

Divers Paths to Justice: Legal pluralism and the rights of indigenous peoples in Southeast Asia

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**Legal pluralism and the rights of
indigenous peoples in Southeast Asia**

**Marcus Colchester & Sophie Chao (eds.)
with Ramy Bulan, Jennifer Corpuz, Amity Doolittle,
Devasish Roy, Myrna Safitri, Gam Shimray &
Prasert Trakansuphakon**



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Asia Indigenous Peoples Pact (AIPP)
Forest Peoples Programme (FPP)
The Center for People and Forests (RECOFTC)
Rights and Resources Initiative (RRI)

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Marcus Colchester and Sophie Chao

Editors

Foreword

Legal pluralism in Southeast Asia: insights from Nagaland

Gam A. Shimray

Indigenous peoples are among the most historically ancient living cultures of the world and have over time developed their own distinct bodies of laws and institutions of social organisation, regulation and control. These laws and institutions are expressed and practised in ways unique to their socio-cultural contexts as self-determining peoples since time immemorial. Today, they are commonly referred to as *customary laws* (and practices). Customary laws govern community affairs, and regulate and maintain indigenous peoples' social and cultural practices, economic, environmental and spiritual well-being. However, customary laws and practices and governing institutions have come under frequent and repeated attack, leading to their severe distortion and erosion since the period of conquest and colonisation. This situation has continued with the formation of new States following decolonisation in more recent times. Prejudices against indigenous peoples and projects of nation-building have led to these peoples being marginalised and the practice of their customary laws, cultural practices, beliefs and institutions has become a criminal offence in many parts of the world, including Asia.

Nonetheless, indigenous peoples throughout the world, to varying degrees, still continue to regulate their social and cultural practices through customary laws even though they live within State systems. They continue to administer their own affairs in accordance with their own systems of law. This is made possible by the recognition of customary laws in some national constitutions, even though this recognition is still minimal. It is also made possible by some circumstantial factors, whereby weak States are unable to enforce national laws. In some cases, traditional authorities hold greater de facto control of local affairs and are able to override the application of restrictive State laws.

In a positive development, and as a result of the growing resistance and assertiveness of indigenous peoples' movements, recent years have seen a move towards a greater acceptance of legal pluralism as part of the search for social order and co-existence. This is true in the context of Asian countries, particularly Malaysia, Indonesia, Philippines, India and Bangladesh. In a number of countries—particularly those mentioned above—custom is recognised as a source of rights in the national constitutions. In Sabah and Sarawak, the Bornean States of Malaysia, there are legal and administrative provisions for the exercise of customary laws through native courts. In the Philippines, native title to lands is recognised and it is required to obtain the Free, Prior and Informed Consent (FPIC) of indigenous peoples by statutory law for the implementation of any development projects or programmes in their lands and territories. In the Northeastern part of India, the ownership of land, territories and resources are vested in the communities to varying extents, particularly in Nagaland. Furthermore, in the State of Nagaland, according to the law, criminal and civil disputes can be settled through Naga customary laws even in State courts. This includes the use of community dispute settlement mechanisms and judicial systems instead of introduced statutory law.

Despite the fact that custom is an active source of law in Asia, the effectiveness of its implementation on the ground has remained poor. This is equally true whether there is strong or weak recognition and protection of customary rights and laws in the national Constitution. The problem points partly to weak actualisation or enforcement and lack of respect for customary laws. As long as customary law is made subservient to positive law and is dependent on it for its enforcement, it is unlikely that a harmonious coexistence of both legal systems can be achieved. The challenge, therefore, is how can this hierarchical relationship be undone to secure the equal enforcement of customary laws and positive laws? And how can meaningful self-determination, a fundamental right of all peoples, be attained by indigenous peoples?

To raise these issues and questions is not to negate the move towards legal pluralism but rather to explore the full potentiality that legal pluralism as a concept and practice can offer in the context of concrete experiences on the

ground. Legal pluralism informs us as to the ways in which the legal frameworks in which societies operate and develop have met and adapted to new challenges and how these frameworks are being used by local communities and indigenous peoples to respond to changing spiritual, moral, cultural, social, economic and environmental conditions. Such adaptability is required of all legal regimes in order to maintain legitimacy and effectiveness and the long term well-being of society. The study and exploration of legal pluralism is still in its infancy and there remains a large gap in our understanding of the modalities and mechanisms for building functional interfaces between legal regimes in pluri-cultural societies. In order to address the inherent tensions between customary and positive law systems, it will be necessary to develop greater awareness of the distinctions between them, including their respective nature, objectives, principles and characteristics.

There are several varying definitions of customary law but no universally accepted definition. Some anthropologists have referred to it as 'primitive law' and have studied it as a part of legal anthropology, in an effort to understand indigenous peoples' institutions of social control. Furthermore, conceptually speaking, customary law has tended to be perceived by States as formless, astructural and thus unsuited to the needs of the modern nation State.¹

Moreover, taking the case of the Nagas of Northeast India as an example, most definitions and descriptions of customary law have omitted two important dimensions, namely:

1. The constitutional law of the village
2. Laws regarding inter-village and inter-tribal relations

Constitutional village law pertains in particular to the authority of the Village General Assembly and the Council of Elders. It also concerns the

¹ Boast 1999

division of jurisdiction or the division of responsibilities and rights. This includes, for example, the right to implement forest fire safety regulations or the responsibility to ensure due observance of certain rituals and restrictions. Constitutional village law also relates to associations, in other words, the rights of individuals to membership of various social organisations such as Long (Youth Clubs), age groups etc. On the other hand, inter-village and inter-tribal laws relate to the strict observance of rules and conducts of hospitality, security, protection of property and use and maintenance of common resources. The serious omission of these fundamental dimensions in many definitions reflects a lack of depth in understanding the scope, purpose, nature, principles and characteristics of customary laws.

There are significant differences between the customary laws of indigenous peoples and positive laws. The distinction is not so much in terms of customary laws not being codified whilst statutory laws are, as has often been assumed (i.e. written versus oral traditions). The difference is more in terms of the nature, rationale and principles of these two legal frameworks. Customs and customary laws embody the cosmologies and values of indigenous societies that have evolved from their primordial relationship with the land and the creator(s) of their cosmos. For example, the notion of property ownership as understood in western legal systems, where the focus is on the right of the individual and is intrinsically economic in nature, does not exist within many indigenous communities. The emphasis within indigenous communities is placed instead on the sacredness, spirituality and relational value of resources, and the *collective* ownership and responsibilities of property.

Such significant differences can be observed in the governance of natural resources, the execution and maintenance of political and social affairs, or the administration of justice. To take another example, Guisela Mayen² states, in reference to Mayan law that:

² Mayen 2006

Customary indigenous law aims to restore the harmony and balance in a community; it is essentially collective in nature, whereas the western judicial system is based on individualism. Customary law is based on the principle that the wrongdoer must compensate his or her victim for the harm that has been done so that he or she can be reinserted into the community, whereas the western system seeks punishment.

This can be further illustrated with reference to the Naga community. Within the Naga community, justice is seen as a means of building amity and unity through consultations and mentoring. The arbiter takes the role of a mediator between the parties in dispute in order to reconcile them and encourage a healing in their social relations. In cases of grave nature, retribution too occurs, but this is seen as a failure of the entire community. Hence, it is natural that the Council of Elders goes through a process of informal consultation and mediation which cross-cuts their social structures, such as family and clan affiliations. As a final resort, cases that are extremely grave in nature and are beyond the wisdom of the elders and community are resolved by seeking the intervention of the Creator³ to transform the conflict and commence the healing process. In this case, the outcome is seen more in terms of its utility and healing in order to prevent the dispute from affecting the integrity of the community. Unlike 'positive' law, Naga customary laws clearly prioritise reconciliation and social harmony over redress and punishment.

³ The Nagas see the Creator as the only just and supreme being. They believe that ill-fate will befall those who falsely swear in the name of the Creator on a sacred place, or bite a piece of soil in the name of the Creator, or engage in a contest by taking the Creator's name, etc. For example, in the water submergence contest, both parties in dispute submerge themselves in water in the name of the Creator. It is believed that the one at fault will float to the surface first or drift away from the point of submergence. The entire community witnesses such events and the outcome must be accepted with humility and no party must hold any enmity against the other.

In political and social affairs, customs and customary laws ensure that decisions are made by following the principle of consensus in decision-making. The basic principle at play is the respect of diversity. Therefore, as the executive head, the Council takes up issues in the role of facilitator in order to achieve consensus, and not as the enforcer of authority and power. Although indigenous peoples are very varied, a considerable degree of social egalitarianism in customary law is evidenced by many traditions of indigenous communities, including those of the Naga, whereby, the rights of a free member of their tribe are as respected as the rights of the chief himself or herself.

In natural resource management among indigenous communities, customary laws serve as the primary basis for the regulation of rights, and the application and management of their collective knowledge over their lands and resources. Commonly, such management is governed by the principles of 'use and care' (reciprocity), the 'first owner'⁴, guaranteed usufruct rights⁵ of community members and the collective responsibility of the community for the protection of individual and common property.

In terms of scope, indigenous peoples' ancestral territory determines the extent of jurisdiction and of the application of customary laws, but spatial factors may not limit the relevance of these customary laws in a strict manner. For example, usufruct rights on the use of natural resources on community lands may be guaranteed to neighbouring communities, and hunting grounds may be shared by many indigenous communities with neighbouring social groups. Referring back to the example of the Nagas, Naga communities have a very elaborate water-sharing scheme for their agricultural systems that cross-cuts villages and tribes. According to this water-sharing system, water must be shared equally and it must be ensured that downstream communities are not deprived of it. Additionally, communities living in upstream areas must not inundate the paddy fields of

⁴ An individual who has acquired superior rights to or responsibilities for collective property.

⁵ The legal right to use and enjoy the advantages or profits of another person's property.

the downstream villages through irresponsible management of check-dams. The chain of connections between villages in this sense literally goes right up to the source.

Similarly, among the Nagas, wars were fought not for the purposes of conquest or subjugation. Most were fought in order to safeguard family and community honour. It was a customary practice within some indigenous communities to have a friendly village that was bigger or stronger as the protector of a weaker or small village. Wars were fought under the observation of strict customary rules, monitored by a neutral party. High numbers of casualties were never allowed. There were also rituals for the well-being of the family or community that were preferably performed by another village or tribe on their behalf.

Various types of conventions exist between villages and tribes, such as those pertaining to security and war, dispute resolution, sharing and management of resources, hospitality and rituals. Hence, the notion that customary laws are strictly local is based on the wrong premise. Today, there are tribes that have established customary courts from the village level, up to the sub-regional level, and beyond, to the highest level court of the tribe.

Customary law in itself is plural, but in the course of interaction between communities, common elements have developed and have established functional interfaces across communities. However, the greatest challenge is to develop modalities and mechanisms in order to move towards establishing legal pluralism with positive laws in its truest sense. To begin with, the fundamental distinguishing principles between the two have to be well understood. This is not to overlook the importance of the historical relationship between customary law, positive law and natural law. These three inter-related legal concepts continue to play an important role in the legal order and regulation of many countries, whether formally or informally.

Customary law regimes have been and continue to be flexible systems of local governance capable of adapting to the changing needs and realities of the societies they govern. However, achieving a genuine recognition of

customary laws with a renewed vision of legal pluralism will require strong political will and commitment, particularly at the State level. The effectiveness of its operational mechanisms and enforcement will depend on the level of recognition and autonomy given to traditional authorities. The key issue will be the extent to which institutional arrangements and the application of customary laws will conform to the underlying principles of indigenous legal regimes and their cultural, spiritual and moral beliefs.

Often, even in cases where there is strong recognition of customary laws and autonomy is given to traditional authorities, the tendency for State structures (based on the principles of positive law) to undermine and supersede traditional governance structures (based on the principles of customary law) remains a serious problem. Frequently, bureaucrats and State agencies, who are ill-equipped to handle customary procedures, are the final arbiters or authority in matters concerning communities. They are also responsible for developing and implementing operational mechanisms for the implementation of the provisions of the Constitution or State law. The tendency to automatically assume that bureaucrats and State agencies have the knowledge to develop appropriate institutional modalities and mechanisms as well as the capacity to handle customary procedures, defeats the very purpose of such constitutional provisions. The result is the bureaucratisation of procedures and the deformation of customary governance structures.

A genuine legal pluralism framework will require appropriate institutional support mechanisms that facilitate the restructuring of the fragmented legal order and governance structures, and nurture its growth in accordance with the underlying principles of customary laws and the cultural, spiritual and moral beliefs of indigenous communities.

This publication is the outcome of a regional consultation with the aim of gaining better insights into some of the fundamental issues and questions described above. By shedding light on divers Asian countries' legal experiences, it is hoped that this publication will help us better understand, and shape, the future of legal pluralism in this region.

On behalf of the Asian Indigenous Peoples Pact (AIPP), I would like to join Forest Peoples Programme (FPP) in thanking our partners, the Rights and Resources Initiative (RRI) and the Centre for People and Forests (RECOFTC) for their support and input to the Legal Pluralism workshop held in 2011. I also extend my thanks to the indigenous authors of the chapters of this publication for their valuable contributions and insights into the multi-faceted nature of legal pluralism in Southeast Asia.

1. Divers Paths to Justice

Legal pluralism and the rights of indigenous peoples in Southeast Asia – an introduction

Marcus Colchester¹

Recent years have seen a move toward legal pluralism as an inevitable concomitant of social and cultural pluralism. In the final analysis such legal pluralism will most likely entail a certain degree of shared sovereignty; but any such suggestion clearly opens up possibilities of conflicts between the different sources of legal authority. While pluralism offers prospects of a mosaic of different cultures of co-existence, with parallel legal frameworks, it also presents the danger of a clash of conflicting norms (between state law and customary practices). A true pluralistic society must learn to cope with such conflicts – searching for a *modus vivendi* that will allow the state to preserve social order (one of its prime tasks), while yet assuring its citizens of their legal rights to believe in and practise their own different ways of life.

Leon Sheff in *The Future of Tradition*.²

Introduction

The rationale for this book, and the wider project of which it is part, stems from a concern for the future of the hundreds of millions of rural people in Southeast Asia who still today, as they have for centuries, order their daily affairs, and make their livelihoods from their lands and forests, guided by customary law³ and traditional bodies of lore.⁴ Many of these indigenous

¹ Director, Forest Peoples Programme, marcus@forestpeoples.org

² Sheff 1999:6

³ International law refers to both 'custom' and 'tradition' in referring to indigenous and tribal peoples' ways of ordering their social relations and means of production.

peoples, as they are now referred to in international law, have had long histories of dealings with various forms of the 'State' and indeed their social orders may be substantially evolved to avoid and resist these States' depreations.⁵ Yet cultural, political and legal pluralism has also been a long term characteristic of many of the pre-colonial State polities of Southeast Asia.⁶

The rise of post-colonial independent States in the region and the penetration of their economies by industrial capitalism now pose major challenges to such peoples. On the one hand their lands, livelihoods, cultures and very identities face unprecedented pressures from outside interests. On the other hand they have responded in varied ways to assert their rights and choose their own paths of development according to their own priorities. With growing assertiveness indigenous peoples have been demanding 'recognition' of their rights to their lands, territories and natural resources, to control their own lives and order their affairs based on their customs and traditional systems of decision-making. The Forest Peoples Programme supports this movement.⁷

Yet we are at the same time aware that 'recognition' is a sword with two very sharp edges. 'Recognition' of customary laws and systems of governance by the colonial powers always came at the price of submission to the colonial State's overarching authority. Acceptance of this authority would inevitably lead to more interference in community affairs than the ideal of nested sovereignties might promise. As Lyda Favali and Roy Pateman were driven to conclude from their detailed study of legal pluralism in Eritrea:

Following Favali and Pateman (2003:14-15), we agree it is not very productive to try to distinguish between the two, although in the English vernacular 'custom' tends to be considered more labile and evolving than 'tradition' which is often considered more conservative and inflexible.

⁴ Colchester et alii 2006

⁵ Scott 2009

⁶ Reid 1995 see especially page 51.

⁷ and see AMAN 2006

The most serious challenge to the survival of traditional land tenure practices came when the state gave formal recognition to them. The state was then able to demarcate the areas where tradition was to be allowed to prevail... Recognition of traditional practices by the colonial masters was in fact the first step in a process of cooptation that eventually rendered local authorities less powerful than they had been in the past.⁸

One rationale for this book is thus to remind ourselves of the experiences of colonialism and distil some of the main lessons that come from this history. How can indigenous peoples today secure the State recognition that they need to confront the interests moving in on their lands and resources without forfeiting their independence and wider rights?

The second rationale is more obvious. It is a matter of law that the majority of Southeast Asian countries already have plural legal systems. Custom is recognised as a source of rights in the constitutions of a number of these countries. In some States (like Sabah and Sarawak), there are legal and administrative provisions for the exercise of customary law through native courts. In others (like the Philippines), laws require that custom is taken into account in land use decisions, especially in processes which respect indigenous peoples' right to give or withhold their Free, Prior and Informed Consent to actions proposed on their lands. In the Philippines, Sabah, Sarawak and Indonesia, custom is also recognised in law as a basis for rights in land (though these provisions are neither implemented effectively nor widely). Moreover, where common law traditions are observed such as in the Philippines and Malaysia, the courts have recognised the existence of native title and aboriginal rights. In various ways, therefore, throughout the region, custom is a living and active source of rights not just in practice but also in law. Yet at the same time the current reality is that in many countries statutory laws give very little effective recognition of these same rights and only weakly protect constitutional provisions. How can indigenous peoples secure better enforcement of

⁸ Favali & Pateman 2003:222-223

favourable constitutional provisions, court judgments and administrative opportunities?

The third major reason for this review is to take account of the ‘third generation’ of international human rights law which significantly modifies the way the international human rights regime is seen as applying to indigenous peoples. Thanks to the evolution of a substantial body of international jurisprudence related to indigenous peoples, and with the UN General Assembly’s adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), it is now clear that, in line with common law judgments, these international laws very firmly uphold the principle that indigenous and tribal peoples derive their rights in land from custom and their close ties with their lands. Such rights obtain independent of the actions of the States, which they may in any case predate. International conventions are also explicit that indigenous peoples have the right to exercise their customary law, to self governance and to represent themselves through their own representative institutions. Given that the majority of Southeast Asian States are also party, to one degree or another, to international human rights treaties, indigenous peoples now have recourse to this third body of law to assert their rights to their lands and territories to self governance and the operation of customary laws.

The final main reason for this review is that it has been demanded by our partners and collaborators. During the 2006-2007 ‘*Listening, Learning and Sharing*’ process of the Rights and Resources Initiative (RRI), which in Southeast Asia was led by RRI partners RECOFTC, ICRAF, the Samdhana Institute and the Forest Peoples Programme, participants clearly identified the need for a regional sharing of experiences with legal pluralism and called for follow up to this end.⁹

This study thus responds to this demand and aims to strengthen regional understanding of plural legal regimes and how they can be used to strengthen the use of custom as a source of rights and in conflict resolution, while avoiding so far as possible the pitfalls of intrusive recognition. The

⁹ Colchester & Fay 2007

target groups are the indigenous leadership, supportive lawyers, human rights commissions and social justice campaigners. The logic is that if forest peoples in Southeast Asia are to achieve effective control of their lands and resources based on rights or claims to customary ownership, self-governance and the exercise of customary law, then policy-makers and community advocates need to be clear what they are calling for and how such measures will be made effective once and if tenure and governance reforms are achieved.

The study also takes into account the studies and consultations being undertaken with funds from the initiative by Epistema in Jakarta, which has already undertaken four case studies in different parts of the archipelago and held several workshops to bring together insights and experiences relevant to legal pluralism in Indonesia.¹⁰

Indigenous peoples and customary law

Since the time of the Romans and probably before, it has been widely understood by jurists that custom can be more 'binding than formal regulation, because it was founded on common consent'.¹¹ An early legal authority of the Roman period, Salvius Julianus, noted:

Ancient custom is upheld in place of [written] law not without reason, and it too is law which is said to be founded on habit. For seeing that the statutes themselves have authority over us for no reason other than they were passed by verdict of the People, it is right that those laws too which the People endorsed in unwritten form will have universal authority. For what difference does it make whether the People declares its will by vote or by the things it does and the facts?¹²

A working convention once current among anthropologists is that 'custom'

¹⁰ HuMA Learning Centre 2010. The HuMA Learning Centre has now been renamed Epistema.

¹¹ Harries 1999:32

¹² Salvius Julianus cited in Harries 1999:33

takes on the character of ‘customary law’ where infractions are punishable.¹³ Yet, so diverse are societies’ systems of governance that applying such general definitions to varied realities is bound to generate confusion or uncover imprecisions. The reality is that customary law is itself plural.

