homesteads. But the most significant provision is under section 3(i), which pertains to the right to protect, regenerate, conserve, or manage any “community forest resource” that they have traditionally protected and conserved for sustainable use.⁶² The FRA also makes it mandatory for rights holders to ensure sustainable use, conserve biodiversity, and maintain ecological

⁶¹ “Third generation of human rights” is a term used for those rights that go beyond the mere civil and social expressed in many international law documents, including the 1972 Stockholm Declaration of the UN. The first generation of rights dealt with liberty and participation in political life, while the second-generation rights are related to social, economic, and cultural equity.

⁶² “Community forest resource” means a customary common forest within the traditional boundaries of the village or seasonal use of the landscape in the case of pastoral communities.

balance, thereby strengthening the conservation regime of forests across the country.

The FRA has run into obstacles from the beginning, because it does not recognize the varied uses of forest lands and it is too theoretical in its language. A major bone of contention has been the section in the act providing for certain areas to be declared, after due scientific study, as “critical wildlife habitats” and prescribing a clear procedure for moving people out of such areas. Over 32,000 square kilometers of land in various tiger reserves have already been designated as critical tiger habitats and as out of bounds for human beings in keeping with the requirements of the amended Wildlife Protection Act. Thus, village communities lying in those areas will be relocated. Tribal rights activists, however, see this as an effort to arbitrarily sabotage the rights of indigenous peoples and remove them from forest areas (Anon 2007).

The arguments over the FRA include probing questions about the pragmatism of removing centuries of injustice with one sweeping law and about the government’s failure to follow up with procedures and safeguards needed to put the law’s directives into practice. The 2006 act hardly empowers the tribal population at large. Therefore, it is reasonable to question whether tribal communities can enforce and manage their legal rights to land while continuing to be marginalized in a macro-socioeconomic context.

Even the rules of the act have attracted criticisms. For instance, it is argued that they are inadequate in the matter of eco-conservation by the *gram sabhas* (village assemblies). The act forbids diversion of forest land without the consent of the gram sabhas, but the fear is that they could be manipulated by commercial interests, particularly when those forces are too powerful and deeply entrenched. The law itself is not explicit enough on this matter (Roy-Burman 2008).

While the basic principle behind the law is sound, the lack of a larger framework required to bring about reform of such a grand scale clearly raises questions about the motives behind its hurried passage. The law itself sends out a strong political message, but it is unlikely to make a

significant difference unless there is a continued constructive engagement between the state and tribal people.

The Critical Role of Common Lands

Common lands are vital for the livelihoods of millions of people in India, which is still largely an agrarian economy. The majority of the country's farming people work on small farms. In fact, about 60% of landholdings are categorized as marginal, which means less than 1 ha of landholding. Furthermore, over two-thirds of the cultivated area in India depends on erratic rainfall with little or no access to irrigation. Thus, only a single crop a year could be cultivated in most rain-fed farming areas. The dry, harsh, and risky environmental conditions of a large part of India have discouraged the privatizing of large tracts of land to be used as agricultural fields. As a result, many of the rural communities supplement their meager household incomes by depending on common property resources such as forests for their basic subsistence and livelihood. "Balancing of intensive (by cropping) and extensive (by pasture/forest) uses of land, as required by the resource characteristics, became a part of collective strategy for risk management and production enhancement" (Jodha 2001).

In India, about 170,000 villages with a total population of 147 million are located in the vicinity of forests (Ellsworth 2002). A vast majority of rural Indians thus depend on forests for meeting their basic needs of fuel wood, fodder, small timber for agricultural implements and house construction, and food and medicines. Resources from the "commons" provide the poorest of the poor with last-resort livelihoods as well as security of tenure in the form of a "place in the world" (Ellsworth 2002). Studies have shown that the rural poor in India depend significantly more on common lands to earn their livelihood than do the poor elsewhere (Jodha 1986; Pasha 1992; Singh et al. 1996; Beck and Ghosh 2000; Menon and Vadivelu 2006).

A large number of tribal groups in India live off communal land. Even where some households own land, the area is usually very marginal and therefore largely unproductive (Brits et al. 2002). Where land reforms have

taken place, such reforms have not been complemented with better literacy, development of skills, and provision of access to extension services. Moreover, the substitution of customary law with codified law has progressively limited communal management of common lands. In many areas, rich farmers have taken possession of land parcels previously held by communities. The laws have sometimes regularized such encroachments. This was possible because traditional institutions that used to control common property resources are no longer recognized by national and state laws (Gadgil and Guha 1995).

Conclusion

The tribal forest dwellers of India may not fit the classic anthropological model of “indigenous” in the sense of being original settlers or primitive and isolated. However, the term is appropriate as it conveys notions of customary rights, notions that are central to the international discourse on indigenous peoples. Communities living in and around the forests of India have been disenfranchised of their customary rights to forests and forest produce. Today, indigenous peoples do not have de jure communal tenure rights, and there is much conflict between communities and the state over the continued though limited exercise of de facto rights over forests. This historical loss of access to land has been central to the crystallization of an *adivasi* identity among tribes in different parts of the country. This is also reflected in a number of social movements in which “*adivasi* consciousness” is inextricably tied to the struggles over ancestral land, water sources, and forests.

The Indian government’s efforts to give tribal communities a key role in forests through the joint forest management program indicates the government’s realization that traditional regulatory approaches to forest management have not succeeded in abating forest degradation. However, the joint management approach has not addressed the key issue of common property rights, although it has put it on the national political agenda. In India, the dependence of large populations, tribal or not, on common property resources such as forests will continue to be huge owing to the limited availability of alternative livelihoods in rural and remote areas. Agriculture, except in some fertile tracts of the country well served with irrigation facilities, does not afford more than a subsistence livelihood to

farmers. Therefore, the conservation of the commons is central to achieving sustainable resource management as well as sustainable livelihoods. The time has come to seriously examine new and alternative approaches to reconciling this conservation-versus-livelihood dilemma. Developing markets for forest services could be a viable option. However, unless the issue of communal tenure is addressed and some security of tenure is provided to rural communities, especially to tribal communities, any approach to sustainable forest management, old or new, will not succeed.

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Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006: A Charter of Forest Dwellers' Rights?

Jayantha Perera

In the late 20th century, particularly after the United Nations drew up international environmental principles in the 1972 Stockholm Declaration and the 1992 Rio Declaration, the Government of India progressively introduced different policies and laws that paved the way to recognize that tribal peoples, especially forest dwellers, had rights over ancestral land, including the right to earn their livelihood from forests and maintain a cultural identity that is linked to them. After nearly 25 years of debate and extensive consultations, this process culminated in the enactment of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 (Government of India 2007). This legislation, known as the FRA, is a landmark in the evolution of the government's attitudes on tribal people and their rights. It attempts not only to correct a "historic injustice" committed by the colonial and postcolonial rulers but also to vest in forest communities a primary role in sustaining forest ecosystems by restoring their rights as well as their environmental duties. It became active on 31 December 2007, and its implementing rules were issued on 1 January 2008. The law basically grants legal recognition to the rights of traditional forest-dwelling communities, partially correcting the injustice caused by successive forest laws in the 19th and 20th

centuries, and it makes a beginning toward giving those communities and the public a voice in forest and wildlife conservation.

The preamble to the FRA states that it is “[a]n Act to recognise and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other forest dwellers who have been residing in such forests for generations but whose rights could not be recorded; [and] to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land.”

The FRA elaborates the justification for the above as follows:

Whereas the recognised rights of the forest dwelling Scheduled Tribes and other traditional forest dwellers include the responsibilities and authority for sustainable use, conservation of biodiversity and maintenance of ecological balance and thereby strengthening the conservation regime of the forests while ensuring livelihood and food security of the forest dwelling Scheduled Tribes and other traditional forest dwellers;

And whereas the forest rights on ancestral lands and their habitat were not adequately recognised in the consolidation of State forests during the colonial period as well as in independent India resulting in historical injustice to the forest dwelling Scheduled Tribes and other traditional forest dwellers which are integral to the very survival and sustainability of the forest ecosystem;

And whereas it has become necessary to address the long standing insecurity of tenurial and access rights of forest dwelling Scheduled Tribes and other traditional forest dwellers including those who were forced to relocate their dwelling due to State Development interventions.