For example, Favali and Pateman in their study of legal pluralism in Eritrea, discern three distinct layers of customary law, the first being the written codes of customary law which have developed through a history of dealings with the colonial and post-colonial State, the second being the oral laws which are widely followed by members of the various societies. However they observe that:

there is a third body of unrecorded legal rules that are deeply rooted in a particular system... that constitute the mentality, the way of reasoning about the law, the way of building a legal rule. These rules cannot be verbalised. They form part of an unrecorded and unexpressed background that an outsider cannot understand, and certainly cannot supplant. This is one of the main aspects of a legal tradition. Tradition is not something that has been built or invented overnight. Certainly it cannot be curbed or abolished on short notice.¹⁴

In like vein, Bassi’s study of decision-making among the Oromo-Borana of southern Ethiopia shows how the society’s norms are not codified nor otherwise set out in an explicit, logical form, but are expressed in a symbolic and metaphorical way, through myths and rituals, which are invoked or which otherwise inform judgements and decisions made to resolve disputes.¹⁵

It seems plausible to argue that in Southeast Asia in the ‘pre-modern’ era, where the key to power in coastal polities lay with control of labour and

¹³ Gluckman 1977. For the Romans ‘custom referred to law which was usually unwritten and which was agreed by “tacit consent”’ (Harries 1999:31).

¹⁴ Favali & Pateman 2003:218

¹⁵ Bassi 2005:99

trade¹⁶ and not the control of land *per se*, discrete bodies of customary law operated, in which one body of law regulated trade, slavery and the patron-client relations through which trade was controlled, while a separate body of community-controlled law related to village affairs, land and natural resources.¹⁷

That there were (and are) multiple layers of customary law in the societies of Southeast Asia is also clear from the wider literature. Changing currents of belief and varied forms of governance mean that customary laws primarily based on subsistence-oriented livelihoods have been overlain with customary laws related to trade and to wider polities and in turn overlaid with customary laws derived from 'world' religious systems and codes. None of these layers of law are impervious to the operations of the other layers and studies show how remarkably fast customary laws and tenurial systems can evolve in response to migration, market forces and the impositions of the State.¹⁸

Social scientists have been slow to understand that indigenous peoples are neither struggling to reproduce frozen traditions of their essentialised cultures nor just responding to the racialised violence of the colonial and post-colonial frontier. Rather they are seeking to re-imagine and redefine their societies based on their own norms, priorities and aspirations.¹⁹ In these processes of revitalisation, and negotiation with the State and neighbouring communities, peoples' very identities will be reforged.²⁰ It is such processes of self-determination which this project seeks to inform.

Custom and colonialism

During the 18th, 19th and early 20th centuries it was the case that throughout the region the colonial powers that came in and sought to take control of

¹⁶ Sellato 2001; 2002; Magenda 2010

¹⁷ Reid 1995; Warren 1981; Druce 2010

¹⁸ McCarthy 2006

¹⁹ Austin-Broos 2009:12

²⁰ Jonsson 2002; Harrell 2001

trade and commerce accepted that these varied bodies of customary laws were too deeply embedded in the lives of the people to be supplanted outright.²¹ Policies of indirect rule were thus preferred by all these intruding powers including the ‘Han’ Chinese in South West China,²² the British in India,²³ Malaya²⁴ and Sabah,²⁵ (as also in Africa),²⁶ the Brooke Raj in Sarawak,²⁷ the French in Indochina and the Dutch in Indonesia²⁸ (with the partial exception of Java).

Likewise Islamic law (*Shari’ah*) is, in its bases (*Usul al Fiqh*), legally plural deriving both from the Quran and the sayings (*Hadith*) ascribed to Muhammad by his followers, as well as building on local customs (*urf*). Thus ‘Muslim conquerors retained the customs and practices of the conquered, merely replacing the leaders and key officials’,²⁹ as in ‘the early days of Islam, tolerance and freedom of religious life was the norm’.³⁰ In Buddhist Thailand, which retained a greater measure of independence than other Southeast Asian countries, the modernising governments of the late 19th century developed a plural legal system to better rule their tenuously secured domains in the Southwest of the country.³¹

Policies of indirect rule have been explicitly recognised as the most effective means of governing previously independent peoples since the time

²¹ Recognition of customary law was intrinsic to colonial policies of indirect rule (Sheleff 1999:194).

²² Mitchell 2004; Sturgeon 2005. Mien (Yao) peoples of Southern China, Thailand, Laos and Vietnam continue to justify their right to autonomy in governing their own affairs by reference to an ancient treaty, the ‘King Ping Charter’, that they signed with the Chinese at an unrecorded date (Pourret 2002).

²³ Tupper 1881

²⁴ Loos 2002:2

²⁵ Doolittle 2005; Lasimbang 2010

²⁶ Knight 2010

²⁷ Colchester 1989

²⁸ Ter Haar 1948

²⁹ Hasan 2007:5

³⁰ *ibid.* 2007:11

³¹ Loos 2002

of the Romans who used indirect rule to annex conquered areas through treaties with cities, which included provisions for the operation of customary law especially in the Greek East.³² Later, the same policy was applied in western Europe when ‘ruling barbarians, through barbarians’ was perceived as the best approach to extend power over unruly frontier provinces.³³

As Niccolo Machiavelli famously noted in *The Prince*:

When states, newly acquired, have been accustomed to living by their own laws, there are three ways to hold them securely: first, by devastating them; next, by going and living there in person; thirdly by letting them keep their own laws, exacting tribute, and setting up an oligarchy which will keep the state friendly to you... A city used to freedom can be more easily ruled through its own citizens... than in any other way.³⁴

Another rationale whereby, in 19th century colonial India, Africa and Southeast Asia, plural legal systems were developed was that ‘customary’ law, rather than the laws of the purportedly secular colonial State, were seen as a more appropriate way to deal with issues related to family and religion, which were considered sources of local cultural authenticity and best not interfered with too much.³⁵

However, exactly because recognition of customary law implies not just the reinforcement of the laws themselves but also of the power relations and institutions through which they are developed, transmitted, exercised and enforced, it is essential to examine plural legal systems from both political and legal perspectives. Recognition may imply not just the continued

³² Harries 1999:32. In this the Romans actually took the lead from the Greeks who recognised that each *polis* (city state) had its own laws, immunities and freedoms, which were not Pan-Hellenic but had to be recognised as specific to each place (Ober 2005:396).

³³ Heather 2010; Faulkner 2000

³⁴ Machiavelli 1513:16

³⁵ Loos 2002:5

operation of customary laws but also the cooptation and control of the very fabric of indigenous society.

Cooptation of indigenous elites

For example in colonial Sarawak, the Brooke Raj recognised and reinforced the authority of the hierarchy of customary headmen and chiefs – *penghulu*, *pemancha*, *temonggong*, *tuah kampong* – which permitted the colonial power to control and tax native people right down to the village level. Exactly because these leaders' authority was reinforced by colonial State recognition, so the same leaders, over time, became increasingly independent of, unaccountable to, and detached from, the community members over whom they had authority and whose interests they were expected to represent. In the post colonial era, the division between traditional leaders and village people has, in many communities, proven to be a fatal weakness as they seek to resist the takeover of their lands by logging, mining, hydropower projects and plantations.³⁶

Likewise in 19th century colonial Natal, the small white colonial force sought to control the local African polities through simultaneous recognition and subjugation. As Knight informs us:

...under the 'Shepstone system', which dominated the colony's administrative approach for more than half a century, the *amakhosi* (Zulu leaders) were transformed from autonomous rulers into a layer of the colonial government. They appeared to govern their people according to traditional law and custom, but in fact had been through a subtle and profound shift in power; their dictates were now subject to the approval of the Natal legislature and their authority remained unchallenged only so long as it did not conflict with the broader policies and attitudes of the colonial regime.³⁷

³⁶ Colchester 1989; Colchester, Wee, Wong & Jalong 2007

³⁷ Knight 2010

Codification and control

In the Dutch East Indies, the colonial State went further than most not only in accepting the operation of plural legal systems but then in seeking to regularise and thereby control customary law itself.³⁸ The system was criticised even at the time for being paternalistic and discriminatory, with one law for the conquerors and their commercial deals and another for the natives, whose trade relations had been annexed.³⁹ The process has also been criticised for freezing customary law and thereby denying its essential vitality, which comes from it being embedded in the life and thought of the people.⁴⁰

As Sheleff in his global review of customary law and legal pluralism notes:

Any approach that sees custom – particularly of another culture – in static terms, dooms that very culture to stagnation, and ultimately rejection, by imposing on it rigidity which is generally by no means inherent to its nature.⁴¹

The freezing of custom into written codes also allows those who write such codes down to be highly selective about what they choose to include and exclude. This may be done inadvertently but may likewise result from censorious officials taking it on themselves to decide what aspects of custom and customary law are useful or acceptable and what aspects are deemed unacceptable or ‘backward’ (and see ‘repugnancy’ below). In effect, the executives of the colonial State have thereby taken over the role of the indigenous peoples’ equivalents of the legislature.⁴²

³⁸ Ter Harr 1948; Holleman 1981; Hooker 1975; Burns 1989; Lev 2000

³⁹ Reid 1995

⁴⁰ Cf Lasimbang 2010 for a comparable process in contemporary Sabah.

⁴¹ Sheleff 1999:85

⁴² Cornell & Kalt 1992

The invention of native courts

In an effort to further systematise the administration of justice, it was common practice for the colonial powers to institute native courts for the adjudication of customary law. Thus in Malaya the British created separate Islamic or customary courts for settling cases related to religion, marriage and inheritance among Malays.⁴³ However, the degree to which such native courts really allowed for the operation of customary law is contested. In Eritrea,

Customary law used in native courts derived in some degree from traditional law, but was often an emasculated or greatly simplified version of traditional law; it represented the law that the colonial government could tolerate or allow space for.⁴⁴

Likewise, in the United States, the Courts of Indian Offenses became increasingly controlled by the Bureau of Indian Affairs and regulated by a 'Code of Federal Regulation'. As Deloria and Lyle note:

When surveying the literature concerning their operation it is difficult to determine whether they were really courts in the traditional jurisprudential sense of either the Indian or Anglo-American culture or whether they were not simply instruments of cultural oppression since some of the offenses that were tried in these courts had more to do with suppressing religious dances and certain kinds of ceremonials than with keeping law and order.⁴⁵

Siam (Thailand) followed the colonial approach by creating Islamic courts in southern Thailand which function to this day.⁴⁶ Loos interprets this recognition as part of an internal colonial process by which the monarch

⁴³ Loos 2002:2

⁴⁴ Favali & Pateman 2003:14

⁴⁵ DeLoria & Lyle 1983:115

⁴⁶ Loos 2002:6

used the agenda of reform to centralise his power, suppress ethnic minorities, strengthen pre-existing domestic class and gender hierarchies and secure the interests of the elite- dominated Siamese State.⁴⁷

Native Title

Colonial powers sought where possible to obtain access to and control of commerce and resources without costly recourse to violence, though this was always a last resort. There is thus a long history of colonial States' recognising to some degree the rights of indigenous peoples to their lands and to consent.⁴⁸ In common law countries this has led to the emergence of the notions of 'native title' and 'aboriginal rights' in land, which accept that 'native' or 'backward' peoples have rights in land based on their custom.⁴⁹

The advances made by indigenous peoples since this legal principle gained wide acceptance in recent years, should not however allow us to overlook the way the colonial State sought to limit these rights, as these limits are to some extent still with us today. These limitations include: the establishment of inappropriate systems for land registration and taxation which discouraged indigenous land claims;⁵⁰ the requirement that all transfers of land must first entail the cession of such lands to the State and;⁵¹ the laying of the burden of proof of aboriginal rights on the people themselves who had to prove continuing occupancy or at least the continuing exercise of customary law over the land.⁵²

Moreover, colonial laws and regulations frequently sought to minimise rights in land, diminishing them to little more than rights of usufruct on

⁴⁷ *ibid.* 2002:15

⁴⁸ For a short summary see Colchester & MacKay 2004. The courts established in 1832 that a European nation could only claim title to land if the indigenous people consented to sell (McMillan 2007:90).

⁴⁹ Lindley 1926

⁵⁰ Doolittle 2005

⁵¹ *ibid.* 2005:22-26; McMillan 2007

⁵² Culhane 1998

Crown land, which were limited both in extent and in the bundle of rights associated with them. On the one hand, the fact that colonial powers recognised indigenous peoples' rights in land at all should be seen as a positive thing, but on the other hand the way this notion of native title was hemmed in with conditions, limitations and restrictive interpretation could also be seen as a legal fiction to allow the colonial powers exclusive rights over native lands. Until 1941 in the USA, the government held that 'Indian title was mere permission to use the land until some other use was found for it'.⁵³

Some of these limitations are still with us today. McMillen notes that 'customary law can become a trap if, as is becoming the tendency in Australia, recognition of Aboriginal Title is made conditional on the continuing practice of unchanged traditional law'.⁵⁴ A ground-breaking study looking into the social effects on Native Title in Australia exposes some of the difficulties Aboriginal peoples have had in securing their rights, given the way that the courts have circumscribed the concept. The various cases show, for example, that titles may have been considered to be extinguished where they have been subsequently overlain by titles granted to others; be considered void if custom is judged to be attenuated; be discounted if the Aboriginal descendants are judged to be of mixed blood. Landowners also find that the way the law is applied may provoke new institutions to replace prior ones, simplify or misrepresent peoples' connections with 'country' (their territories), limit or constrain the exercise of customary law, provoke contests between claimant groups, lead to the codification of customary law as part of claims processes and given greater weight to written testimonies than oral statements.⁵⁵

Even though, the study concludes, overall the recognition of Native Title has been positive for Aboriginal peoples compared to the alternative of non-recognition, nevertheless since the Native Title Act was passed:

⁵³ McMillen 2007:149

⁵⁴ *ibid.*:182

⁵⁵ Smith & Morphy 2007

many Indigenous Australians have become increasingly unhappy with both the strength and forms of recognition afforded to traditional law and custom under this Act, as well as the socially disruptive effects of the native title process.⁵⁶

Specific experiences show that while the courts may confer rights in land this does not mean they confer meaningful self-determination ‘in the sense of the recognition of the jurisdiction’ of customary law, thus imposing the western distinction between title to own lands and sovereignty to control them.⁵⁷

Between self-determination and State sovereignty

The reason for rehearsing these experiences with colonialism is that these same laws, practices and legal doctrines still prevail in many post-colonial States. On the other hand, it is true that many indigenous peoples today are in very different circumstances from these times. By means of mobilisation and assertive action, and above all through the revitalisation and reinvention of indigenous institutions, they have been able to turn the limited options offered by the recognition of customary law, aboriginal title, self-governance and native courts into opportunities to regain control of their lands and lives.⁵⁸ Examples of this emerge from the experiences presented in the following chapters. Nevertheless, the pitfalls in legal and administrative procedures are still there and pose a challenge to the unwary.

Papua New Guinea (PNG) provides a good example of why indigenous peoples need to be vigilant. Whereas customary rights in land in PNG are recognised in statutory law, meaning that some 97% of the national territory is supposedly under native title, nevertheless it is estimated that some 5.6 million hectares of clan lands, some 11% of the territory of PNG, have been fraudulently taken over by logging, mining and plantation companies through contested leases of the clans’ lands to third parties, as Special

⁵⁶ *ibid.*:24.

⁵⁷ Morphy 2007:32.

⁵⁸ Yazzie 1994, 1996; Zion & Yazzie 1997.

Agricultural and Business Leases (SABL), which have been permitted by State agencies largely due to manipulations in the way indigenous institutions and land-owner associations have been recognised (or ignored) by government officials.⁵⁹ These kinds of manipulations largely explain why the indigenous peoples in PNG are now refusing to agree to a government scheme to title their lands, as they are convinced that similar manipulations will ensue which will limit or misallocate clan lands and open the way to other interests.

Peru is currently engaged in a similar debate. In the aftermath of bloody conflicts over land and resources in 2009, the Government has passed a bill through the Congress which seeks to set out how the State will observe ILO Convention 169, to which it is a signatory, with respect to the right to consultation.⁶⁰ The law however, while repeating the provisions of the Convention (which recognises the right of indigenous peoples to represent themselves ‘through their own institutions and representative organisations, chosen in accordance with their traditional customs and norms’⁶¹), then sets out procedures by which the State will recognise and list these authorities. These limitations are similar to those found in the Constitution and laws in Indonesia, which recognise indigenous peoples and some rights, ‘so long as these peoples still exist’, thereby giving the State the discretion to determine when or whether to recognise the people or not.

Even in the operations of the courts a trend is discernible for the rule of law by the State to have gradually expanded, just as the capacity and independence of the judiciary has increased, and for the legislature to pass laws which increasingly restrict the exercise of customary law. This is particularly noticeable in laws directed at conservation and the management

⁵⁹ CELCOR, BRG, GP(Aus) & FPP 2011; Filer 2011

⁶⁰ Ley del Derecho a Consulta Previa a los Pueblos Indigenas u Originarios Reconocido en el Convenio No. 169 de la Organizacion Internacional del Trabajo. Ms. (May 2010).

⁶¹ Op cit Article 6 translation from the Spanish by the author. ILO 2009 also sets out a number of examples of how international laws have been used to limit the exercise of customary law.

of natural resources which tend to place restrictions on customary systems of land use and management just as they are recognised. The trend of 'bureaucratising biodiversity', as I refer to it, actually has the effect of taking control out of the hands of communities and empowering State agents authorised to oversee 'community forests' and 'co-managed' protected areas.

As Favali and Pateman note, aspects of law which had often been left to custom – such as religious practice, land, marriage and personal ethics – are now increasingly regulated through statutory law, by the administration and through the operations of the courts. Yet, as they note,

paradoxically it is traditional law which is more flexible in the face of change. While statutory law requires legal revision through executive and legislative acts, customary law constantly realigns through the interpretative acts of society. Even common law legal traditions cannot match its dynamism.⁶²

Further dilemmas

There are several other major dilemmas with the assertion and recognition of customary law which deserve mention. These include:

- The challenge of freezing tradition even as indigenous peoples themselves take control of their systems of law and codify their own custom.
- The challenge of clarifying the jurisdiction of customary law systems: over which areas and persons do these systems apply; what happens if disputes are between indigenous and non-indigenous persons; what is to prevent plaintiffs and defendants 'forum shopping' to find the court most favourable to them; is that a problem; how do you avoid double jeopardy or double punishment from multiple courts; what crimes or torts should be

⁶² Favali & Pateman 2003:215

referred to State or federal courts? These are some of the main issues addressed by legal specialists examining legal pluralism.⁶³

Between recognition and repugnancy

When indigenous peoples made recourse to the international human rights system in 1977 to commence the process of gaining recognition of their rights at the international level, which led after thirty years of sustained advocacy to the UN General Assembly's adoption of the UN Declaration on the Rights of Indigenous Peoples, it brought with it a challenge of a different kind. By demanding that the international human rights regime give recognition of their rights, indigenous peoples thereby subscribed to these rights and accepted that they themselves should observe their application in their own societies. The principle was explicitly accepted by indigenous representatives negotiating the text of ILO Convention 169 in Geneva in 1989. The UN Declaration on the Rights of Indigenous Peoples is also explicit on this point.⁶⁴

The question then arises, if indigenous peoples have customs, laws or practices that are seen to be violations of human rights, how are these to be addressed? The subject is a delicate one, especially for those of us who are not indigenous! Favali and Pateman note:

It is virtually impossible to engage in a critique of tradition and not be accused a priori of being imperialist, or guilty of condemnatory language and action.⁶⁵

Yet, it needs to be recognised that the State itself has a duty to protect human rights, even against the abusive application of customary law or

⁶³ See bibliography for some relevant sources.

⁶⁴ The universality of the UN human rights regime has frequently been contested. Indeed the American Anthropological Association itself denounced the UN Declaration of Human Rights in 1948 on the grounds that it was too western and individualist in its conception and ignored more collective notions of freedom, rights and justice of other societies.

⁶⁵ Favali & Pateman 2003:195

religious courts.