Indian forest laws enacted in the 19th and 20th centuries treated forest dwellers and other traditional forest users and especially their farming practices such as shifting cultivation as a threat to forest ecology. The new recognition of forest dwellers as “integral to the very survival and sustainability of the forest ecosystem” is a crucial policy reversal compared with previous forest laws, as the new law makes them the custodians of forests and their ecology. The FRA guarantees their livelihood, food security, and forest rights and recognizes their rights to ancestral lands, tenure security, and access to forests and forest produce. Associated with these rights are

their responsibilities, namely, sustainable use of forests, conservation of biodiversity, and sustenance of ecological balance.

The reference to “historical injustice” to forest dwellers during the colonial and postcolonial periods sends a powerful political message to all state governments in India. Its operational implication is that the new law cannot accomplish significant improvements in the status of forest dwellers unless a constructive political and administrative dialogue is continued at the state level to take urgent and comprehensive actions to implement it. Also needed is a campaign to raise public awareness. Indian society at large must see the validity of forest dwellers’ customary rights to earn their livelihood and sustain their cultural identities through the legally recognized relationship between them and their ancestral lands.

Rights of Forest Dwellers

The FRA lists the following as forest dwellers’ rights:

- Right to hold and live on forest land as an individual or community and to cultivate land as a livelihood
- Community rights such as cattle grazing on forest land
- Right to collect, own, use, and dispose of minor forest produce that has been traditionally collected within or outside village boundaries by forest dwellers
- Community rights to fish and collect other products from water bodies
- Right to use traditional seasonal resources such as pastures and water bodies as nomadic or pastoralist communities
- Community rights including tenures of habitat for primitive tribal and pre-agricultural groups
- Right to reclaim any disputed land over which forest dwellers had user rights
- Rights for converting to titles leases or grants of forest lands issued by local authorities or state government
- Rights of settlement and conservation of all forest villages, old habitation, un-surveyed villages and villages in forests
- Right to protect, regenerate, conserve, or manage any community forest resource that the community has traditionally protected and conserved for sustainable use

- Rights that are recognized under state law or laws of any autonomous district or regional council or rights that are accepted as rights of tribal people under any traditional or customary law of the concerned tribes of any state
- Rights to claim intellectual property rights over traditional knowledge related to biodiversity and cultural diversity
- Any other traditional right enjoyed by the forest-dwelling scheduled tribes or other traditional forest dwellers, but excluding the traditional right of hunting or trapping of animals
- Right to relocation and rehabilitation if evicted or displaced from forest land without providing legal entitlement to relocation or rehabilitation before 13 December 2005
- Right to use forest land not exceeding 1 hectare to build schools, dispensaries, fair-price shops, communication lines, minor irrigation canal or other water bodies, vocational training centers, roads, community centers, and drinking water supply pipelines, subject to approval by the *gram sabha* (village assembly)

These various rights of forest dwellers can be classified into four broad types.

Land rights. No forest dweller can claim user rights over any forest land that he or she was not cultivating before 13 December 2005 and is not cultivating at present. Those who are cultivating such land but do not have documents to prove continuous land use can claim up to 4 hectares if they cultivate the land themselves only for their livelihood. Those who possess government leases for forest land can claim user rights even if the land was taken by the Forest Department or is the subject of a dispute between the Forest Department and the Revenue Department. However, if those lands are reconferred on an individual, a household, or a community, they cannot be sold or transferred to anyone except by inheritance.

User rights. The FRA restores the forest dwellers' right to collect minor forest produce such as edible herbs and medicinal plants. But the forest dwellers cannot fell trees for sale. They are allowed to take timber from forests only for household use. The law also recognizes the use of grazing grounds and water bodies by nomadic or pastoralist communities.