Indeed it was concern with exactly these duties which was used by colonial administrators and justices to legitimise their interference in customary law. Perceived abuses such as slavery, human sacrifice, cruel and unusual punishment, witchcraft, unjust property laws, polygamy and female genital mutilation (FGM) were considered 'repugnant' and on these grounds could be justly extirpated, by force if necessary. Indeed, in India, colonial interventions to prevent human sacrifice were used as a justification for the wholesale takeover of tribal areas by force, and resulted in huge numbers of tribal people being killed ostensibly to save the lives of a few dozen.⁶⁶

Contrarily, cases are noted where westerners imposed the death penalty, even in societies where this was considered excessive.⁶⁷ Indeed, such was the prejudice against the 'backward' ways of tribal peoples, that it was not rare that the entire upbringing of a child under native custom was considered 'repugnant', justifying the separation of children from their parents and their being sent to boarding schools to be brought up to understand 'civilised' values.⁶⁸ Such practices were the norm in North America and Australia in the 19th and early 20th century, but as late as the 1990s government programmes in Irian Jaya pursued the same approach.⁶⁹

Of course, some of the limitations on customary systems imposed in the name of human rights are now widely accepted. Slavery, suttee and human sacrifice have few defenders. Other impositions however are far from being so widely accepted. A controversial case is that of Female Genital Mutilation (FGM) which was recognised as an expression of violence against women at the UN First World Conference on Human Rights in Vienna in 1993 and yet has many defenders as a traditional practice in many societies, including by women. FGM was expressly forbidden by the Fourth

⁶⁶ Padel 1996

⁶⁷ Sheleff 1999:124

⁶⁸ Adams 1995; Sheleff 1999:162

⁶⁹ See also Li 2007 for other cases of Indonesian government intervention in the lives of 'estranged tribes'.

World Conference on Women held in 1995 which invoked the Convention of the Elimination of Discrimination against Women (CEDAW). Yet CEDAW has also been invoked as a justification for the breakup of collective lands on the grounds that land should be titled equally to men and women.

The issue that needs clarifying is who defines, and then who acts to extirpate, 'bad custom' and how is this reconciled with the right to self-determination. With respect to customs that discriminate against women for example, the 'Manila Declaration' of indigenous peoples has acknowledged that:

... in revalidating the traditions and institutions of our ancestors it is also necessary that we, ourselves, honestly deal with those ancient practices, which may have led to the oppression of indigenous women and children. However, the conference also stresses that the transformation of indigenous traditions and systems must be defined and controlled by indigenous peoples, simply because our right to deal with the legacy of our own cultures is part of the right to self-determination.⁷⁰

Untangling the triangle: ways forward for indigenous peoples

This short paper has tried to set out some of the dilemmas that need to be confronted by those trying to make use of the reality of legal pluralism to secure justice for indigenous peoples. We see that three bodies of law (with their many subsidiary layers) are operating in relative independence of each other – customary law, State law and international law. Societies organised through customary law have historically been confronted by the dual imposition of statutory laws and international laws, which, by and large,

⁷⁰ The Manila Declaration of the International Conference on Conflict Resolution, Peace Building, Sustainable Development and Indigenous Peoples, organised and convened by Tebtebba Foundation (Indigenous Peoples' International Centre for Policy Research and Education) in Metro Manila, Philippines on December 6 – 8 2010. Available at: <twinside.org.sg/title/manila.htm>

have been mutually reinforcing and have justified severe limitations of the rights and freedoms of indigenous peoples.

The international human rights regime that was set in place at the end of Second World War was, in large part, developed as a reaction against the abuses of State policies which had discriminated against and sought to exterminate whole peoples. The Atlantic Alliance, which was formed during the war itself as a counter to the Axis powers, emphasised the collective right to self-determination and gave rise to the United Nations as a union of member States resolved 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.⁷¹ An early expression of this resolve was thus the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.⁷²

However, the International Covenants laboriously developed during the Cold War, as the 'first generation' and 'second generation' of human rights, gave emphasis first to the civil and political rights of individuals against the State, in line with the social contracts that are perceived to underlie western democracies, and second to the economic, social and cultural rights of individuals that socialist States in particular sought to uphold through centralised government control. Thus whereas both these Covenants gave strong recognition of the right of all peoples to self-determination, they gave little further recognition of collective rights. Their effect was thus to reinforce the rule of positive law over custom and facilitate both private property and State control.

It has been the extraordinary achievement of indigenous peoples during the late 20th and early 21st centuries to have successfully challenged this legal prism and ensure that greater emphasis is given to collective human rights.⁷³ International law thus recognises the rights of indigenous peoples including, most pertinent for this study, their rights to; self-determination; to own and

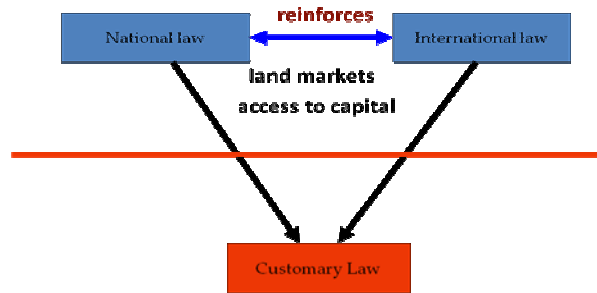
⁷¹ Charter of the United Nations.

⁷² UN 1994:673

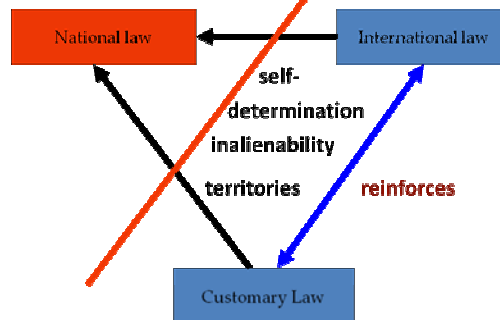
⁷³ For a critical review see Eagle 2011.

control the lands, territories and natural resources they customarily own, occupy or otherwise use; to represent themselves through their own institutions; to self-governance; to exercise their customary law and; to give or withhold their free, prior and informed consent to measures which may affect their rights. Indigenous peoples are now practised at invoking international law to support reforms of State laws so they recognise indigenous peoples' rights in line with countries' international obligations and in ways respectful of their customary systems.

Western individualist laws: 1st and 2nd generation human rights



3rd generation human rights



This reconfiguration of human rights thus poses a challenge to States whose laws and policies discriminate against indigenous peoples and other peoples who make up the populations of their countries. By insisting that these peoples' collective rights must also be recognised, secured and protected by law, international laws and judgements have reaffirmed the validity of customary rights and the relevance of customary law. A substantial volume of jurisprudence has emerged in the UN treaty bodies, at the Inter-American Commission and Court of Human Rights and, more recently, at the African Commission on Human and Peoples' Rights, which sets out how these rights need to be respected and which instruct and advise national governments on how to reform national laws and policies in line with countries' international obligations.⁷⁴

Indeed even during the 1990s, the progressive recognition of indigenous peoples' collective rights in international law in response to the claims of these peoples and pressure from supportive human rights defenders already led many States, especially in Latin America, to revise their constitutions, legal frameworks and in particular their land tenure laws to accommodate these rights.⁷⁵ The accompanying papers in this volume explore some of the challenges now being faced in Southeast Asia to reconcile these bodies of law.

There is however some way to go before it is generally accepted that:

Custom, then, far from being a problematic aspect of tribal life in the context of the modern world, becomes an integral aspect of a legal system, not an artificial addition reluctantly conceded, but an essential component of a meaningful law that is accepted by the citizenry, because it is deeply embedded in their consciousness as a living part of their culture.⁷⁶

⁷⁴ MacKay (ed.) 2005-2011: four volumes.

⁷⁵ Griffiths 2004

⁷⁶ Sheleff 1999:87

2. Legal pluralism in Sarawak

An approach to customary laws on their own terms under the Federal Constitution

Ramy Bulan

Introduction

Malaysia is a federation of thirteen States of which Sarawak is the largest. Eleven States are in Peninsular Malaysia and two in East Malaysia. Penang and Melaka were formerly Straits Settlements and later British colonies. Pahang, Perak, Selangor, Negeri Sembilan and Johor comprised the former Federated Malay States and Kelantan, Trengganu, Kedah and Perlis were the Unfederated Malay States. Sabah and Sarawak, the Borneo States, were formerly British protectorates and later British colonies until Malaysia was formed in 1963. Since then, three federal territories have been created, namely, Kuala Lumpur, Putra Jaya and Labuan. Legislative powers are divided between the Federal and State governments¹ where the Federal government has powers to pass laws on most matters of national importance, but the State retains the legislative powers to pass laws on local government, land, forestry, customs and religion.

One of the most important legacies of the British colonial administration is the legal system which is fundamentally based on the English common law traditions. While English law was applied as the law of general application, exceptions were allowed based on ‘the personal laws’ of certain groups according to race or religion. It was British policy to apply common law, adapted to the conditions and wants of the “alien races” insofar as the religions, manners and customs of the local inhabitants permitted, to prevent the common law from operating unjustly and oppressively² and to

¹ Federal Constitution, Schedule Nine, List I and II

² *Choa Choon Neo v Spottiswoode* [1835] 2 Ky. Ecc 8,11.

avoid hardship to the local inhabitants.³ The religions and customs of the local inhabitants were recognised by general principles of English law as exceptions, particularly in its ecclesiastical jurisdiction.⁴ This was in accord with the doctrine of continuity and the general way in which British law recognised local laws and customs in the nations that, by consent or force were added to the British Empire.⁵ Although the accommodation and adaptations were somewhat eclectic, on the whole, it meant that pre-existing *adat* or customary laws of the various “alien races”⁶ as well as the recognition of Islamic religious laws applied as personal laws.

The principles of English common law and the rules of equity were received at different chronological points in Malaysia’s history. English law was introduced in the Straits Settlement through the Royal Charter of Justice 1826. The Malay States received English law through the Civil Law Enactment 1937 and in the Unfederated Malay States in 1951 through the Civil Law (Extension) Ordinance. These were merely formal receptions as English law and equity principles had already been applied indirectly in those States through administrative arrangements well before the statutory receptions. English principles of English law and equity were applied because they were in accordance with principles of natural justice which the courts had an inherent jurisdiction to apply.⁷

In the Borneo States, English law applied in Sabah through the Civil Law Ordinance 1938 and the North Borneo Application of Laws Ordinance of 1951, and in Sarawak, through the Application of Laws ordinance 1928 and

³ *Choo Ang Choo v Neo Chan Neo* (Six Widows Case) [1911] 12 SSLR 120

⁴ Sir Benjamin Malkin in construing the Charter in “In the Goods of Abdullah” [1869] 1 Ky.216-221 held that the religions and customs of the local inhabitants were recognised by general principles of English law as exceptions, particularly in its ecclesiastical jurisdiction and not by the Charter.

⁵ An excellent explanation of the principles of continuity is given by Mark D Walters in “The “Golden Thread” of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982” 1999 in *McGill Law Journal* 712.

⁶ *Choa Choon Neo v Spottiswoode*, above n1.

⁷ *Motor Emporuim and Arumugam* (1933)

1949. In Sabah, the modifications to English laws by local customary laws were only to the extent that such customary laws were “not inhumane, unconscionable or contrary to public policy”, whereas in Sarawak, English law applied subject to modifications by the Rajah Brooke and, as was applicable, with consideration for native customs and local conditions. The continued application of English law as part of Malaysian law is found in the Civil Law Act 1956 (Act 67) (Revised 1972) where section 3 maintains the proviso that common law, rules of equity and statutes of general application apply insofar as “the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary”.

Today, Malaysia’s national legal system is a plural legal system with an integration of legislation, common law and customary laws. It is founded on a common law tradition but coexists with *syariah* (Islamic) and customary laws, each with a separate system of courts, namely, the civil courts, the *syariah* and native courts. Matters relating to common law and equity and statutory laws are tried under a system of civil courts which are Federal courts. In Sabah and Sarawak, breaches of native customary laws are tried in a system of Native Courts, which are State courts.

Prior to 1988, Malay Muslim laws and Islam were just another subject for regulation in the same manner as contracts, crimes and land. Despite the acknowledgement that Islamic law was local law and that civil courts must take judicial notice of it,⁸ Islamic law applied as personal law concerning marriage, divorce and related matters applicable to Muslims, but reduced to personal laws which the English common law was prepared to accept. Judges generally applied English common law and equity to fill the gaps in the local law. In 1988, the constitution was amended to include a new article 121A, which ousted the jurisdiction of the (civil) High Court over matters that fell under *syariah* courts.

These separate courts are a reflection of the multi-ethnic, multi-religious and multicultural nature of Malaysian society. Although the personal laws

⁸ *Ramah v Laton* [1927] 6 FMSLR 128

mentioned earlier were initially related to religious and family laws, these exceptions have extended to proprietary rights and have evolved as a basis for recognition of fundamental human rights and minority rights.

The intent of this paper is to deal only with customary laws under the Federal Constitution. Given the plural legal system that now exists, it considers how the courts have or can employ this plurality to achieve justice and equality to prevent the law from being oppressive, particularly for indigenous peoples and their land rights. It argues that native customary rights must not merely be reduced to those that the common law is prepared to accept, nor should customary laws be interpreted through the prism of common law, but rather must be taken in their own context. Their validity is to be determined by reference not to the common law, but to the supreme law; the Federal Constitution. This means that the evidentiary rules and methods of proof must take into account the uniqueness of customary laws and the rights that accrue there under as fundamental rights protected by the Federal Constitution.

To say that a right is protected by the Federal Constitution elevates its status and imposes a greater obligation on the government with respect to actions potentially affecting those rights. As the supreme law of the land, the Federal Constitution provides the 'plumb line' against which all laws and actions of the administrators must be measured and a court may declare ultra vires or void those laws that are inconsistent with the Federal Constitution.

Customs as a source of law

The definition of law under Art 160(2) of the Federal Constitution States that law 'includes written law, the common law in so far as it is in operation in the Federation or any part thereof and custom or usage having the force of law', thus making customary law an integral part of the legal system. Indeed, customary laws of the various groups inhabiting Malaysia, including Malay, Chinese and Hindu customary laws, have long been recognised in Malaysia. However, it is aboriginal and native customary laws

that have continued to have the most significance and are at the cutting edge of the development of laws in Malaysia today.

Not only are customary laws defined as part of the law under Art 160(2), Art 150 also provides constitutional protection for native law and customs as part of the basic structure of the Federal Constitution. Given that the federal and State legislative powers are divided, it is significant to note that under Art 150(5) of the Federal Constitution, in a state of emergency, Parliament may make laws with respect to any matter, including that which is under the States' legislative powers, if it appears that the law is required by the emergency. Clause 6A of Art 150, however, states that this power does not extend to Malay *adat* or to any matter of native law and customs in the States of Sabah and Sarawak. This indicates the weight of recognition that is intended and affords a very important and unique protection for rights based on customs, whatever form they may take.⁹ This forms part of the unique right that was negotiated by the founding fathers at the formation of Malaysia, that is to say, that the natives be allowed to practise their customary laws.¹⁰ This brings us to ask the question: what is customary law?

The term customary law is used interchangeably to refer to *adat*, traditional law, or 'tribal law', native law and custom, distinguishing it from the system of laws known to the State legal-judicial system, which is generally based on common law (civil-Roman law). However, the literature on *adat* and customary law often uses the two terms interchangeably, almost cursorily lumping them together into one single concept.¹¹ In Sarawak, the term commonly used to refer to customs is *adat*. *Adat* can also mean the natural order or rules of law, legal usages and techniques and law in the sense of

⁹ Note that matters of religion, customs, land, forestry and local government come under the purview of the State jurisdiction.

¹⁰ The record of the discussion of the Consultative Committee brings this out very clearly.

¹¹ Jayl Langub 1998. Langub says that 'in virtually all the languages of the non-Muslim natives or Dayaks of Sarawak, custom and customary law is known as *adat*.'

concept of law.¹² The generic term for this body of customs is ‘Indonesian *adat*’, which the Dutch had developed into the *adatreticht*.¹³ *Adat* pervades and regulates the whole native way of life. In this sense, it is not only ‘fashion’ or acceptable behaviour, but has coercive force. It refers to an established system of immemorial rules or patterns of social behaviour which, through long-term usage and common consent of the community, are accepted by a given society as beneficial and binding upon itself, as a means of generating harmonious inter-personal relations and solving conflicts in order to maintain a cohesive society. A custom would be upheld if it was of great antiquity and dating back to time immemorial, meaning that in the absence of sufficient rebutting evidence there is ‘proof of the existence of the custom as far back as living witnesses can remember’.¹⁴ Established customs become the accepted norm or the law of the place¹⁵ and the leadership will use the coercive powers they may possess to ensure compliance. These customary laws include norms of correct social behaviour, prescribed rules for ceremonies including marriage and religious rites, agricultural systems¹⁶ and settlement of disputes involving community

¹² Hooker 1972

¹³ There are massive Indonesian *adat* compilations made by Dutch scholars and which would require separate treatment. See Peter Burns, *The Leiden Legacy: Concepts of Law in Indonesia*, Leiden: KITLV 2003; M B Hooker, *Adat Law in Modern Indonesia*, (1978); Van Vollenhoven, *Het Adatretch van Nederlandsch-Indie (Adat Law of the Netherlands Indies)* (1931–1933) 3 vols, and Ter Haar, *Adat Law in Indonesia* (1948). What is referred to as ‘Indonesian’ customary law in the Sarawak context is not restricted to the Indonesian Republic, but includes almost the whole area of Southeast Asia and its islands between Australia and Thailand, where ‘the practices of communities in these regions are fairly similar’. See Maxwell W E 1884 ‘The Law and Custom of the Malays with Reference to the Tenure of Land’ in *Journal of the Royal Asiatic Society*, Straits Branch 13:75–220

¹⁴ Halsbury’s *Laws of England*, Vol 12, 4th edn, 1975, 422, quoted in Nor Nyawai I [2001] 6 MLJ 241, 258

¹⁵ See Sir Benson Maxwell’s decision in *Sahrip v Mitchell & Anor* (1877) Leic. Reports 466, 468

¹⁶ See Jayl Langub 1998 ‘The Ritual Aspects of Customary Law in Sarawak with Particular Reference to the Iban’ in *Journal of Malaysian and Comparative Law* 25:45-60

membership, kinship, leadership feuds, resource access and property rights.

As in many jurisdictions, customary laws in Malaysia are largely unwritten. They are oral traditions and rules known to the community which are handed down from generation to generation and which have their own values and norms. To the extent that they accommodate the changing realities facing the community, they are also flexible. However, this does not mean that they are incoherent. Rather, they will continue to evolve and develop to meet the changing needs of the community. Customs and oral histories are often peculiar to each locality; oral histories generally relate to particular locations, families and communities, and thus might be unknown outside of that particular community. As a result, the difficulty has often been that of establishing proof of these customs outside the immediate sphere of the community. It has primarily been the courts which have had to explore and determine the customs' existence, either by declaring that a certain practice is indeed an accepted custom, or by distinguishing between a certain custom that exists in one locality from customs that exist in another locality.

The courts have relied on a number of tests to determine the existence, validity and proof of customs. Blackstone's Commentary on the laws of England suggested that the custom must be immemorial, reasonable, continuous, peaceable, certain or clear, compulsory (not optional) and consistent with other recognised customs. These guidelines were used by the Rajah Brooke in Sarawak for his administrators and adjudicators in the performance of their dual duties as administrators and arbiters in the district or Resident's courts. To be accepted, customs had to be reasonable and not offend 'humanity, morality and public policy.'¹⁷ They should not be 'inhumane, unconscionable'¹⁸ or 'repugnant to good administration'.¹⁹

¹⁷ Notes for the Guidance of Officers in Interpreting Order No. L-4 (Law of Sarawak Ordinance) 1928 (Cap. 1) (Revised Edn. 1947) ('Guidance') (quoted in MB Hooker (ed), *Laws of South-East Asia, Volume II, European Laws in South East Asia* (1988) 420. See *Edet v Essien* (1932) 11 NLR 47, for the use of the repugnancy test in another common law jurisdiction.

¹⁸ Civil Law Ordinance 1938, s 3.

¹⁹ Guidance, above n 16, 420.

Reasonableness of the practice is an important foundation. What is reasonable is often measured against the behaviour and practices of those within the area in which it operates. For instance, the Malay system of customary land tenure which provided for the payment of a tithe was approved as being 'good and reasonable custom'. It was upheld by the Court of Judicature in *Sahrip v Mitchell & Anor*.²⁰ The claimants had a right to the land in question simply because the custom or local law gave it to them.

Given these guidelines, under English law, customs are a question of fact which must be proven. This raises the question; how should customs be proven and the rights based on native laws and customs thereby established?

Proof of native laws and customs: "stories matter"

The question of proof and the treatment of oral histories of indigenous peoples by the courts is endemic to native customary land rights and aboriginal rights litigation generally. Customs may be proven or established by reference to writers on indigenous law, public records, village oral traditions and the opinion of persons likely to know of the existence of such traditions. Even in using the works of writers, there have been voices cautioning against text books and old authorities which tend to view indigenous law through the prism of legal conceptions that are foreign to it. Courts may also be confronted with conflicting views on what customary law is exactly. In the case of *Angu v Attah*,²¹ Sir Arthur Channel said an alleged rule of customary law must be 'proved in the first instance by calling witnesses acquainted with the native custom until the particular customs have, by frequent proofs in the courts, become so notorious that the

²⁰ (1877) Leic Reports 466. The introduction of English law through the Charter of Justice did not supersede that custom any more than it superseded customs in England.

²¹ *Angu v Attah* (1916) PC Gold Coast 1874–1928, 43

courts will take judicial notice of them'.²²

The courts in Malaysia have generally allowed oral evidence to be adduced to prove customary practices. Proof of customs through oral traditions was allowed in both *Sagong bin Tasi and Ors v Kerajaan Negeri Selangor and Ors* ('*Sagong I*'),²³ and *Nor anak Nyawai v Borneo Pulp Plantation*,²⁴ two of the leading Malaysian cases on common law recognition of customary rights to land. In *Sagong I*, Mohd Noor Ahmad J ruled that oral histories of the *Orang Asli* relating to their practices, customs, traditions and their relationship with the land be admitted as evidence subject to the terms of the *Evidence Act 1950*, s 32(d) and (e). With respect of native customs, s 48 and 49 of the *Evidence Act 1950* allow for the opinions of a living person as to general rights or customs, tenets or usages. Mohd Nor J stated that the statements on oral histories must be of public and general interest; must be made by a competent person who 'would have been likely to be aware' of the existence of the right or the correct customs; and must be made before the controversy as to the right or the customs.²⁵

In the case of *Nor Nyawai*, oral narratives and oral histories of the Iban and expert evidence were adduced and admitted to prove customary practices of the Iban community. The customs that are admitted as proof of title and evidence have specific contents and implications for native customary rights and interests in customary lands. Similar sentiments were expressed by Haidar Bin Mohd J (as he was then called) in *Hamit bin Mattussin & Ors v Superintendent of Lands & Surveys & Anor*.²⁶ One of the first methods of proof, he said, "consists of testimony of a witness who deposes, from his own personal knowledge, to the actual existence of custom or usage". That evidence "may be based on observation of many instances, and may

²² *Anguh v Attah* (1916) PC Gold Coast 1874 -1928, 43 at 44.4

²³ *Sagong I* [2002] 2 MLJ 591, 622-24

²⁴ *Nor Nyawai I* [2001] 6 MLJ 241, 251

²⁵ *Sagong I* [2002] 2 MLJ 591, 623

²⁶ [1991] 2 CLJ 1524

sometimes be based on reputation or hearsay”.²⁷

One of the main contentions raised against the enforcement of customary rights in Sarawak is that custom or *adat* covers only social etiquette or norms of correct social behaviour. Customs, it is argued, become ‘customary laws’ only when they are codified.²⁸ Central to this argument is the meaning given to the phrase “custom and usage having the force of law”, where “law” is taken to be only written law. It is also contended that these customs were “not part of the Rajah’s legislation or codified” and although “practised, are not part of native customary law”.²⁹ The rationale given is that [written] laws and codified customs “provided a degree of certainty and stability in the implementation of the State’s development goals.”³⁰

However, it can also be argued that this narrow view appears to put certainty above the essence and justice of the law. This concept of law as man-made laws passed by legislature monopolises the Malaysian concept of law³¹ and is undoubtedly influenced by John Austin’s positivist theory that law is the command of the sovereign. Austin, a leading jurist, declared that a custom becomes law when it is recognised by a judge of the State. Until the legislator or the judge impresses it with the character of law, the custom is nothing more than positive morality. According to Austin, “if it was recognised as law, it must have been law already”. By Austin’s definition, there is no such thing as a customary law which is distinct from State law. This conception of law ignores the reality of native existence and survival based on the land and the customary laws established and derived from the community.

²⁷ Cross on Evidence (Third Edition)

²⁸ See Fong ‘Native Customary Laws and Native Rights Over Land in Sarawak’ in SUHAKAM (ed), *Penan in Ulu Belaga: Right to Land and Socio-Economic Development* (2007) 175, 177 for an explanation of this argument.

²⁹ *ibid*:36

³⁰ Myth, Facts and Reality of EU FLEGT- VPA: Sarawak’s Perspective, Sarawak Timber Association, 2009, p. 34

³¹ Hugh Hickling, *Introduction to Malaysian Law*, Pelanduk Publications (2001)

Be that as it may, in *Nor anak Nyawai v Borneo Pulp Plantations*, Ian Chin J recognised this and referred to *adat* as a “practice by the habit of a people and not by the dictates of the written law”. In *Madeli bin Salleh v Superintendent of Lands and Surveys, Miri Division & Anor*,³² the Federal Court reaffirmed the recognition of customary laws as pre-existing laws, whose existence does not depend on specific legislation or find its source in statutes or executive direction to ‘create’ them.

Admittedly, in consonance with constitutional recognition, some native customs in Sarawak have been codified. Beginning with the Adat Iban Order of 1993 and the Adat Bidayuh Order, other codes have been drafted based on the structure reflected in the Iban model.³³ Concepts of Iban customary laws³⁴ were identified and translated into terminologies that were not only acceptable to Iban throughout Sarawak, but also suitable for administrative and legislative purposes. Some provisions of the Tusun Tunggu (an earlier written ‘code’) were rewritten and recast and variations among the riverine groups excluded while the core or the commonly practised *adat* were included in the Adat Iban Order. These codified customs are however not exhaustive. A savings clause provides that an action or suit in respect of any breaches of other customs recognised by the community but not expressly provided for in the code, may be instituted by any person in any Native Court having original jurisdiction over such matters and that the court may impose such penalty or award as it considers appropriate in the circumstances.³⁵

³² [2005] 5 MLJ 305

³³ The Adat Iban comprises 8 chapters, dealing with customs relating to longhouse community living, farming, customs on marriage and family, distribution of property, deaths and burial. It also includes a saving provision.

³⁴ At a meeting with the leaders of the community held in Kapit in March 1981, it was agreed that the Iban customary laws throughout Sarawak would be codified based on the existing Tusun Tunggu Iban (Sea Dayak) Third Division 1952 and Dayak Adat Law Second Division 1963, which were compiled and edited by AJN Richards.

³⁵ In the Adat Iban Order this is included as section 198 under the heading ‘miscellaneous’.

Uncodified and codified customs are therefore equally valid sources of law, as uncodified customs are still practised and govern the lives of the communities.³⁶ In *Nor anak Nyawai v Superintendent of Lands*³⁷ (Nor Nyawai) Ian Chin J concluded that “customs are not dependent for their existence on any legislation, executive or judicial declaration ... They exist long before any legislation”. Ian Chin J described native customary rights in the words of Brennan J in *Mabo No 2*, saying that “it has its origins and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of the territory”. Indeed, some of the most important customs that have *not* been codified are customs relating to land tenure, which continues to be practised by various native groups. These customs lie at the core of the economic, spiritual and cultural longevity of native communities and touch on the fundamental aspects and values of these native communities. This is clearly borne out in *Nor anak Nyawai* where the Iban customary practice of *pemakai menoa*, or customary territorial domain, is declared as a valid existing custom of the Ibans.”

It is instructive at this juncture to say something about native customary rights (NCR) to land in Sarawak and the statutory provisions through which they are acquired. The relevant law is embodied in sub s (1) of s 5 of the *Land Code 1957* which provides that, as from January 1st 1958, “native customary rights may be created” in accordance with native customary law of the community or communities concerned, by the methods specified in sub-s (2) which are: the felling of virgin jungle and the occupation of the land thereby cleared, planting of land with fruits, occupation of cultivated land, use of land for a burial ground or shrine, use of land for rights of way, and by any other lawful method (the last phrase was deleted in 2000).³⁸ Existence of native customary lands also need to be seen in the context of a specified classification of land under the code, namely: Mixed Zone Land (may be held by any citizen without restriction), Native Area Land (land

³⁶ Nor Nyawai I [2001] 6 MLJ 241, 268, 287

³⁷ [2001] 6 MLJ 241

³⁸ A 78/2000. This amendment is yet to be enforced.

with a registered document of title, to be held by natives only),³⁹ Native Communal Reserve (declared by Order of the Governor in Council for use by any native community and regulated by the customary law of the community), Reserved Land (for public purposes), Interior Area Lands (land that does not fall under Mixed Zone or Native Area Land or Reserved Land and for which title cannot be registered) and Native Customary Land (NCL) (land in which customary rights whether communal or otherwise, have been created). By virtue of this classification, NCL can only be created in Interior Area Land.

In *Nor Nyawai & Ors v Borneo Pulp Plantations Sdn Bhd & Ors (Nor Nyawai)*,⁴⁰ the Iban plaintiffs argued that they have a customary right both under common law and the *Land Code* and its predecessors, giving them a right to native customary lands. They based their claim on their exclusive use and occupation of the land under a customary system of territorial control of land. Under Iban customs, they had acquired native customary rights to lands which they regarded as *pemakai menoa* (literally, “land to eat from”), part which had been encroached upon.

The main issues centred around the native identity of the claimants, whether the Iban customs of creating *pemakai menoa*, *temuda*⁴¹ and *pulau galau*⁴² were the same as those practised by their ancestors and recognised by law and if so, whether they conferred rights over land. Were those customs abolished or were there ‘clear and plain’ extinguishments of those ‘pre-existing rights’ by order of the Brooke Rajahs or by subsequent legislation? Could oral evidence of customary practices be accepted as evidence?

The claimants’ Iban identity was easily established as they all spoke Iban. Upon admission of expert oral evidence, the High Court recognised their

³⁹ Land declared as such under the Ord. No. 19/1948 remains. Native Area Land may also be declared as such under s 4(2) or (3) or (4)(b) or s 38(5) of the Land Code 1958.

⁴⁰ [2001] 2 CLJ 769

⁴¹ Formerly cultivated lands at various stages of young wild growth.

⁴² Customary communal forest reserve.

pre-existing rights to lands, based on their customary practices as evidenced by their existence as a community surviving on the land. It also recognised the customary tenure involving the *pemakai menoa*. The term *pemakai menoa* refers to an area of land held by a distinct longhouse or village community exercised within a *garis menoa* – territorial boundaries between villages marked by rivers, hills, clumps of trees or other natural features. Under Iban custom, each longhouse has a territory over which a community exercises control. The *pemakai menoa* includes: the *tana umai* (cultivated lands- farms and gardens), *temuda* (formerly cultivated lands at various stages of young wild growth), *tembawai* (old longhouse sites) and *pulau galau*, a forest reserve or land that is left uncultivated, which includes an area of forest whether wholly or partially surrounded by *temuda* for communal use. Such communal use areas include those for the supply of natural resources such as rattan and other jungle produce, water catchment areas, hunting and fishing areas, and land reserved to honour a distinguished (deceased) person. A *pulau* may be owned by a single village or shared between two or more village communities.

The recognition of the Iban customary practice of *pemakai menoa* was significant because it epitomised the existence of traditional forms of occupation, albeit not specifically enumerated under the five limbs of s 5 of the *Land Code*. Despite increasing comprehensive regulatory legislation, Ian Chin J found that customary rights associated with the terms *temuda*, *pulau* and *pemakai menoa* had not been abolished by the code or any other statute but had survived through the Brooke orders and ordinances of the colonial period up to the present day. The Ibans were acknowledged to be “rightfully in possession of ... [their customary land] right”.

On appeal, the defendants contended that those rights must be recognised by statute. They argued that recognition of NCR under the Land Code 1958 had to be through the creation of *temuda* (the felling of virgin jungle for cultivation and left to grow into secondary jungle) and not simply by roaming or foraging. It was also argued that the terms *pulau* and *pemakai menoa* did not appear in any of the statutes, nor in the codified Iban Adat.

On July 9 2005, the Court of Appeal granted the appellants' appeal against the grant of compensation to the plaintiffs⁴³ on the grounds of insufficient proof of occupation in the disputed area. It was acknowledged, however, that they had satisfied the test for NCR in the adjacent area. It appears that the proof required was that of actual 'cultivated areas' or *temuda* without reference to other aspects of the traditional methods of occupation. Notably, the Court of Appeal⁴⁴ did not refute the High Court's finding that the Iban concept of *pemakai menoa* did exist.

This case is a clear illustration of how the body of indigenous traditional knowledge that relates to the social and physical aspects of indigenous existence, and to ceremonial practices that govern their relationship with the land within their own peculiar cultural practices, may not necessarily be contained in written codes. Often, as was the case in *Nor Nyawai*, the evidence took the form of oral narratives and stories of occupation. In many instances, the evidence of indigenous occupation and connection with the land would be evidenced in their narratives, the indigenous taxonomy of rivers and sites on the land, stories, songs and ballads. Their songs and stories speak of peoples' proprietary rights, responsibilities on the land and tell of regimes that govern relationships to the land.⁴⁵ These provide an indigenous perspective that must be given weight, even in litigation. This brings us to the evidentiary standards required to prove customs in which rights are anchored. Clearly, "stories matter."

In the celebrated Canadian Supreme Court case of *Delgamuukw v British*

⁴³ Superintendent of Lands and Surveys, Bintulu v Nor Anak Nyawai and Ors. 'Borneo Pulp wins Appeal Case on NCR Land', The Sarawak Tribune, Saturday, 9 July 2005, 3.

⁴⁴ [2006] 1 MLJ 256

⁴⁵ Borrows J (2001) writes on the importance of oral history as a valuable source of information about a peoples' past. Despite its value, there are particular challenges with regard to admissibility and interpretation. He highlights the need for the courts to be sensitive to the factual, social and psychological context within which a litigation arises. A judicial inquiry in context is necessary so that oral history is placed on equal footing with other types of evidence.

*Columbia*⁴⁶, one of the most important pronouncements was that aboriginal title was recognised by both common law and constitutional law. The other was that “stories matter.” This phrase refers to the court’s precedent-establishing decision that aboriginal oral histories must be given significant weight. In *Delgamuukw*, a new trial was warranted because the trial judge erred in his interpretation of oral histories and failed to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims. The recognition of aboriginal histories is of practical significance since such histories are the primary means by which native nations can prove their claims. Referring to his earlier decision in *Van de Peet* (p.68), Chief Justice Lamer wrote,

A court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times when there were no written records.

Lamer CJ went on to say,

“In other words, although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly *sui generis* and demand a unique approach to the treatment of evidence which accords due weight to the perspective of indigenous peoples. However, that accommodation must be done in a manner which does not strain the Canadian legal and Constitutional structure.”⁴⁷

To insist on written records as a means of proof is to “impose an impossible burden of proof on [native] peoples, and render nugatory any rights they have” because “most [native] peoples did not keep written records.”⁴⁸

The same sentiment was also expressed by the Malaysian court in *Sagong*

⁴⁶ [1997] 3 SCR 1010

⁴⁷ (1997) 3 SCR 1010

⁴⁸ *ibid.* quoting from *R v Simon* [1985] 2 SCR 387 at 408.

Tasi.⁴⁹ In that particular case, the oral histories of the Orang Asli relating to their practices, customs, traditions and their relationship with the land, were admitted, resulting in recognition of customary rights of the Orang Asli. At a deeper level, recognising the evidentiary difficulties is a “profound effort to reconcile how different peoples with different cultural traditions see the world”. It is also a recognition that native rights “demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples”.⁵⁰

To see through the “indigenous law” prism: an approach to customary law on its own terms

In the recognition of customary rights, it must be made clear that while common law recognises native customary rights to land, it is not a creation of common law. The Federal Court itself upheld that the common law of Malaysia recognises native customary title in *Superintendent of Lands & Surveys & Government of Malaysia v Madeli bin Salleh*.⁵¹ It is a right that is sourced in native law and customs and is recognised by the constitution. Failure to recognise this subtle but very important distinction can lead to dire consequences for native land rights.

To revisit the decision in *Adong v Kuwau*, Mokhtar Sidin, as he then was, said, “I believe this is a common law right which the natives have”. Later, Abdul Azizi bin Abdul Rahman J in *Amit bin Salleh*, drawing a parallel between communal rights in NCR in Sarawak and those of Orang Asli in *Adong bin Kuwau*, called it “common law right”. To the extent that this is a right that is derived through pragmatism and judicial decisions, it is a common law right. However, there is a danger of misinterpretation of the substance if the courts interpret the customary rights through the prism of common law concepts. A classic case is that of *Keteng bin Haji Li v Tua Kampong Suhaili*⁵², in which Digby J categorised the right to land under

⁴⁹ [2022] 2 MLJ 591.607.

⁵⁰ Lamer CJ in *Delgamuukw* (1997) # SCR 1010, at 1069.

⁵¹ [2008] 2 MLJ 212

⁵² [1951] SCR 9

native law and custom as the right of a mere licensee. He held that as an occupier, the native holder is at best, “a mere licensee and he has no legal interest which he can either charge or transfer.” This term, which is derived from the English doctrine of tenure and seen through the lenses of common law, is ill fitting and denies the existence of a valid native perspective of land ownership based on native law and customs. Ian Chin J in *Nor Nyawai* took this concept but maintained that this licence was “not terminable at will.”

In handing down decisions on the content of indigenous land rights in Crown colonies, the Privy Council repeatedly emphasised the importance of customs and reiterated that courts should examine such customs free from the limited notions of English common law property rights. The dangers of looking at indigenous law purely through a common-law prism are obvious. The two systems of law developed in different situations, in different cultural contexts and in response to different conditions. While native title is recognised under the common law, its origins are in native customs and traditions.⁵³ It is not a creature of the common law and the interests associated with native title are not limited by common law conceptions of property. Thus, Lord Haldane cautioned against interpreting native title by reference to English land law principles in the Privy Council case of *Amodu Tijani v Secretary, Southern Nigeria*, saying,

“There is a tendency, operating at times unconsciously, to render [native] title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial

⁵³ *Nor Nyawai I* [2001] 6 MLJ 241, 268, 286; *Nor Nyawai II* [2006] 1 MLJ 256, 269-70; *Jalang Paran* [2007] 1 MJL 412, 421-22; *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 24.

rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence.”⁵⁴

The Privy Council further observed in *Amodu Tijani v The Secretary, Southern Nigeria*,

“The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community...To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.”

The rights protected by native title are defined by the customs in which that title is housed. As such, the determination of the real character of indigenous title to land therefore “involves the study of the history of a particular community and its usages” to determine the true nature of the customary right in question. Each community’s customs must be treated on their own terms.

In *Amodu Tijani*, according to Oluwa customs, the land belonged to the community and never to individuals. Each community member held an equal right to the land, with the chief of the community or family acting as a trustee. The chief could not make important decisions with respect to the land without consulting the community or family elders, and grants to strangers were subject to their consent. In interpreting the provisions of the Ordinance of 1903, the Privy Council considered these customs, and noted

⁵⁴ [1921] 2 AC 399, 403. This case has been cited by the courts in *Sagong Bin Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591, 611 (‘Sagong I’), *Adong I* [1996] 1 MLJ 418, 427 and *Madeli III* [8/10/07] Civil Appeal No. 01-1-2006(Q) 24. Other common law jurisdictions have also relied on this case. See *Mabo (No 2)* (1992) 107 ALR 2, 35 (Brennan J); *Calder et al. v. Attorney-General of British Columbia* [1973] S.C.R. 313, 34 D.L.R. (3d) 145, 112 (Hall J dissenting) (‘Calder’).

that the community's usufructuary occupation was 'so complete as to reduce any radical right in the sovereign'. The Crown obtained no beneficial ownership interests that displaced native title. Thus, the Governor was required to pay compensation based on the full ownership interest of the community.⁵⁵

Similarly, in *Oyekan and Others v Adele Oyekan*,⁵⁶ the Privy Council ruled that customs, and not English common law concepts of property, must control the determination of the rights held under native title so that disputes between inhabitants regarding property rights were determined under native law and custom "without importing English conceptions of property law".⁵⁷ The caution administered by the Privy Council was referred to at length in *Sagong Tasi v Kerajaan of Selangor*. The court went on to uphold that the character of land tenure and use among the aboriginal Temuan people consisted in an interest in the land and not merely a usufructuary right.