Right to protect and conserve. Until the FRA was enacted in 2006, only the Forest Department was entrusted with the duty of protecting forests. This legislation for the first time gives forest-dwelling communities the right to protect and manage the forest in which they live. It authorizes forest dwellers to conserve community forest resources by giving the community a general power to protect wildlife and forests. This is vital, as thousands of forest dweller communities are trying to protect their forests and wildlife against threats from forest mafias, industries, and land grabbers, most of whom operate in connivance with the Forest Department.

Relief and development. The FRA guarantees a right to get rehabilitated in case of illegal eviction or forced displacement and also to receive basic amenities, subject to the restrictions imposed to protect forests.

The FRA states in section 4(1) that, “notwithstanding anything contained in any other law for the time being in force, and subject to the provisions of this Act, the Central Government hereby recognizes and vests forest rights in (a) the forest dwelling Scheduled Tribes in States or areas of States where they are declared as Scheduled Tribes in respects of all forest rights mentioned in section 3, (b) the other traditional forest dwellers in respect of all forest rights mentioned in section 3.” This is a powerful and unambiguous recognition of rights of forest dwellers and an unreserved vesting of such rights on them.

“Free, Prior, Informed Consent” and Conservation

The FRA prescribes that all future creations of “inviolate” conservation zones and curtailment of rights in protected areas shall require the “free, prior, and informed consent” of tribal people who live on such land. It also emphasizes that all forestlands—irrespective of location and category—that have traditionally been used by tribal communities will henceforth be treated as “community forest resources” and says that forest dwellers can act decisively in conserving such resources. What is most important, the FRA says that recognized rights of forest dwellers include conservation of forests and biodiversity (section 5).

The FRA empowers holders of forest rights and their gram sabhas to

- protect the wildlife, forest, and its biodiversity;
- ensure that adjoining catchment areas, water sources, and other ecological sensitive areas are adequately protected;
- ensure that habitats of forest-dwelling scheduled tribes and other traditional forest dwellers are preserved from any form of destructive practices affecting their cultural and natural heritage;
- ensure that the decisions taken in the gram sabha to regulate access to community forest resources and stop any activity that adversely affects the wild animals, forest, biodiversity, and natural heritage are complied with.

The legislation recognizes both the individual and collective rights of forest dwellers to forests that provide them livelihood and cultural identity.

Key Rules to Implement the FRA

It took nearly 2 years to publish rules for the implementation of the FRA. Political interventions, bureaucratic twists, and hectic lobbying by activists representing tribal people and wildlife interest groups took center stage during the review of draft rules that were presented for public comment. The compromises and the accommodation of various interest groups in the formulation of the final rules, which were published in January 2008, have diluted in a number of ways the strong, forcefully stated forest rights enshrined in the law. A good example is that although the law provides for forest dwellers to have rights over water resources in forests and avail themselves of traditional fishing rights, the published rules do not address this critical subsistence issue. There are four key aspects of forest rights that are not sufficiently addressed in the rules.

Who rules in disputes?

According to the FRA, the gram sabha plays a key role in determining who has what rights to which forest resources. This is an attempt to devolve decision-making powers to the grassroots level, that is, to the hamlet level. However, the rules direct that in any area under dispute that is not a “scheduled tribal area”, the decision-making authority will be the

panchayat ("revenue" village council), not the gram sabha. (Each panchayat comprises several gram sabhas.) If a forest-dweller village is only one among many villages that form a panchayat, where the non-forest-dwellers are the majority, the forest-dweller village might find it difficult to get its rights approved if the others oppose. This is because corrupt officials and village elites could easily exploit the vulnerability of forest dwellers in such a council and manipulate the council resolutions in favor of vested interests, or against forest dwellers.

Who conserves forests?

The FRA authorizes forest-dweller communities to protect forests against destruction. Instead of defining this key right and the environmental interests of forest dwellers and specific powers to implement them, the government has said in the rules that a forest-dweller community should conserve forest and forest resources as a "duty", closely following an official "working plan" prepared by the Forest Department. The rules do not clarify whether forest dwellers will be consulted on a free, prior, and informed basis in formulating such working plans or what actions they could take to halt or regulate forest destruction by any external agency, including government departments and private companies. This means that the forest-dwelling communities could become tools in the hands of the Forest Department and private companies that would like to exploit resources in forest areas.

Where do displaced people go?