Another important leading case that the Court of Appeal in *Sagong Tasi* referred to was the decision of the Constitutional Court of South Africa ('CCSA') in *Alexkor Ltd and Others v Richtersveld Community and Others* ('*Richtersveld Community*'), which suggests an approach for applying customs in defining rights under native title. In the case of *Richtersveld Community*, members of an indigenous group, the Richtersveld Community, alleged they were entitled to compensation for dispossession of their land, which they held according to customary laws. They sought redress under the Restitution of Land Rights Act ('Act'), which authorised restitution to

⁵⁵ Adong I cites the principles of Amodu Tijani as stated in this paragraph as part of its review of the common law decisions recognizing native title. [1997] 1 MLJ 418, 427. Madeli III cites Amodu Tijani and in particular, the principles set out in this paragraph, in support of its determination that Mabo (No 2) and Calder state the common law position regarding native title 'throughout the Commonwealth.' Madeli III [2007] Civil Appeal No. 01-1-2006(Q) 26.

⁵⁶ [1957] 2 All ER 785.

⁵⁷ Madeli III cites Okeyan and in particular, the principles set out in this paragraph, in support of its finding that the common law rule requires courts to assume that the Crown will respect the property rights of indigenous inhabitants. [2007] Civil Appeal No. 01-1-2006(Q) 23-24.

communities holding “a right in land” subsequently dispossessed on a racially discriminatory basis. The Act defined a right in land to include “a customary law interest”.⁵⁸ The lower court found that the community held an interest in their lands under customary law “akin to ownership under common law” and this interest included ownership of the minerals.⁵⁹ The appellant challenged this finding on appeal to the Constitutional Court of South Africa.

In examining the ‘nature and the content of the rights’ held by the community and whether those rights survived the Crown’s acquisition of sovereignty over the Community’s territory in 1847, the CCSA noted that such rights “must be determined by reference to indigenous law. That is the law which governed its land rights.”⁶⁰ The CCSA referred to the Privy Council’s decision in *Oyekan and Others v Adele*, holding that English property law should not be imported in determining land rights held under indigenous customs.⁶¹ Furthermore, the court stated,

“While in the past, indigenous law was seen through the common law lens, it must be seen as an integral part of our law. Like all laws, it depends for its ultimate force and validity on the Constitution. Its validity must now be determined not on common law but on the Constitution.”

The Constitution of the Republic of South Africa 1996 required that courts apply customary law *where applicable*, subject to Constitutional and legislative requirements regarding such laws. Customs were an independent source of law within the South African legal system, but were interpreted according to the values in the Constitution and subject to legislation.⁶² According to the CCSA, in this way, ‘indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.’⁶³ In

⁵⁸ Richtersveld Community (2003) 12 BCLR 1301 (CC), 2003 SACLR LEXIS 79, *11

⁵⁹ *ibid.*:*36

⁶⁰ *ibid.*:*42

⁶¹ *ibid.*

⁶² *ibid.*:*42-43

⁶³ *ibid.*:*44

addition to the Constitution, South African courts were to take judicial notice of the content of indigenous law established through evidence and it was the duty of the judiciary to interpret customs and resolve conflicts between competing versions of traditional practices.⁶⁴ [T]he determination of the real character and content of indigenous title to land was thus to “involve the study of the history of a particular community and its usages”.⁶⁵

To the extent that the CCSA holds that indigenous laws must be referenced through the Constitution and not common law, it may have persuasive authority in Malaysia. However, since customs and usages may have the force of law under 160(2), it is argued that customary law is not subject to legislation nor to common law, but stands to be interpreted on its own terms under the Constitution.

Recent judicial application and contextualising of native laws and customs

In two recent decisions, David Wong J had a fresh look at native customary practices relating to land. In *Agi Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd*⁶⁶, two provisional leases were granted to the defendants. The plaintiffs claimed that their customary land was within the defendants’ parcel. They claimed NCR on the lands through the Iban custom of *pemakai menoa* to which the defendants objected on grounds that this custom was not recognised in law.

Two experts on the customs testified in court, explaining the nature of the *pemakai menoa* and the rituals involved in creating it. Bawin spoke of the rituals of *panggul menoa* in commencing a new settlement where the community can establish its right to fell the trees and create their *pemakai menoa*. Empeni Lang, a former Registrar of the Native Court, revealed another facet of the *pemakai menoa*: “The *pemakai menoa* is inclusive of

⁶⁴ *ibid.*:*44

⁶⁵ *ibid.*:*49

⁶⁶ [2010] 4 MLJ 204

the forest and are also sources of collection of jungle produce such as ferns, bamboo shoots and other edible produce. The *pemakai menoa* defines the jurisdiction of each *Tuai Rumah* [headman] and it is this jurisdiction of *Tuai Rumah* that is defined or implied in s 7 of the Native Court Ordinance 1992. Without the concept of *pemakai menoa*, there would be no clear definition and extent of the local jurisdiction of the *Tuai Rumah* as the presiding officer of the headman in the native court system.”

Empeni Lang also spoke of *temuda* as an area of primary forest that has been felled by an original or pioneer worker or by ancestors, the right of use of which may be transferred to subsequent generations. He explained that it is common practice for the lands to be left idle in accordance with a fallow system of use to maximise land fertility and to enhance use. The length of the idle period within the fallow system is contingent on the nature of the fertility of the land.

Wong J followed the Court of Appeal decision in *Nor Nyawai* and did not hesitate in holding that the *pemakai menoa* is an Iban custom and practice. In that case, the view of the Court of Appeal differs from the High Court only in respect of the factual evaluation in which they found that the plaintiffs there had failed to prove the existence of *pemakai menoa*. Despite the fact that it is not listed in the codified Iban Adat 1993, the court referred to earlier authorities and held that “native title requires an examination of the customs and practices of each individual community and this involves a factual inquiry and not whether the customs appear in the statute book.”⁶⁷ Furthermore, Justice Wong said that the view was “consistent with the intention of the Federal Constitution which defines law to include “custom and usage having the force of law in the Federation or any part thereof.”

In another significant case, *Mohd Rambli bin Kawi v Superintendent of Lands, Kuching*⁶⁸, Wong J considered whether Malays had customary rights to their *kampung* lands and the lands on which they foraged around their *kampung*, including the swampland on which they depended for their livelihood. Consequently, the question arose as to whether by Malay

⁶⁷ Agi Bungkong [2010] 4 MLJ 204, 215

⁶⁸ [2010] 8 MLJ 441

customs, a Malay can transfer NCR lands to members of the same or other native communities.

Through oral evidence and narratives of respected members of the Malay community, it was made evident that according to Malay customs, a pioneer who occupies an area for farming, for the planting of crops or fruit trees, or generally for “*cari makan*” in (foraging for food or general use of the land for livelihood purposes), would claim a right over the said land. The Malay NCL included the swamplands and rivers where they had planted and foraged for food. The plaintiffs claimed that it was fundamental to the social, cultural and spiritual aspects of Malay life. It was “not just for their livelihood, it was life itself.” The said land could be inherited by descendants. Such inherited or acquired right over the NCL may by custom also be “*serah*”, that is to say, surrendered to another person or another native who may not be of Malay race but is a native of Sarawak.

Wong J upheld the transfer of NCL in this case on the grounds that there was nothing in their customs that prohibited it. Indeed, the concept of “*serah*” had evolved to the point that the “*serah*” involved a *Surat Perjanjian Menyerah Tanah Temuda* (a document of transfer) which was recognised by the Lands and Surveys Department.

In both cases, the court rejected the defendants’ contention that there cannot be NCR unless the same is embodied in statute. In a further explanation of the approach to proof of customs, Wong J referred to the observation by Kirby J (as he was then called) when acting as the president of the Court of Appeal of the New South Wales Supreme Court in *Mason v Triton*⁶⁹, where he said,

“In the nature of aboriginal society, their many deprivations and disadvantages following the European settlement of Australia and the limited record keeping of the earliest days, it is next to impossible to expect that the aboriginal Australians will ever be able to prove, by record details, their presence genealogy back to the time before 1788. In these circumstances, it would be unreasonable for the common law

⁶⁹ (1994) 34 NSWLR 572 at 572

of Australia to demand such proof for the establishment of a claim to native title. The common law, being the creation of reason, typically rejects unrealistic and unreasonable principles.”

Clearly, trial courts need to approach these trials with an appreciation of the evidentiary difficulties inherent in aboriginal claims and, by the same token, customary claims.

Conclusion

The preceding cases illustrate that, to various degrees, indigenous conceptions of property ownership are relevant in determining the native title rights recognised under the common law. The Privy Council recognised early on that seeking to render those rights in English law concepts was unwise and unproductive, and ultimately undermined the object of recognition.

As in Malaysia, there are other jurisdictions that recognise native title rights reflected in traditional laws and customs. Australia and South Africa define indigenous land rights by reference to traditional laws and customs. Canadian law acknowledges the importance of the indigenous perspective in establishing proof of occupancy. What is sought to be protected are pre-existing property rights founded on those very laws and customs.

The basic principle underpinning the recognition of customary rights points to equality as a key objective in affirming indigenous land rights. The status of customs as part of Malaysian law is well entrenched. Similarly, equality of treatment among the various groups of peoples that comprise the multi-racial citizenry of Malaysia is part of the basic framework of the Federal Constitution. Article 8(1) of the Federal Constitution guarantees equality before the law for all persons, and Art 8(2) prohibits discrimination against citizens based on their race or descent in regard to any law relating to the holding or disposition of property

The principle of equality requires that, with respect to property rights,

native communities are provided the same protections accorded to non-native communities. This means recognising their property rights under customary laws on their own terms and giving due weight to perspectives of indigenous peoples. This includes a unique approach to the treatment of evidence, under native laws and customs as well as oral traditions and histories. In practical terms, it is necessary for judges to inquire into “the factual, social and psychological context within which the litigation arises” and that “conscious, contextual inquiry”⁷⁰ would be a step towards judicial impartiality. This will give meaning, to customary laws as an equally important body of law. The rights imbedded in customary laws are unique, or sui generis, and must be construed within the spirit and intendment of the supreme law, the Federal Constitution.

⁷⁰ Per Justices L’Heureux-Dube and McLachlin in *R v S (R.D.)* [1997] 3 SCR 484, 507.

3. Legal pluralism: the Philippine experience

Jennifer Corpuz

The Philippines is an archipelago of 7,107 islands located between the Philippine Sea and the South China Sea, east of Vietnam. The population of the country is of 85 million distributed over a land area of 300,000 square metres (or 30 million hectares).

The Philippines was a Spanish colony from 1521 to 1898. During this period, there occurred widespread conversion of the local population to Roman Catholicism as well as the emergence of a landed elite class resulting from the elimination of communal ownership under colonial rule. However, the dissolution of communal ownership did not reach the highland areas of the country, where most indigenous peoples fled. It was also during this period that a Civil Law system was established by the Spanish rulers.

The Philippines then became an American colony from 1898 to 1946, a period which saw the spread of Protestantism and the establishment of English as the Lingua Franca. The Spanish Civil Law system was transformed into a hybrid civil law, referred to as the Common Law system.

The legal system of the Philippines today remains a pluralistic hybrid of civil and common law. Judicial decisions form part of the Land Law, as are the principles of international law. In addition, indigenous customary law and *sharia* law also form part of the Philippines' legal system.

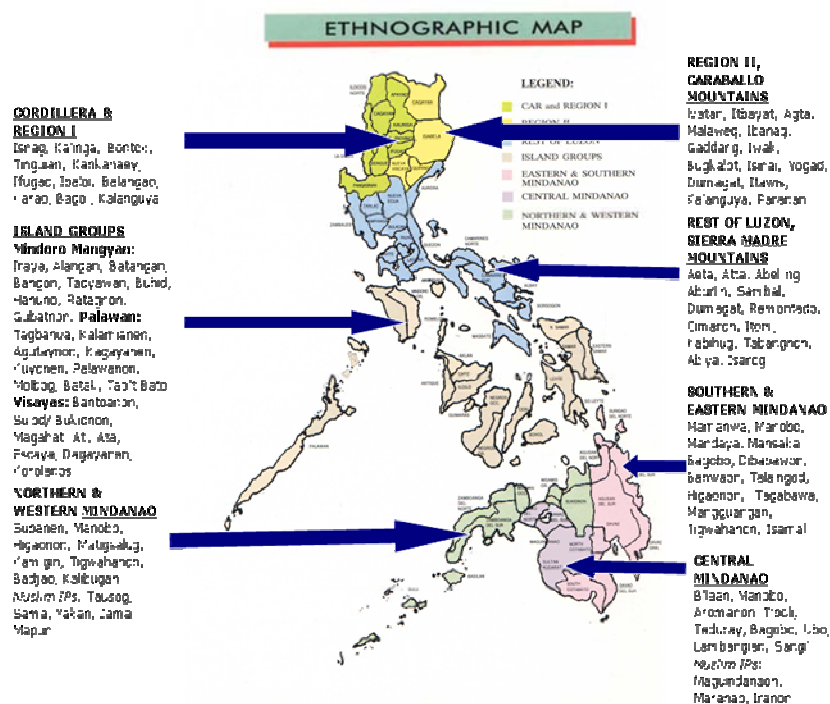
Sharia law recognises the legal system of the Muslim population in the Philippines as part of the Land Law and seeks to make Islamic institutions more effective in their implementation. The *sharia* law also codifies Muslim personal laws (relating to family and community conflict) and provides for an effective administration and enforcement of Muslim personal laws among Muslims. *Sharia* courts have also been established to this end.



Indigenous peoples and the 1987 Philippine Constitution

No accurate figures are available for the total population of indigenous peoples in the Philippines. The estimated indigenous population in 1995 was of around 12.8 million. Indigenous peoples comprise 17% of the total Philippine population, represent over 110 different ethno-linguistic groups and reside mostly in the province of Mindanao (61%), covering an average area of 5 million hectares. Other indigenous peoples are found in Luzon (36%) and the Visayas (3%).

The map below shows the distribution of indigenous peoples across the Philippine archipelago:



The 1987 Philippine Constitution makes several references to the rights of indigenous peoples. In particular, Sec. 22 of Art. II stipulates that:

The State recognises and promotes the rights of indigenous cultural communities within the framework of national unity and development.

In relation to indigenous peoples' land and resource rights, Sec. 5 of Art. XII states:

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.

The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.

Furthermore, Sec. 6 of Art. XIII states:

The State shall apply the principles of agrarian reform or stewardship, whenever applicable in accordance with law, in the disposition or utilisation of other natural resources, including lands of the public domain under lease or concession suitable to agriculture, subject to prior rights, homestead rights of small settlers, and the rights of indigenous communities to their ancestral lands.

Finally, Sec. 17 of Art. XIV states:

The State shall recognise, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.



The Indigenous Peoples' Rights Act (IPRA) of 1997

Of major significance to the Philippines' indigenous peoples was the passing of the Indigenous Peoples' Rights Act (IPRA) in 1997, itself anchored in several legal instruments, including the 1987 Constitution, ILO Convention 169, the Draft Declaration on the Rights of Indigenous Peoples and Philippine Native Land Titles. Under IPRA, indigenous peoples' rights were recognised, including:

- 1) rights to land and resources (ancestral domains and ancestral lands)
- 2) rights to self-governance and empowerment
- 3) rights to social justice and human rights
- 4) rights to cultural integrity (Sections 4 –37 of IPRA)

IPRA's definition of the terms "indigenous peoples"/"indigenous cultural communities" is:

...a group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organised community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed and

utilized such territories, sharing *common bonds of language, customs, traditions and other distinctive cultural traits*, or who have, through *resistance to political, social and cultural inroads of colonisation, non-indigenous religions and cultures, became historically differentiated from the majority of Filipinos*. ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonisation, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present State boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains” (Section 3(h), IPRA) (emphasis added)

In terms of indigenous peoples’ rights to ancestral domains and ancestral lands, IPRA stipulates that indigenous peoples may own such lands with a native title, and have the right to develop and manage lands and natural resources as well as remain within their territories. The entry of migrants into ancestral lands and domains is to be regulated. Conflicts within the community are to be resolved through customary law. The FPIC of indigenous communities is required before development or other projects are initiated on their lands.

In terms of indigenous peoples’ rights to self-governance and empowerment, IPRA states that indigenous peoples should be able to:

- Freely pursue their economic, social and cultural development
- Use commonly accepted justice systems, conflict resolution institutions, peace-building mechanisms and other customary laws
- Participate in decision-making that may affect their lives and livelihoods
- Maintain and develop their own indigenous political structures
- Achieve representation in policy-making bodies and local legislative councils
- Determine their own priorities for development

- Organise themselves into Indigenous Peoples' Organisations (IPO)

In terms of social justice and human rights, IPRA states that indigenous peoples should enjoy:

- Equal protection and non-discrimination
- Human rights and freedoms in the Constitution and relevant international instruments
- Rights during armed conflict
- Non-discrimination and equal opportunities and treatment
- Basic social services
- An integrated system of education
- Rights for women, youth and children

Preserving the cultural integrity of indigenous peoples involves:

- Preserving and protecting their culture, traditions and institutions
- Proving them with access to various cultural opportunities
- Preserving the dignity and diversity of cultures
- Protecting community intellectual rights
- Protecting religious, cultural sites and ceremonies
- Promoting and developing indigenous knowledge systems, sciences and technologies
- Protecting indigenous peoples' resources and FPIC
- Achieving sustainable agro-technological development
- Providing funds for archeological and historical sites and the preservation of cultural artifacts

The National Commission on Indigenous Peoples (NCIP)

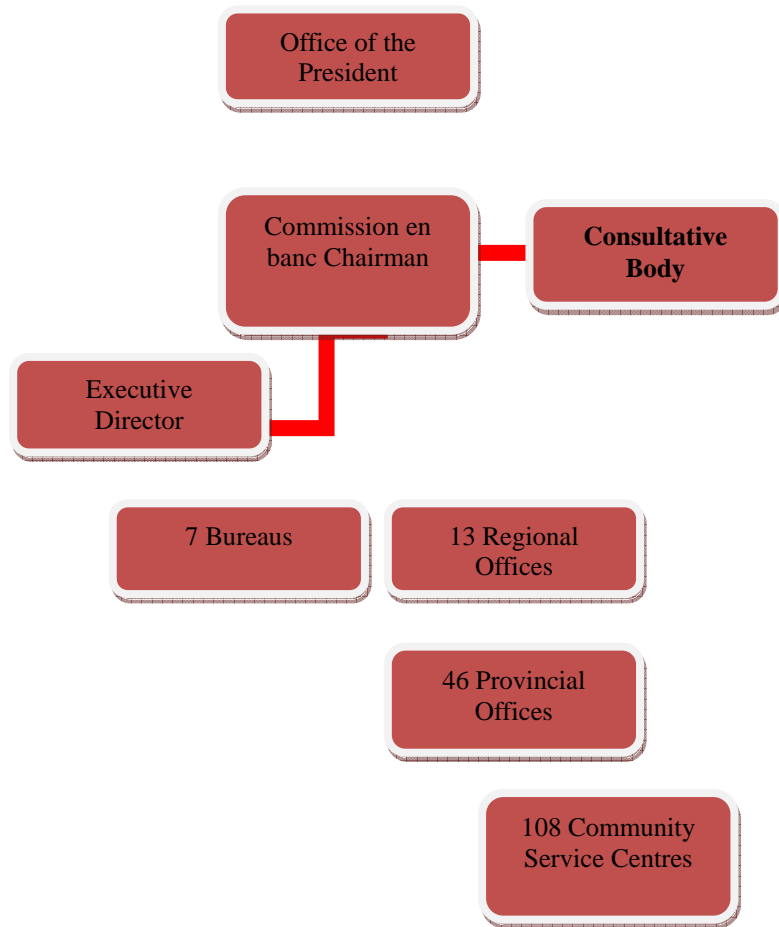
Another important body related to the legal rights of indigenous peoples is the National Commission of Indigenous Peoples (NCIP), the primary implementing agency of IPRA. NCIP consists of seven Commissioners appointed by the President and responsible for different ethnographic regions: Region I & Cordilleras; Region II; the rest of Luzon; Island Groups including Mindoro, Palawan, Romblon, Panay and the rest of the Visayas;

Northern and Western Mindanao; Southern and Eastern Mindanao and; Central Mindanao. In these areas, NCIP exercises administrative, quasi-legislative and quasi-judicial functions and powers.

Its responsibilities include the following:

- To serve as the primary government agency through which ICC/IPs can seek government assistance and as the medium through which such assistance can be extended
- To formulate and implement policies, plans, programs and projects for the economic, social and cultural development of the ICCs/IPs and to monitor the implementation thereof
- To issue ancestral land/domain titles
- To issue certification as a pre-condition to the grant of permit, lease, grant, or any other similar authority for the disposition, utilisation, management and appropriation of the ancestral domain after obtaining the mandatory consensus approval of the ICCs/IPs
- To convene periodic assemblies of IPs to review, assess as well as propose policies or plans
- To make decisions regarding all appeals from the decisions and acts of the various offices within the Commission and regarding overall claims and disputes involving the rights of IPs

Organisational structure of NCIP



Major programs of NCIP

a. Land tenure security – Certificates of Ancestral Domain/Land Title

One of the major areas of work of NCIP has been the provision of land tenure security for indigenous peoples in the form of Certificates of Ancestral Domain/Land Title – CADT/CALT. NCIP assume a quasi-judicial function in the allocation of these Certificates, which involves titling and delineation of Ancestral Domains, the issuance of CADTs/CALTs and registration of the latter with the Land Registration Authority, as well as the adjudication of cases related to the above.

The delineation and titling of Ancestral Domains involves obtaining a written testimony from the elders/leaders of the indigenous community in question, as well as proof of “since time-immemorial possession” of the land. Self-delineation through ground surveys and the mapping of Ancestral Domain boundaries ensues, based upon which the survey plan and its technical description are submitted for validation and publication in order to obtain approval and registration of the land title.

Applications must be accompanied by additional required material to justify the land claim, including:

1. Genealogical surveys
2. Historical accounts
3. Write-ups of customs and traditions
4. Anthropological data
5. Written and oral testimonies under oath of living witnesses
6. Written accounts of the indigenous community’s political structure and institutions or traditional structures of indigenous social and government systems, with names of recognised leaders
7. Pictures showing long term occupation such as those of old improvements, burial grounds and sacred places
8. Pictures and descriptive histories of traditional communal forest and hunting grounds
9. Pictures and descriptive histories of traditional landmarks such as

mountains, rivers, creeks, ridges, hills and terraces

10. Write-ups of names and places derived from the native dialect of the community

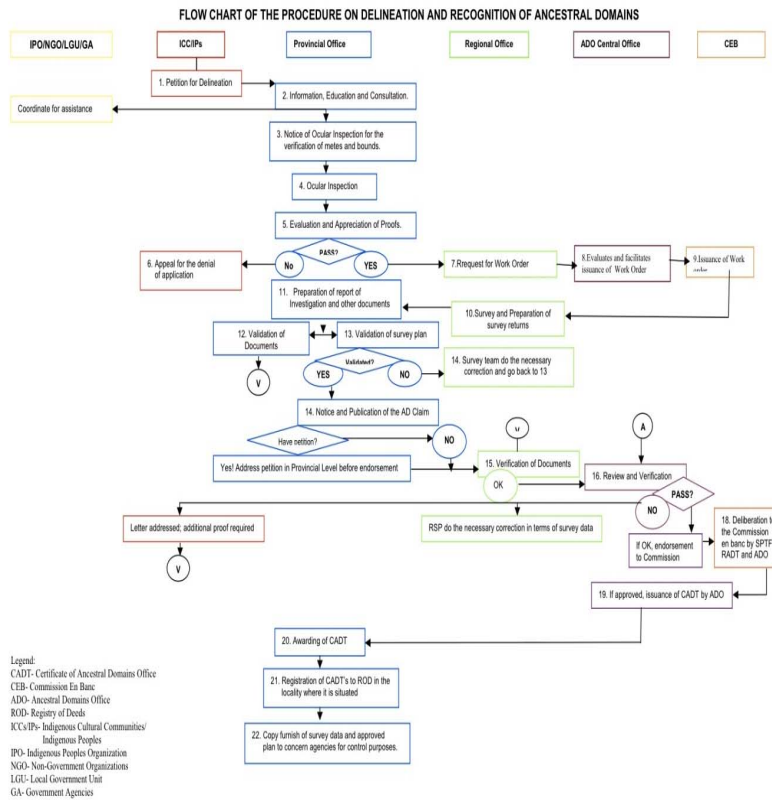
11. Survey plans and/or sketch maps

12. Ancient or Spanish documents

13. Other documents directly or indirectly attesting to the long-term occupation of the area which show possession since time immemorial, through their predecessors-in-interest, in the concept of owners and in accordance with their customs and traditions

The diagram below shows the procedure for the delineation and recognition of Ancestral Domains:

Divers Paths to Justice: Legal pluralism and the rights of indigenous peoples in Southeast Asia



At the time of writing, CADT/CALT applications had been submitted for 4,878,883.65 ha of land, representing 81% of the estimated number of Ancestral Lands. 57 CADTs and 171 CALTs had been issued, covering an area of 1,121,116.35 ha in the name of 245,154 rights holders, representing 19% of the total target area of Ancestral Lands.



b. Establishing model Ancestral Domain (AD) communities through development and peace

Another area of work of NCIP, in which it plays an administrative function, is the establishment of model Ancestral Domain (AD) communities, achieved through the Ancestral Domains Sustainable Development Protection Plan (ADSDPP) and involving the development of indigenous communities through: coordination in the delivery of basic services, especially: livelihood support, healthcare, relief and rehabilitation in cases of natural disasters and calamities, and educational assistance. Furthermore, NCIP works to bridge international agencies' support services, protect and enhance the cultural heritage of indigenous peoples and carry out cultural mapping of all indigenous communities.

The basic steps involved in formulating ADSDPPs for indigenous communities involve:

- Organisation of community planning teams
- Data gathering and assessment

- Goals and objective setting
- Program/project identification and investment planning
- Plan promotion/marketing

c. Enforcement of human rights and empowerment of indigenous peoples

Finally, a third dimension of NCIP is its administrative function in the enforcement of human rights and the empowerment of indigenous peoples. To this end, NCIP provides:

- Assistance in the resolution of conflicts through customary laws, traditions and practices
- Facilitation in obtaining the FPIC of IPs where needed
- Legal assistance in the interest of the community
- Support on the constitution of a Consultative Body (CB)
- Quick Response Mechanisms (QRM) to address emergency cases (STRAT-QRU)

The issuance of a Certificate is a pre-condition for NCIP to become involved in such situations. This involves the conduct of field-based investigations, consensus building to achieve and respect FPIC, and negotiations on the terms and conditions for the Memorandum of Agreement prior to the written consent of the indigenous community.

In all its areas of work, IPRA gives primacy to indigenous customary law. As stated in Sec. 65:

When disputes involve ICCs/IPs, customary laws and practices shall be used to resolve the dispute.

NCIP has quasi-judicial power, exercised through its Regional Hearing Officers and the NCIP Legal Affairs Bureau, as described in Sec. 66:

Jurisdiction of the NCIP - The NCIP, through its regional offices, shall have jurisdiction over all claims and disputes involving rights of ICCs/IPs. Provided, however, that no such

dispute shall be brought to the NCIP unless the parties have exhausted all remedies provided under their customary laws ...

Appeals to the Court of Appeals involves several steps:

1. Customary decision-making processes are given primacy
2. If customary decision-making processes fail to resolve the case, IPs may appeal to the NCIP Regional Hearing Officer
3. NCIP then reviews the case
4. Based on NCIP's review of the case, a petition for review may be submitted to the Court of Appeals

Recommendations

Despite the benefits brought about by IPRA in terms of the rights of indigenous peoples in policy and practice, recognition of these rights also has its dangers. As can be seen from the processes described above, a significant amount of bureaucratic and administrative steps are involved in land titling, conflict resolution and community development. Moreover, there is the risk that IPRA's terms may be manipulated and distorted by individuals, both indigenous and non-indigenous, with their own personal interests in mind, and not those of the indigenous community they supposedly represent. In addition, NCIP processes and requirements reveal several limitations; they may be too complex for local implementation and may require documents and proof that are difficult to access or produce for indigenous peoples residing in remote areas.

In this light, it is recommended that existing conflicting laws be harmonised, that simple and culturally appropriate procedures be implemented, that a "checklist" approach to land delineation and titling be avoided, and that a competent implementing agency be responsible for the implementation and respect for the rights of indigenous peoples, as stipulated in IPRA and other international conventions.

4. Native customary land rights in Sabah, Malaysia 1881-2010¹

Amity Doolittle

Introduction

In the following pages I want to explore three questions regarding native land rights and legal pluralism in the context of Sabah, Malaysia. My first question is: How were native customary land rights treated in the early days of colonial rule under the North Borneo Chartered Company? To answer this question I explore the formation of land laws and policies instituted at the start of colonial rule in 1881. At the heart of colonial land laws was the principle of legal pluralism: one set of land laws for the colonialists and another set of laws for native peoples. While Company officers often framed their commitment to legal pluralism as a way to paternalistically protect native peoples and their customs, it can also be seen as a mechanism of control and authority that severely limited the rights of native peoples to govern their traditional lands according to their customs, while simultaneously fostering the development of colonial plantation agriculture.

The second question I seek to answer is: What is the legacy of colonial legal pluralism for native peoples' struggles for land rights in contemporary Sabah? Drawing on a high profile case regarding the violation of native land rights that was brought before the Sabah Human Rights Commission² in 2003, I show that one of the largest obstacles to natives gaining title to their land in the 21st century is the very same obstacle that natives faced in the 1880s; large companies, working in collusion with ruling elite are able to place their land claims at the forefront of the application process, overriding pre-existing native claims.

Finally I seek to understand the constraints and benefits associated with

¹ Sections of this paper have been previously published in Doolittle 2003, 2005 and 2007.

² Suhakam 2003

legal pluralism and the notion of “reinvigorating” native customary law. I ask: What is the best path for native peoples in contemporary Sabah to gain secure land rights? Specifically, is there room for a vibrant native customary law to exist within the modern legal system in Sabah, Malaysia? This section builds on the previous one, demonstrating how the modern State still paternalistically articulates the need for the State to protect natives from their own inexperience. This modern reworking of the colonial policies of selectively supporting limited aspects of native land rights makes for a very weak form of legal pluralism that does not secure justice for native peoples, but rather further marginalises them by taking control of native customary law. In this situation the State’s supposed interest in protecting native traditional lifestyles has less to do with equity for natives and everything to do with limiting native land rights.

In the conclusion I do not argue for the end of legal pluralism and for the beginning of legal integration, despite the damage legal pluralism appears to have done to native peoples’ rights and autonomy. Instead I draw attention to the need for the State to return control over defining and adjudicating native land rights to native peoples. In brief, it is time for a new form of legal pluralism in Sabah.

Treatment of native customary land rights under the rule of North Borneo Chartered Company

The North Borneo Chartered Company (hereafter the Company), established in 1881, had a dual mission in North Borneo. First, it was concerned with economic growth through the exploitation of the territory’s natural resources. Second, the Company was obligated to respect native rights and customs. There were inherent conflicts between these two considerations; the very property rights and native legal institutions that Company officials were charged to respect soon became an obstacle to the expansion of commercial agriculture. As a result, the Company instituted a system of legal pluralism in which some native customary laws were supported while those that hampered the commercial exploitation of land were replaced with western legal concepts.

In the following section on colonial land laws I examine four key moments in Company rule regarding legal pluralism and native land rights. I begin in the 1880s, tracing the emergence of legal pluralism under Company rule as colonial officers tried to grapple with the inconvenience of native land rights while simultaneously trying to encourage European plantation agriculture. Next, I provide a case study from 1889 of a Dutch-owned tobacco plantation that illustrates how the Company's efforts to protect native land rights, while nurturing the growth of commercial plantations, fell far short of the written policy. In the third section I explore the manner in which Company officers convinced themselves that they had completed a full settlement of all native land rights in the early part of the twentieth century, despite clear indications to the contrary. Finally, I will briefly illustrate how continued colonial paternalism was expressed in colonial policies in the mid 1900s that limited the natives' ability to sell their lands to non-natives without approval of the State.

The emergence of legal pluralism in the land code

William Treacher, the first Governor of North Borneo, devoted much of his attention to the abolition of slavery in the territory. His preoccupation with this matter was in large part due to the urging of the Court of Directors and the anti-slavery lobby in Britain. Consequently he gave scant attention to formulating land laws.³ The first two pieces of land legislation that Treacher introduced, Proclamation 23 of 1881 and the Land Proclamation of 1885, entirely failed to understand native customary rights to land. The only mention of native rights to land occurred in Articles 26 and 27 of the 1885 document, in which Treacher placed the ultimate authority over land in the hands of the State by refusing to allow natives to buy or sell land to foreigners, unless such transactions were mediated by the State.⁴

In many ways the 1885 Proclamation did more damage to native land rights than subsequent, more comprehensive legislation. This first law set the stage for later laws and established unequivocally that the State was the

³ Black 1983:55-60

⁴ JSBRAS 1885:158

ultimate authority over land. Furthermore, based on this proclamation, native rights to land would subsequently have to be arbitrated by the State and made compliant with the State's broader agenda of economic growth.

In 1888, Charles Creagh replaced Treacher as Governor. Creagh had seen a version of the Torren's system of land registration in operation in Perak and other Malay States. He urged for the adoption of the Torren's system in North Borneo and called for urgent measures to protect native rights to land.⁵ The resulting legislation, "Native Rights to Land" (Proclamation III of 1889), focused primarily on how native rights to land would be settled when applications by foreigners for "waste land" were received. The legislation stated that as soon as the boundaries of the land application were defined, it was the duty of the district officer to inform the native chiefs in the area about the new foreign application for land. They should then submit to the district officer all native claims that existed in the area under the foreign application. Once the district officers had received these claims in writing, a land registry would be compiled and native lands would be surveyed and delineated with boundary markers.

If native rights were determined to be legitimate by the district officer, they could be settled in one of two ways, both requiring government sanction.

⁵ Black 1983:109

The Torren's system of land registration was developed in the 1850s for use in South Australia. It involved title to land by registration rather than by deed; land registers were maintained by the government. Land in the registers should be accurately described and the records should to be kept up-to-date. In principle a title or deed would be issued eventually to all the owners of lands on the register. One of the benefits of this system from the State's perspective was that it quickly – and with the least amount of expense on the part of the State – produced revenue in the form of land taxes (Wong 1975: 16-20). Furthermore, the Torren's system was perceived as the most appropriate way to register land in a largely illiterate society. As one colonial officer in North Borneo wrote, 'A man of the smallest intelligence and education can buy, sell, and mortgage land without the intervention of a lawyer. It is this fact that makes the Torren's system eminently suitable in countries where many landowners are Natives or Chinese' (A. C. Pearson, 'Report on land administration', 1909, CO 874/796).

The land could be “reserved” from the foreign concession for the native owners through the clear demarcation of their holdings. If possible, a consolidation of native holdings was attempted by moving isolated natives together in grants of land in close proximity to each other. The other method of settling native claims to land was by compensation in cash. Finally, the Proclamation set strict terms for foreigners who did not respect native rights: they would be evicted from the land.⁶

Proclamation III was the first land law that made any attempt to recognise the nature of native land rights and to provide the mechanism by which these rights could be formalised in the eyes of the Company. Unfortunately, time would show that Governor Creagh and several of his successors were unable to fully uphold the letter of this law. With less than thirty Company administrators and £30,000 for annual expenses, the administration found itself unable to adequately settle native claims to land.⁷

In the following section I present a case that illustrates the treatment of native land rights and the clear violations of the principles laid out in Proclamation III of 1889, drawing attention to the vast gap between written land laws and the actual implementation of these laws.

Count Gelose d’Elsloo Tobacco Estate

By 1888 the Dutch tobacco planter Count Gelose d’Elsloo had acquired thirty square miles along the Kudat peninsula on the north coast of Borneo. He found that the progress of plantation development was impeded by the “unexpected difficulty arising from native rights” on his tobacco estate. In an exchange of letters between the Count and the Kudat District Officer Davies, the Count explained that “there will be great difficulty in settling ‘Native Rights’...if we proceed on the plan of cutting out the land to which native people are entitled under Proclamation No. III of 1889”. He went on to say that if they did cut out all the land from the Count’s estate to which

⁶ Proclamation No III of 1889, North Borneo Herald and Gazette, 1 Feb.1889, pp. 53-4.

⁷ Tregonning 1956:50

natives were claiming rights, the best land on his estate would *cease to be available for his tobacco company*.⁸

To remedy the situation, District Officer Davies came up with an alternative scheme that would allow natives to remain on the land that the government had sold to the Count. Davies proposed that the natives would “carry out their little planting operations as in the past, subject to the understanding that they shall always give way to the tobacco planters, when both want to use the same piece of land during the same season”. Davies further suggested that natives be encouraged to plant on the land that the Count had previously used to grow tobacco, paying him 10% of their crop for the privilege. The natives would also be “ordered before cutting any jungle to apply to the manager of the estate near where they lived...to find out whether the place they proposed to plant will be required by him the estate manager during the next two...seasons”.⁹

Count Gelose d’Elsloo was not satisfied with this arrangement and responded: “I told you that the planting by natives on land where jungle is growing would certainly not enrich the land and also deprive us of the timber grown on it...” To further appease him on this point, Davies suggested that the “native shall not be allowed to cut down valuable timber suitable for posts of houses...so long as there is sufficient land cleared or land with small trees on it”. This concession seemed to satisfy the Count and Governor Creagh supported Davies’ settlement of the native claims to land on this particular estate.¹⁰

This exchange of letters took place only five months after Governor Creagh had issued his Proclamation III, yet the pre-existing native claims to the

⁸ Letter from Count Gelose d’Elsloo, 9 July 1889; Letter from the Resident in Kudat to Count Gelose, 6 July 1889, CO 874/248; emphasis added.

⁹ Letter from the Resident in Kudat to Count Gelose, 6 July 1889, CO 874/248; emphasis added.

¹⁰ Letter from Count Gelose d’Elsloo, 9 July 1889; Letter from Resident Davies to the Government Secretary, 9 July 1889; Letter from the Government Secretary to Resident Davies, 25 July 1889; CO 874/248.

land on the tobacco concession were not settled according to its stipulations. The land was not surveyed and set aside for native ownership, nor did the natives receive any cash settlement. Instead, they were confined to using land previously used by the estate and were required to pay a tax to the estate holder. Furthermore, they always had to apply to the estate manager for permission to cultivate the land, which they had to do according to the needs of the estate rather than their own land claims.

In brief, despite the 1889 legislation, native claims to land were not recognised when they interfered with income-producing plantation schemes. This case raises important questions about the intentions and the ability of the Company to work within a system of legal pluralism that acknowledged native land rights. Without the slightest comment on the blatant disregard for native rights illustrated in this case, Company officials forged ahead with their mission to settle all native land rights in North Borneo.

Colonial settlement of native lands

It was not until 1913 that the Company began a full-scale initiative to recognise all native land rights. There were two incentives for colonial officials to settle native claims to land at this point in time. First was the need to increase revenue through taxation of native holdings. In his “Report on Administration, 1911”, Sir Richard Dane pointed out that in Peninsular Malaya significant revenue was derived from native quit rents, arguing that in North Borneo these potential rents were being lost. Commenting on the ineffective land settlement under Governor Ernest Birch’s administration (1901-3), Dane urged immediate survey and settlement of all indigenous land holdings and the payment of rent on them.¹¹ The second incentive for the settlement of native claims to land was the ongoing need to generate revenue from commercial agriculture. To encourage Europeans to invest in plantation development in North Borneo, the State needed to determine which lands could be deemed as “waste lands” and made available to

¹¹ ‘Richard Dane’s report on administration (1911)’, p. 88, CO874/154. Dane, a forty-year veteran of the civil service in India, was invited to report on the Company’s administration in Borneo (Black, 1983: 210).

foreign plantation owners.

The primary focus of demarcation of native land rights from 1913 onward was the surveying and registration of land kept under permanent cultivation only.¹² This emphasis on native lands under continuous cultivation shows once again a blatant disregard for the various ways in which natives could claim land, as documented in the Proclamation III of 1889 and the Land Laws of 1913. In the reports of the Land Settlement Department it was made clear that settlement officers found the demarcation of native rights other than permanent agriculture far too confusing to undertake. As the Commissioner of Lands, G. C. Woolley, reported in 1915, “At present the state of affairs with regard to titles other than those for native-owned rice fields is somewhat chaotic.” Consequently, Company administrators found it convenient to describe land in fallow or secondary forests as un-owned, empty, waste, abandoned or useless.¹³

During the settlement of native rights, natives were asked to clear the boundaries on their permanent agricultural land. But the district officers whose job it was to oversee land settlement were plagued by difficulties. There are numerous accounts in the Company papers detailing the district officers’ struggles with land settlement. The letters describe many instances of both passive and active resistance on the part of the natives; it was not unusual for inhabitants of a village to fail to be present on the assigned day when the surveyor was available for boundary marking.¹⁴ This reflects the local perception of the survey process as inherently disempowering. Unable to stake their claims through their presence, they resisted by making themselves absent.

Company officials persisted in the task of land settlement, however fragmentary the results, hoping to overcome resistance by gaining the

¹² ‘Annual report on the land settlement for 1914’, CO874/797.