Indian courts have clearly stated that if a forest-dwelling community is physically displaced because of a development project, the state should make all possible arrangements for the community to continue its livelihood and maintain its cultural identity elsewhere. This is one of the core forest rights that are bestowed on forest dwellers by the FRA. The rules published in 2008 neither elaborated this key right of forest dwellers nor stipulated how a development project that would displace them could rectify such a breach of their rights. Instead, the central government has handed over the responsibility of formulating the rules for dealing with land acquisition and resettlement of displaced forest dwellers to the Ministry of Environment and Forests. The ministry strenuously opposed the draft bill of the FRA on the grounds that such rights would increase

human activities in forests and thus harm the sensitive ecology of forests and wildlife (Empower Poor 2008). Although the FRA was enacted, the ministry has not changed its opposition to the awarding of forest rights to forest dwellers. Such attitudes and opposition to the environmental rights of forest dwellers make them vulnerable to the actions of a powerful central ministry, which does not recognize their livelihood and survival rights. Moreover, the ministry could interpret the FRA narrowly in formulating the rules, which could limit their enjoyment of forest rights.

How do people prove they are eligible?

The rules do not clarify how the two intertwined criteria of eligibility—forest dwellers should reside in forests and should prove 75 years of family residence in the area—will be applied to evicted forest dwellers and those whose land have partially been taken over for public purposes. Without such clarifications, it is easy to apply the two criteria to exclude many forest dwellers from the purview of the FRA, as many of them do not possess documentary evidence to prove that they have been forest dwellers at least for three generations (75 years). Furthermore, there is no rule that provides a way for “other traditional forest dwellers” to prove that they qualify for the rights guaranteed by the legislation.

The FRA—A Charter of Tribal Rights?

Ever since the FRA was enacted, the Government of India and state governments have been claiming it as a major victory for tribal peoples’ rights in India. But this law will not be able to resolve tribal peoples’ human rights and livelihood issues without similar or greater advancement in law and administration in other areas (which are intrinsically linked with tribal peoples’ rights) such as land acquisition, development-induced displacement, and political autonomy. The proposed National Rehabilitation and Resettlement Bill, 2007 was a positive step toward improving land laws that affect tribal people directly.⁶³

⁶³ The National Rehabilitation and Resettlement Bill, 2007 was approved by the lower house of Parliament in 2009. It specifically addresses the land rights of tribal people and special procedures that should be followed in acquiring their territories. In February 2009, the bill was rejected by the upper house of Parliament.

The greatest value of the FRA is that it effectively recognizes rights of forest dwellers who previously were considered encroachers on state land. The Forest Department had powers to expel them without paying appropriate compensation, and such expulsion had taken place mainly when they did not have sufficient evidence to prove their right to ancestral land (Leelakrishnan 2002). Corrupt practices, bribery, and tribal vendetta often influenced such actions. Unfortunately, however, the FRA has not taken into account those thousands of forest dwellers who face charges under different provisions of the Indian Forest Act, 1927 and Forest Conservation Act, 1980 for illegal felling of trees, encroachment, and collecting minor produce. There is no provision in the FRA that would close or drop such charges against forest-dwelling scheduled tribes. There were 257,226 such cases pending against 162,692 forest dwellers and other tribal people under sections 26, 33, and 41 of the Indian Forest Act 1927 by 2004 (Ghosh 2006).

Although the FRA seeks to strengthen forest conservation by giving powers to forest-dwelling communities to protect forests, such powers are *in addition to* not *instead of* the powers that the Forest Department and other government agencies possess, thereby creating room for a clash between communities and the Forest Department. This can happen if forest dwellers disagree with government's decisions to transfer forest land to development projects. In this regard, the FRA stipulates that the government should obtain the "free informed consent" of affected forest dwellers and their village councils for such transactions (section 4(2)[e]). However, a framework for how to obtain free, informed consent of affected forest dwellers has not still been formulated by the government. The marginalized status of forest dwellers and other tribal populations, the powers vested in Forest Department officials regarding forest management, and the higher political, economic, and social status of the rural elite will make it difficult to formulate such a consultation framework and to apply it.