¹³ Woolley’s comment is in ‘Recommendation of Governor Parr re: settlement work’, 4 Feb. 1915, CO 874/797.

¹⁴ ‘Annual report on land settlement, 1916’, CO874/797.; examples of letters are in North Borneo Company Archives #1356.

cooperation of the native chiefs. The latter were made exempt from the payment of land rents, in return for which they would be held responsible in part for ensuring that the population in their areas complied with the land settlement plans.¹⁵ But even that was apparently not enough incentive for native participation.

For example, the Assistant District Officer from Keningau in the Interior Residency, in his report to the Resident of Tenom, expressed his dismay over the lack of compliance of the native chiefs:

Paid chief Sebayai at Tambunan was arrested and detained until his people pointed out their lands. Sebayai was subsequently dismissed from government service. This year an attempt was made to roughly mark out and register native lands. With the exception of two paid Government chiefs all the natives refused to point out their lands... Much of the cultivated land is common land or used by others than the customary owner.¹⁶

As illustrated in the final sentence of the above quote, one of the primary difficulties faced by the Company officers as they grappled with native rights to land was their inability – or perhaps their unwillingness – to understand the native system of land tenure. In their view, natives were mostly “nomadic”, moving from place to place to cultivate jungle land, but rarely staying on one piece of land and “improving” it in a western sense. To many Company officers in North Borneo these features suggested that the natives were “squatters”, not landowners. Furthermore, the notion of the village (as opposed to an individual farmer) holding rights over agricultural land frustrated the officials, who were insistent on simplifying indigenous claims and settling individual rights only. Finally, the notion that the ownership of some resources such as fruit trees could be held by an individual or a group, irrespective of the ownership of the land underneath, was a complicated arrangement that collided with the rigid British view of

¹⁵ Letter from Pearson to Government Secretary, 23 Oct.1913, CO874/796.

¹⁶ Letter from Assistant District Officer in Keningau to Resident Tenom, 13 May 1913, North Borneo Company Archives #1356.

individual property rights. While the land laws recognised many elements of native land tenure systems, the policies and practices of Company administration remained focused on a western notion of individual private property.

Following Dane's recommendation to settling native land claims the Company was eager to exact a land tax from natives, which it was hoped would significantly increase land revenue for the Company. The following statement illustrates the rigid thinking on the topic of land registration and taxation:

[The natives] should be educated gradually to realise that they can no longer with impunity acquire land by the hitherto accepted custom of merely settling on it without any reference to Government and must be taught that under the new regime the punctual payment of rent will be considered by Government the first duty of a land holder.¹⁷

Fiscal returns for the registration of permanent native holdings did in fact rapidly begin to produce the expected revenue. In 1914 the rent roll for indigenously held land produced around \$6,000; by 1920 the amount had risen to \$32,605. Yet paradoxically, this latter figure represented only a tiny amount of the overall yearly budget for the Company.¹⁸ Given the relative insignificance of native land taxes in light of the larger State budget we can surmise that it was not merely the financial aspects of land registration that drove Company officials to pursue native land settlement so vigorously. Notions of making order out of a territory perceived to be in a state of chaos; creating rational, governable subjects through the imposition of law; and making the resources of North Borneo available for the benefit of all people, all played an important role in legitimising Company rule in the territory.

¹⁷ Letter from Pearson to General Secretary, 23 Oct. 1913, CO874/796. See also 'A.C. Pearson's report on land', 11 May 1909, CO 874/283, and 'Richard Dane's report on administration, 1911', CO 874/154.

¹⁸ 'General return of revenue, expenditure, trade, and population for 1890-1931', North Borneo Company Archives # 579; figures from Black, 1983: 218.

By 1919 Company officials appeared to be winding down their efforts to demarcate and settle native claims to land under permanent cultivation. The Tambunan District Officer reported in 1918 that “land settlement was finally completed” in the previous year. In the 1919 Annual Report of the Land Settlement Department, the Commissioner of Land stated that “no large area of Native holdings now await demarcation”.¹⁹ While many Company officials felt that they had sufficiently demarcated and settled native holdings to land under permanent cultivation, they also realised that the demarcation of village communal reserves, forest reserves, land used for shifting cultivation and isolated fruit trees had been neglected.

However, to most of the Company officers it did not seem urgent or practical to demarcate these rights. For example, in 1919, Acting Commissioner of Lands C. F. Macaskie reported “in practice I do not think that it would be possible to mark or register such rights as isolated fruit trees”. Later in the report he stated that he saw no urgency in the demarcation of communal reserves. He concluded his report by recommending that these rights be dealt with only when conflicts arose if foreigners applied for the same lands.²⁰ These statements reflect the fact that some Company officers acknowledged the existence of native claims to land other than that held under permanent cultivation, but doubted the practicality of trying to demarcate those rights.

Based on the reports that land settlement was near completion (and ignoring statements that many aspects of native customary tenure had not been demarcated), Governor Pearson issued a memorandum to the district officers in February 1920, informing them that in the future the Company would be under no obligation to grant natives land under Native Title. Pearson argued that since Native Title was supposed to be recognition of “ancient native customary rights” to land, once settlement of native claims was complete, natives should have no future claims to land based on

¹⁹ ‘Annual report of the Land Office, 1918’, CO 648/8; ‘Annual Report of the Land Settlement Department, 1919’, CO 874/797.

²⁰ Letter from the Land Office to the Government Secretary, 25 Aug. 1919, CO874/797.

customary rights. All claims based on customary tenure were considered to have been settled or to have lapsed by default. Customary laws would effectively be replaced entirely by statutory laws, effectively ending this period of legal pluralism. Pearson recommended that once land settlement was completed, natives looking for new land would have to acquire it under “a Country Grant, and the terms would be the same whether the applicant was a Native, Chinese or other alien”.²¹

Pearson’s memorandum provoked a heated debate within the Company administration over the validity of restricting the rights of natives to acquire land under Native Title.²² Land Settlement Officer, Maxwell Hall argued that since land settlement was not complete, the State could not bar future applications for Native Title. In a letter to the government secretary he explained “our settlement was not a full settlement. We dealt with claims which brought rent, but rejected others. We omitted sago swamps, village and grazing lands and hill lands. I think that there is no area which may be considered closed by settlement.”²³

Further opposition to the governor’s memorandum came from the district officers. One of the most vocal was A. B. Francis, who had served in the territory since 1902. On the question of whether land settlement of native rights was complete, Francis wrote that “no native titles have been issued except for paddy lands; orchards, house sites, grazing lands, timber reserves, sago, reserves for expansion have all been excluded from the settlement, mainly...because they were not assessable with rents or with only small rents”. He further argued “the whole tenor of the land law is to allow natives certain priority and preference over aliens”.²⁴

²¹ Minutes by Governor Pearson to Government Secretary, 12 Feb. and 13 Feb. 1920 (quotation on ‘Country Grant’ from the latter), CO 874/985. His comment on Native Title is in a Memorandum by A.B.C. Francis n.d. (1920?), in the same file.

²² Memo by W. J. W., ‘Land grants to natives’, 21 Oct. 1921, CO 874/985.

²³ Letter from J. Maxwell Hall, Commissioner of Lands to the Government Secretary, 8 Mar. 1920, CO 874/985; emphasis added.

²⁴ Memorandum by A. B. C. Francis, CO 874/985; emphasis added.

As I will show later in this paper, the failure of the colonial government to fully recognise all native land rights and the disempowering form of legal pluralism instituted under colonial rule has had a profound impact on land management in present day Sabah. Currently, complaints over the violations of native land rights constitute the largest single issue brought before the Sabah Human Rights Commission.²⁵

Protecting natives from their own improvidence

While aspects of the colonial administration were concerned with how much rent they could obtain from the issuance of native land titles, other aspects were concerned with protecting native peoples from the fast-paced economic development that was occurring in the region. Many colonial administrators believed that natives were unable to manage their lands in a rapidly changing market economy. Evidence of this concern is found in the legal restrictions on natives selling their native titles to non-natives without governmental sanction. The notion behind this restriction was that natives did not understand commercial land transactions, and if they were not “*protected from their own improvidence*”, they would sell all their land to foreign speculators and be left with no land of their own to cultivate.²⁶

Debates within the colonial administration over the possibility that natives would sell all their lands to non-natives peaked in the late 1950s. Some colonial officers believed that the “North Borneo native is a poor unsophisticated wight,²⁷ who is easy meat for a non-native land shark”.²⁸ These officers felt that it was their paternalistic duty to protect natives “against the cunningness of the sophisticated non-natives, who carrot-wise,

²⁵ Keng 2011

²⁶ Circular Notice to Officers, 1928. North Borneo Company Archives # 815.

²⁷ “Wight” is an old English word meaning “person...thing, creature of unknown origin” (The Oxford, 1991).

²⁸ Letter from the Director of Lands and Surveys to All Residents, 17 October 1957, District Office Records.

dangle treasury notes or trade goods before their noses”.²⁹

Even in Peninsular Malaya official paternalism resulted in policies aimed at protecting the *orang asli* (lit. “the original people”) from the “unseemly commercialisation” of their life.³⁰ Commercialisation of resources, it would appear, was attractive only in the hands of Europeans. This legal pluralism couched in terms of paternalism significantly limited native land rights and barred natives from entry into the rapidly developing commercial agricultural sector. As previously argued, this form of legal pluralism did not support native rights nor did it provide them with any secure avenue to seek equity and justice in terms of land rights.

The enduring legacy of colonial legal pluralism

The legacy of colonial legal pluralism over land matters is still apparent in the 21st century in native peoples’ daily lives. The incomplete process of land settlement initiated in the early 20th century still plagues native peoples. Many natives still have not received legal title to land that has been in their family for generations. In contemporary Sabah, it is not unusual to hear stories of the difficulties families have endured in their efforts to claim title to land. Commonly, the head of the household has gone through the appropriate steps of filing their claim with the land office. Many have returned to the land office countless times to check on their applications. Sons have continued checking on claims their fathers made before they died.³¹ Most native farmers, who cannot afford a private surveyor, must wait an average of twenty years, and up to fifty years³² before the State surveyor makes it to their land to register their claim.

This problem was largely ignored at the governmental level until 2009 when the Director of Land and Survey Department, Datuk Osman Jamal, finally

²⁹ Letter from the Director of Lands and Surveys to All Residents, 17 October 1957, District Office Record

³⁰ Harper 1997:9

³¹ Bernama 2004

³² Bangkuai 2003

publicly acknowledged that his Department was incapable of handling the land applications submitted by natives. At that time, the department received over 40,000 applications for native title annually and was only able to process 12,500. As a result, over 265,000 applications for native title remain outstanding.³³

This massive backlog of applications for land titles lies at the heart of many of the current conflicts over native land rights. With such a large number of unsettled land claims it is inevitable that overlapping claims for land are submitted and boundaries between lands never properly delineated.

Human rights violation: the Kundasang Public Inquiry

In this section of the paper I look closely at a landmark complaint of violation of native peoples' land rights that was brought before the Sabah Human Rights Commission in 2003. The highly publicised land dispute took place between eighteen farmers living on the boundary of Kinabalu Park and the Desa Highland Company (a flower farm run by a subsidiary of the Rural Development Corporation, a State entity that falls under the Ministry of Agriculture and Agro-Based Industry³⁴). Desa Highland Company's activities around Mt Kinabalu include the State-run chrysanthemum farm on land that was excised from Kinabalu Park in 1984.

It is not possible to trace the very beginnings of the 2003 land case. However, in the public eye (and as reported in the newspapers) the legal origins of the battle started in 1989 when a group of eighteen villagers made an application for seventy four acres of land in the village of Kundasang, on the southern boundary of Kinabalu Park. They had the approval of the village headman, and one of the farmers claimed his father had taken care of the land before him and that they used to "harvest damar and rattan from the land" when he was a child.³⁵ The farmers cleared the

³³ Sabahkini 2009

³⁴ Ministry of Agriculture and Agro-based Industry 2006

³⁵ New Sabah Times 2004

Claims of past hunting and collection of forest products are commonly used by

land in 1989 to start new gardens and build new homes. They cultivated the land for five years with no objection from other parties. The villagers assumed that they had legal title to the land and were just waiting for the State to complete the paperwork.³⁶ However, the villagers' request for title to the land was ultimately denied. Then, in 1992, the Desa Highland Company made an application to the land office for the same land. The villagers made a futile objection to the company's application in a letter to the land office.

In May 2003, representatives from the Desa Highland Company accompanied by about ten police officers and three bailiffs came to "chase the villagers away from the land".³⁷ They came with chainsaws and heavy machinery to destroy the homes of the villagers and claim ownership of the land. The villagers resisted the demolition of their homes, and as a result they were arrested on 28th May 2003 and placed in jail for fourteen days, on orders from the district officer.³⁸

On 17th June 2003, the farmers sent a memorandum to the Suhakam (Malaysian Commission on Human Rights) claiming that the company and the police had violated their human rights. The villagers' allegations fell into the following categories: (1) the land was improperly alienated to the company; (2) the order of possession of the land and the subsequent jailing of the farmers were invalid actions; (3) there was improper use of force by the police during the eviction of the farmers and the police were not impartial (the manager of chrysanthemum farm and company's lawyers accompanied the police on the eviction making it appear that the company and the police were working in collusion); and (4) the conditions of the

natives trying to establish a history of ownership of the land, even if they have not cultivated it (Doolittle 2005).

³⁶ According to current State regulations governing customary law, if land is continuously occupied for three years and if no one raises any objections, then the occupants are entitled to the land (New Sabah Times 2004).

³⁷ Suhakam 2003:1

³⁸ *ibid.*2003

prison cells were inhumane.³⁹ In February and March of the following year, the Malaysian Human Rights Commission held a panel to investigate the allegations; the panel is referred to in all subsequent documents and reports as the “Kundasang Public Inquiry”.

According to the reports from the Kundasang Public Inquiry, the Suhakam determined that they had no jurisdiction to deal with the first two allegations, those regarding the proper alienation of the land and the validity of the actions taken against the villagers. Regarding the allegation about improper police force and lack of police impartiality, the Suhakam gave the police a slap on the hand, recommending that “the police take steps not to give the perception through future actions that they are partial, however misconceived the perception may be”.⁴⁰ The majority of the panel’s recommendations dealt with the inhumane conditions of the cells and treatment of the prisoners.

There is no doubt that the conditions of the cells were deplorable and warranted close attention from the Suhakam.⁴¹ However, it is curious that the Human Rights Commission chose to turn away from dealing with the issue of native land rights and the allegations of corruption in the police department. At the time, the Suhakam was a relatively new authority in Malaysia, established in 2000. In all annual reports prior to this conflict, Suhakam stated that native land rights was one of the most pressing concerns for the native people in Sabah.⁴² Yet when presented with a case of native land rights the commission took a timid and ultimately ineffectual stance. Suggesting that the question of proper alienation of land to a company over native peoples who have occupied the land is outside the jurisdiction of the Suhakam, when nearly 50% of the complaints they receive in Sabah concern land matters, is a poor excuse to avoid a

³⁹ *ibid.*:2–3

⁴⁰ Suhakam 2004a:43

⁴¹ Suhakam 2003:2–3

⁴² In Suhakam 2004 and 2005, nearly half of all complaints lodged with the commission were about land rights (2004a, 2004b, 2005).

particularly thorny issue.⁴³ In the early 21st century it seemed that the Suhakam did not recognise native customary land rights as a component of human rights.⁴⁴ This disjuncture between discourse and practice regarding the importance of resolving native land case leaves one wondering: Whose interests does the Suhakam represent?

The Suhakam's lack of action on the question of native land rights mirrored the stance of many of Sabah's politicians at the time. In 2005, the President of the Consumer Association of Sabah (CASH) called for the State to set up a commission to look into the problems with land applications. In an appalling understatement, bordering on naiveté, the President of CASH said:

What is most perplexing is that there are cases of local people who had submitted land applications earlier but did not get the land title whereas applications made later for the same land by big companies were approved by the Land and Survey Department . . . This problem is getting serious and there is a need for the department to explain why these big companies are given special treatment at the expense of local people.⁴⁵

In an equally underwhelming speech launching the Ninth Malaysia Plan 2006–2010 by Malaysia's Prime Minister Yab Dato'Seri Abdullah Ahmad Badawi in 2006, the following is the *only* mention of native land rights in the entire thirty nine page speech:

We will also assist the development of customary land in Sabah and Sarawak... [by] creating more income generating opportunities through Skim Pembangunan Kesejahteraan Rakyat (Peoples Prosperity Development Scheme) and relocation schemes...

⁴³ In some places it is reported that complaints on land issues constituted up to 80% of the complaints the Suhakam receives (Bernama 2005a; 2005b; see also Thien 2005).

⁴⁴ Nicholas 2002

⁴⁵ Bernama 2005c

Apparently not only will the Human Rights Commission turn away from solving native land rights, but so too will the State and federal governments who seem unlikely to pursue the problem in any depth. Instead they suggest relocation and new development schemes, two initiatives that have historically failed to produce any tangible benefits for small-scale agriculturalists. For politicians to make such disingenuous statements of surprise and passivity suggests that there is no intention at multiple levels of government to take the steps necessary to correct over a century of inequality in land matters. In fact, this attitude towards the violation of land rights suggests that politicians have no desire to intervene in a land title system that has worked in the State's favour since the 1880s.

We come a full circle: renewal of communal titles to protect natives

The ongoing conflict over native land titles is not the only relic of the colonial era. Legal pluralism in land matters continues to be motivated by a façade of paternalism, instead of a respectful co-existence of different legal norms and customs. This weak form of legal pluralism diminishes and constrains native peoples' rights rather than empowering them. The recent decision of the Sabah government to amend the land code, allowing for the issuance of communal titles to groups of native peoples on State land, rather than settling individual native titles based on customary rights, provides a fruitful example for exploring this modern form of paternalism that continues to support weak legal pluralism.

At the time of writing, the only source of information on this change in the land titling process was newspaper articles and press releases. There were no annual reports available from the Land and Survey Office to provide us with more insight. Furthermore, Chief Minister Musa Aman's public calls for a "Land Task Force" in 2004⁴⁶, a "Land Tribunal" in 2005⁴⁷, and "full research and study" on all aspects of native customary rights⁴⁸ have not

⁴⁶ Liusin 2004

⁴⁷ Maskilone 2005

⁴⁸ The Star 2011

produced any public reports that would aid this research. As a result this analysis is necessarily partial. In the following section, using publically available data, I will trace how the Land and Survey Office introduced and implemented the change in the land code, explore the stated reasons behind the new land titling process, and question whether there might be other, unstated reasons for this change.

In January 2011, the Sabah Office of Land and Survey announced a new land alienation method aimed at resolving outstanding applications for native titles. The “Briefing on Issuance of Communal Title” on the department’s website announced multiple, and somewhat contradictory, reasons for this new decision. These are:

- 1) To resolve the Native Customary Rights issues without Land Inquiry.
- 2) To resolve overlapping land applications and to ensure a fair and balanced land alienation.
- 3) To protect the interests of Sabah Natives on State land in areas surrounding Native Kampongs.
- 4) To prevent Sabah Natives from selling their land.
- 5) To expedite the title issuance in the form of NT/FR [native title/field register] to the natives of Sabah in a Communal (sic) form.
- 6) To eradicate poverty through pre-planned land alienation and optimal land development.
- 7) To prepare large scale State land so that the government could develop joint ventures between Sabah natives and private sector and government agencies.⁴⁹

The notion of issuing communal titles to address landlessness and poverty in Sabah surfaced in newspaper articles as early as 2008. However, this announcement in 2011 was the first time that it was publically suggested that communal titles could be a mechanism to resolve the long-term violation of native land rights.

Three significant issues central to native peoples’ land rights are never explicitly addressed in this briefing: 1) communal titles can not be sold by individuals, 2) communal titles would be issued not on land that natives

⁴⁹ Jabatan Tanah dan Ukur Sabah 2011

claim customary rights to but on other vacant State land, and 3) issuance of communal titles might be contingent on community leaders agreeing to enter in joint commercial ventures between communities and State or quasi-State agencies aimed at developing commercial agriculture.

In sum, from the perspective of native peoples it could be argued that the new communal titles are not full titles that recognise customary land rights. Instead communal titles can be seen as a way to control the nature of agricultural development on native lands and to limit individuals' ability to make their own decisions regarding land development. Furthermore, since these titles cannot be sold, they appear to ensure that natives will stay in marginal positions on their land. It could be argued that these communal titles are a very limited form of ownership that serves the State's interest more than native peoples' interest.