Section 4(2)(d) of the FRA stipulates that the displacement of tribal people may occur only after a resettlement or alternative package has been prepared in consultation with them. The package must ensure that affected communities will have appropriate income and livelihood sources. It will fulfil "the requirements of such affected individuals and communities given in the relevant laws and the policy of the Central Government." Section

4(2)(f) says that “no resettlement shall take place until facilities and land allocation at the resettlement location are complete as per the promised package.” This is a great improvement in land acquisition, compensation, and rehabilitation of project-affected forest dwellers. However, its application in association with the Land Acquisition Act of 1984 could lead to the payment of only cash compensation at the statutory value of land decided by the local government administrators, which is often substantially lower than the replacement cost of such property.

Several agencies—both private and public—have challenged the FRA in high courts in several states and in the Supreme Court of India on several grounds. In March 2008, the Supreme Court told the central government and the state governments to respond to several petitions that challenged the constitutional validity of the FRA in permitting allotment of forest land to tribal people. The argument is that land administration is under the purview of a state government; therefore, the central government cannot allocate or decide the size of such allocations. In another petition, a group of wildlife organizations—Wildlife First, the Nature Conservation Society, and Conservation Trust—challenged in 2008 the legal and constitutional validity of the FRA on the grounds that it violates the fundamental rights of the citizens guaranteed under Article 14 (“The State shall not deny to any person equality or equal protection of the laws within the territory of India”) and Article 21 (protection of life and personal liberty) of the Indian Constitution, as it is against the principles of “sustainable development”. It will take several months, if not years, to know how the judiciary views such challenges based on a broad interpretation of the fundamental rights of citizens.

Conclusion

The FRA is a landmark in the struggle of forest dwellers and other tribes to get legal recognition of their environmental rights over forests. The FRA definitely has converted key environmental interests of forest dwellers into environmental rights that could be enforced by courts. The strength and value of the FRA, however, have been diluted by the rules that have been approved to implement it and by the rules that are missing, leaving gaps instead of covering the entire charter of forest rights.

The struggles over forest rights of tribal people need to be seen in the broader political context, both nationally and internationally. When the FRA was presented as a bill to the Parliament in 2005, there was a conscious attempt by several ministries to undermine tribal community control over forest resources. A similar attempt by the government to change environmental regulations to facilitate the construction of mines, dams, and industries indicates the reluctance at the highest political level to award forest rights to tribal people or to strengthen their control over their ancestral lands in forests. The drive to acquire both fertile agricultural land and village commons for "Special Economic Zones" and for big private companies has been moving on a fast track. Granting of mining leases to private companies in forest areas has increased in recent times.

Despite the alarming rate at which ancestral land is being lost to companies and private developers, the FRA provides tribal communities a political space to articulate their forest rights. The passage of the FRA encourages forest dwellers all over India to build an alliance, embracing India's democratic and pluralistic political and social organizations and based on environmental and social justice. However, the state-capitalist nexus will be a formidable obstacle to implementing the FRA. The decisions of the high courts and the Supreme Court of India on legal challenges will reveal how the judiciary considers forest dwellers' rights elaborated in the law.

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Land and Cultural Survival: The Communal Land Rights of Indigenous Peoples in Asia

Development in Asia faces a crucial issue: the right of indigenous peoples to build a better life while protecting their ancestral lands and cultural identity.

An intimate relationship with land expressed in communal ownership has shaped and sustained these cultures over time. But now, public and private enterprises encroach upon indigenous peoples' traditional domains, extracting minerals and timber, and building dams and roads. Displaced in the name of progress, indigenous peoples find their identities diminished, their livelihoods gone.

Using case studies from Cambodia, India, Malaysia, and the Philippines, nine experts examine vulnerabilities and opportunities of indigenous peoples. Debunking the notion of tradition as an obstacle to modernization, they find that those who keep control of their communal lands are the ones most able to adapt.

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Asian Development Bank
6 ADB Avenue, Mandaluyong City
1550 Metro Manila, Philippines
www.adb.org
ISBN 978-971-561-801-4
Publication Stock No. BKK090139



Printed in the Philippines