The explanation for the need for communal titles over native titles is explained in an article called "Musa Aman's stroke of Genius". The article begins:

Chief minister (sic) Musa Aman wants to give land to thousands of extremely poor landless native villagers. But he faces a dilemma: the land is sold for a song to smooth-talking businessmen as soon as his government has given it to them. The villagers leave their home to spend their money in towns. Having spent it all, they are poor and landless again as they are displaced by new landowners. His solution: his State government will give villagers thousands of hectares of agricultural land. They will get a communal title... which gives them joint-ownership of the property. They can develop the land but cannot sell it.⁵⁰

Just as colonial treatment of native peoples was based on the notion that natives needed to be protected from the vulgarities of the commercial world, today's politicians in Sabah believe native peoples will be quickly duped out of their land by more savvy businessmen if they are not protected by the

⁵⁰ Insight Sabah 2010

State.

Turning again to newspaper coverage, we can see that natives have been quick to draw attention to these shortcomings in communal title and joint ventures. One article explains the conflicts over native land rights as follows:

Today, the natives of Sabah have to compete for land ownership with the powerful and politically connected corporations, and have often become victims of acquisition of State land by government agencies. These include SAFODA, SLDB ... and corporations that are eyeing land resources and joint ventures with private companies under the guise of public purpose and development.⁵¹

In general, native peoples seeking recognition of native customary land rights rejected the offer of the Department of Land and Survey for communal title since it restricted their rights to sell the land and potentially relocated them, as in the case of Tongod, to “steep and hilly terrain unfit for cultivation”.⁵²

This is not to say that no native will benefit from the communal titles. There is potential in this opportunity. Yet as Malaysia’s Human Rights Commissioner, Jannie Lasimbang has commented, there are many “grey areas” in the communal land titles that need clarification.⁵³

Conclusion

In this paper I have shown how native customary laws were treated by the

⁵¹ Kaung 2011

SAFODA (Sabah Forestry Development Authority) and SLDB (Sabah Land Development Board) are semi-governmental agencies in Sabah with the mission to develop the forestry and agricultural sector.

⁵² Kaung 2011

⁵³ New Sabah Times 2010b

North Borneo Chartered Company and British colonial officers from 1880 to 1950. In the first section I showed that while colonial officers might have been committed on paper to honouring native land rights and customs through a system of legal pluralism, in practice the separate laws for native peoples was used as a means to control the local population and ultimately severely limited the rights of native peoples to govern their traditional lands according to their customs. The prime beneficiaries of the dual legal system were European commercial agricultural ventures, which were fostered by the government as their primary source of revenue.

In the next section I argued that even after independence from colonial rule, the violation of native peoples land rights has continued into the present day. At times, the remnants of native customary law that are woven into the Sabah land code, as in the case of communal land title, have been perverted and used in a manner that is not in the best interest of native peoples.

What then is the future of legal pluralism in Sabah as a mechanism for native peoples to gain justice and secure rights to land? Despite the negative picture described above, three recent events suggest that there is the possibility that native peoples can reclaim control over native customary law and reshape the current form of legal pluralism to their advantage. The first of these events began in mid-2010 when the Chief Judge of Sabah and Sarawak, Tan Sri Richard Molanjum, announced that Sabah's Native Court system should be given equal standing with other legal institutions in Sabah, such as the Syarait Court.⁵⁴ Pressing for full recognition of the Native Court, Tan Sri Richard Molanjum called for full and equal treatment of the three different legal traditions in Sabah: the Civil Court, the Syarait Court and the Native Court.

The second event that has bearing on native land rights consists in the two judgments by the Sabah High Court that ruled in favour of native land rights. The first case was the resolution of the Kundasang Public Inquiry discussed above. In this case Justice Datuk Ian Chin ruled in favour of the native farmers saying "there is no need for a native to seek permission from

⁵⁴ Fernandez 2010a

the government to enter State land for the purpose of establishing native customary rights since such rights were exercised from time immemorial".⁵⁵ In the second case Justice David Wong Dak Wah ruled on the question "Can native customary rights exist on forest reserve?" In his ruling Justice Wah determined that the six men in the case "possess native customary rights to the land, they have the authority to be on the land to cultivate and do other things which their 'adat' (custom) allows them to do". He ruled that they had been wrongfully evicted by the Forestry Department.⁵⁶ Both these landmark decisions from the Sabah High Court unequivocally support native customary rights to land, sending an important signal to supporters of a new, stronger system of legal pluralism.

The final significant event that could have a major impact on native land rights is a planned national inquiry by the Malaysia Human Rights Commission into the land rights of indigenous peoples in Malaysia. The inquiry begins in June 2011 and a report is anticipated by late 2012. The results of this report are bound to carry a great deal of weight.

Looking at all these events together, albeit from a distance, it appears that Sabah may be at a tipping point in its treatment of native land rights through legal pluralism. At this moment there is a convergence of factors: increasingly strong NGOs (such as PACOS) facilitating native communities in their land struggles⁵⁷, sympathetic judges at the level of the High Court, ruling in favour of native rights, renewed efforts at strengthening the Native Court system, and a Human Rights Commission that appears ready to confront the issue of native land rights. Therefore it is an ideal time to put a great deal of thought into the role of legal pluralism in protecting native peoples in Sabah. If, as I argue, legal pluralism in Sabah has not, to date, successfully supported native peoples in their quest for autonomy and security, then this might be a window of opportunity for native peoples and

⁵⁵ Case K 22-71-2000 in Sabah High Court. "Rambilin binti Ambit vs. the Director of Lands and Survey".

⁵⁶ Case K41-128 of 2010 in Sabah High Court. "Andawan Bin Ansapi and 5 Others v Public Prosecutor".

⁵⁷ Doolittle 2007

their advocates to thoughtfully restructure legal pluralism in a manner that truly creates a scenario where a respectful co-existence of different legal norms and customs is possible.

5. Asserting customary land rights in the Chittagong Hill Tracts, Bangladesh

Challenges for legal and juridical pluralism¹

Devasish Roy²

This paper discusses the challenges faced by the indigenous peoples in the Chittagong Hill Tracts (CHT) region in Bangladesh in exercising their customary land rights within the Bangladeshi legal and juridical system (other than in those lands categorised as ‘forests’). Although Bangladesh has a unitary form of government, the CHT has a separate administrative system where customary laws, largely unwritten, apply under the aegis of statute law. The colonial-origin CHT Regulation of 1900 regulates, and thus implicitly recognises, customary land and resource rights of the indigenous people, under the custodian role of traditional chiefs and headmen. The 1997 “peace” Accord on the CHT, and consequent post-Accord legislation, reinforce the status of customary law, including through strengthened self-government under indigenous-controlled district and regional councils. Implementation, however, remains a daunting challenge.

This paper explores the nature of these challenges, including the tensions within the Bangladeshi legal and juridical system in accommodating customary land. It will focus on two major areas: allotment of ownership and use of land, and the resolution of disputes over land. In both cases, it is

¹ Paper prepared for presentation at the “Regional Meeting on Securing Rights through Legal Pluralism in Southeast Asia” hosted by the Forest Peoples Programme and the Centre for Peoples and Forests with the support of Rights and Resources Initiative, Kasetsart University Bangkok, Thailand on 20-22 September 2010.

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seen that customary land rights are often at risk of being subsumed into, or negated by, mainstream concepts and practices of land ownership and use that draw upon exchange-oriented individual rights. The latter are often promoted by (largely non-indigenous) government functionaries and non-indigenous settlers.

Several indigenous peoples' institutions and organisations, including traditional institutions (barring some exceptions), on the other hand, seem to be equally determined to resist such a process, by invoking customary practices and statutes that support their concept of land rights and land use. Although the force of the State is on the side of mainstream practices, indigenous peoples have the advantage of physical possession of the swidden and forest commons, knowledge about the resources thereon, their relative remoteness and the absence of land survey (which would have provided the State with detailed data on the lands in question). For the time being, the resistance is holding on, to some extent at least, but in the long run, its persistence will depend upon how united the indigenous peoples can remain, and the extent to which they can combine peaceful occupation and resistance programmes with the strategic use of judicial and other recourse mechanisms.

Legal pluralism in Bangladesh: a brief overview

Bangladesh - a unitary system of government - practises a form of legal pluralism. This is primarily in regards to two major contexts. One concerns personal laws. Thus, somewhat like in Pakistan, India and Malaysia - also former British colonies like Bangladesh - the personal or family law principles governing marriage, inheritance and related matters in Bangladesh are based upon the ethnic or religious affiliation of the individuals concerned.³ This is true for all parts of the country. This paper, however, will not address personal law issues other than where they are pertinent to the issue of customary land rights.⁴ The other major form of

³ Roy 2009:19.

⁴ For a detailed discussion of the customary personal laws of the indigenous peoples

legal pluralism that is practised in Bangladesh is in the partially autonomous CHT region in the country's south-eastern frontier. Here, special regional statutes - such as the CHT Regulation 1900 - and customs, recognised expressly or implicitly in statutes, co-exist with national laws, albeit not without tension and conflict.

Constitutional law

In the Constitution of Bangladesh, the definition of law includes "custom or usage"⁵, and the expression "existing law" includes laws in existence prior to the commencement of the Constitution (article 152). In a case concerning the succession to a hereditary chiefship in the CHT – the *Bohmong Chiefship* - the apex national court, the Supreme Court of Bangladesh, declared that neither the government nor the court itself had the authority to interfere with the customary laws of the Bohmong Chief's territory, known as a 'Chief's Circle'.⁶ While personal customary laws have been accorded a reasonably high status in Bangladesh, as mentioned above, the case of customary resource rights is more problematic, although not bereft of formal recognition.⁷

Customary land rights

The customary land and resource rights regime in Bangladesh includes aspects of substantive law - i.e., the content of laws, whether based on oral customary traditions or statutes that expressly or implicitly acknowledge custom-based rights - and procedural law in both land management and land dispute resolution.⁸ Thus conflicts based upon competing legal regimes over

of the Chittagong Hill Tracts, see Roy 2004a and Roy 2005.

⁵ Under article 152, "law" means "any Act, ordinance, order rule, regulation, bye-law, notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh".

⁶ *Aung Shwe Prue Chowdhury v. Kyaw Sain Prue Chowdhury and Others* (Civil Appeal No. 8 of 1997)[1998] 18 BLD 33-43 at 41.

⁷ Roy 2004a:124; Roy 2010:126-127.

⁸ For a detailed discussion of the status of customary land rights in the CHT, see Roy

lands categorised as forests within Bangladesh - e.g. customary law versus 'colonialist' Forest law regimes - show a clear subordination of customary regimes to 'statist' interpretations of Forest laws.⁹ The trend is not unlike that seen in several other parts of South and Southeast Asia.¹⁰ This paper will not focus on these issues. It will, instead, discuss the major challenges in asserting and defending customary land rights in the CHT in areas not formally classified as forests.¹¹

Legal, administrative and judicial pluralism in the Chittagong Hill Tracts: historical and current context

Bureaucratic, traditional and elective authorities

The administrative and legal system in the CHT is unique in Bangladesh on account of both the structures of governance and the laws applicable to the region. The CHT administration includes, in addition to the usual bureaucratic and elected local government system, the traditional self-government institutions of the *rajas* or 'circle chiefs', headmen and *karbaries* (village chiefs), which do not occur in other parts of the country. These institutions were partially formalised during British rule (1860-1947) through legislation, although some of them predate the British advent in the area.¹² Additionally, there are the three hill district councils and the CHT Regional Council, two-thirds of whose membership, along with their chairpersonship, are reserved, by law, for "tribals".¹³ The latter institutions

2002, 2004a, 2004ba, 2005; Roy C 2000:53-58

⁹ Roy & Gain 1999:22; Roy 2002:20, 26-29; Roy 2005; Roy 2010

¹⁰ Lynch & Talbott 1995

¹¹ Although Forest Department officials do not manage or administer these lands, unlike those that are categorised as "reserved forests", they nevertheless have jurisdiction over these lands when it comes to the issuance of the mandatory permits for sale and transit of timber. In this case, the department steps in on the grounds that these lands are categorised by the department as "unclassed State forests".

¹² Serajuddin 1971, Chakroborty 1977, Brauns & Loffler 1990:27, Quanungo 1997.

¹³ Roy 2000: 43-49; Roy R C:29-35; Roy 2009:21-30; Khan 2004:23-26; Martin 2004:74-79.

are the result of the autonomist struggle of the 1970s to the 1990s, culminating in the signing of the CHT accord of 1997 and the revival of limited self-rule in the region through bureaucratic, elective and traditional systems of governance.¹⁴

CHT: an example of legal and juridical pluralism

It has been said that “[the] CHT is the example of a legally and juridically pluralistic system. Legal pluralism exists on account of the concurrent application of customary, regional and national laws to the region. Juridical pluralism is reflected through such matters as the co-existence of traditional and State courts, based upon different traditions of justice, litigation procedure, penal and reform systems, restitution and compensation processes, and so forth”.¹⁵

Conflict of systems and authorities in land allotment

Formal land grants through Deputy Commissioners

The CHT land administration system, especially with regard to the system of land allotment, shows a conflict of traditions, particularly since the 1970s. Prior to 1971, land grants to outsiders was not permissible by law. Except for the small extent of commercially valuable lands in market centres and the scarce valley-floor lands suitable for intensive irrigation-oriented agriculture, CHT residents did not go for private titles. Amendments to the CHT Regulation of 1900 (to rule 34) in 1971 and 1979, led to the introduction of the practice of providing land grants to outsider individuals and companies.¹⁶

However, the practice of providing grants only after consulting the *mauza* headmen for specific cases, and the Circle Chiefs, in a general manner, was

¹⁴ Roy 2000; Khan 2004; Martin 2004:21,74-79

¹⁵ Roy 2004a:127

¹⁶ Roy 2004b:30

not expressly overruled. Tens of thousands of acres were granted to outsiders in the 1970s and 80s, either for the establishment of commercial plantations and industries,¹⁷ or to re-settle an estimated 450,000 ethnic Bengali settlers in the region.¹⁸ In both cases, the customary land rights of indigenous communities were wantonly violated, including by bypassing the headmen and chiefs in the settlement and lease-granting process.¹⁹

Land grant authority is vested upon the senior-most district-level civil administration official known as the *Deputy Commissioner* (“DC”) under the supervision of higher officials. However, the traditional headmen have the authority to formally grant homestead land to indigenous residents, to advise the DC on land title grants and transfers, and to allot lands for use for swidden or ‘shifting’ cultivation or other customary use, in a semi-formalised manner. Likewise, the DC is obliged to consult the chiefs on “important matters affecting the administration of the CHT”, which was not done in this case.²⁰

Land administration and management by the mauza headmen and the Hill District Councils

The aforesaid system of land administration is expressly provided for in the concerned laws, or sanctioned through long-standing administrative practices, while others are exercised on the basis of customary law, being implicitly recognised by the CHT Regulation of 1900.²¹ Thus there are overlapping layers of concurrent authority, one based upon mainstream concepts of land ownership (as exercised by the DC) and another based upon traditional customs, some of which have been formalised by statute and exercised under the supervision of the village *karbaries*, *mauza* headmen and circle chiefs. To the aforesaid two layers of land administration authorities – the bureaucratic and the traditional – has been

¹⁷ Roy 2002:31

¹⁸ Roy 1997:169-173; Roy 2002:29,30

¹⁹ Roy 2002; Roy 2010

²⁰ Rule 39, CHT Regulation 1900.

²¹ Roy 2004b:21,62-66

added a third authority, namely, the three *hill district councils*, under the supervision of the CHT Regional Council.²² The concerned laws – the almost identical Hill District Councils Acts of 1989 [at section 64(1)(a)] provide that, “*notwithstanding anything contained in any law for the time being in force- (a) no land including the khas land suitable for settlement within the jurisdiction of Rangamati Hill District shall be leased out, settled with, purchased, sold out or transferred otherwise without the prior approval of the Council*”. Similarly, “no land, hills and forests under the control and jurisdiction of the Council shall be acquired without consultation with and the consent of, the Council”.²³

Formal land grants by the DCs have been suspended since 1989, except in the case of religious or educational institutions.²⁴ On certain occasions, DCs have instructed the traditional headmen to refrain from processing land grant applications. However, the practice of customary use of land, whether for swidden cultivation, or for use of produce from forests (other than formally classified ‘reserved forests’) or in other such ways, continues, although frowned upon and discouraged by district non-indigenous functionaries. Surveys of lands have not been conducted in most parts of the CHT, barring some market centres and townships.

Therefore, the only officials who have detailed knowledge about untitled land – which form the bulk of the CHT – are the headmen, and their deputies, the *karbaries*. *This is one of the prime reasons – not having land survey records - for which the alienation of further community land has been prevented by the refusal of the traditional leaders to assist outsiders in*

²² The posts of chairperson, and two-thirds of the members of the aforesaid councils, are reserved by law for “tribals”. The district-level councils were introduced in 1989, with their powers being strengthened in 1998, through legal amendments following the signing of the CHT Accord of 1997, otherwise known as the “peace accord”.

²³ Section 64(1)(b), Rangamati Hill District Council Act, 1989 (as amended in 1998). Identical provisions are contained in the Khagrachari and Bandarban Hill District Council Acts of 1989 (as amended in 1998).

²⁴ Executive orders of the Ministry of CHT Affairs, Government of Bangladesh.

their quest for acquiring land titles or possession. The embargo on the grant of land titles since 1989 has also prevented the acceleration of the process of privatisation, except between indigenous individuals.

The hill district councils' role in land administration is still largely untested, except in the case of land transfers. For transfer of land, the consent of the councils is required, before the DCs provide the mandatory permission, required for all land transfers within the CHT.²⁵ However, in two specific cases, the Rangamati district council exercised its authority to provide formal recognition to custom-based use of untitled land for a Buddhist monastery-cum-meditation centre and for a community-managed forest.²⁶ In both cases the headmen initiated or supported the application, in addition to the concerned circle chief, in one of the cases.²⁷

The aforesaid two cases are the only known instances in which a hill district council has invoked statute law to formalise customary land grants, thereby providing a clear precedent for asserting customary land rights without involving the DC. If the aforesaid practice is continued by the Rangamati District Council and mirrored by the other two district councils, this would be a good way to safeguard customary resource rights. However, to what extent this can secure the indigenous peoples' customary land rights will depend upon the extent of lands that come under such formal acknowledgment. Another factor that may negatively impact upon such a process would be the re-opening up of land grants by the DCs.

The threat of land survey

Another factor which may impinge upon the safeguard measures is an imminent land survey. This is an ongoing issue that has created much debate

²⁵ Roy 2008:495,520

²⁶ Memo of Land Officer, Rangamati Hill District Council to Headman and concerned Upazilla Nirbahi Officer.

²⁷ In the case of the *Furamone International Meditation Centre* (about 250 acres), the author, in his capacity as a Circle Chief, forwarded the application of the headmen to the chairperson of the Rangamati Hill District Council.

and controversy in the CHT. The chairman of the CHT Land Disputes Resolution Commission – which was established to provide expeditious remedies to cases of land dispossession - has declared that the government will start a land survey soon. This decision seems to be supported by a section of the Bengali inhabitants of the CHT, including the government-sponsored Bengali migrants of the 1980s. However, indigenous leaders, including those that are members of this commission, have been critical of this decision – citing provisions of the CHT Accord of 1997 – and have demanded that no survey be conducted, unless asked for by the CHT Regional Council, and until people displaced during the conflict are rehabilitated.²⁸ Some of them have demanded that there should not be survey even on “un-disputed” land. This is therefore a clear case of conflict between two traditions. One is oriented towards customary use of land, as espoused by the indigenous peoples, who resist the survey. The other lays its basis upon the concept of private titles, a largesse conferred upon individuals at the instance of the State, which probably seeks to legitimise its occupation of land that it claims belongs to the State to allocate as it pleases, irrespective of the status it has according to oral traditions of the indigenous peoples.

There are several reasons as to why the indigenous people oppose the proposed survey. *Firstly*, it is feared that a survey would result in the legitimisation of the occupation by settlers of customary lands of the indigenous people, since survey documents provide a presumption of legitimacy of occupation, unless rebutted. *Secondly*, it would provide the government with detailed knowledge of the land, which might eventually lead to land grants to more non-indigenous people.²⁹ *Thirdly*, such a survey

²⁸ Clause 2 of Section D of the Accord reads: “After signing and implementation of the agreement between the government and the Jana Samhati Samiti, and after rehabilitation of the tribal refugees and internally displaced tribal people, the government, in consultation with the Regional Council to be formed as per this agreement, shall start cadastral survey in CHT as soon as possible and after finalisation of land ownership of tribal people by settlement of land dispute through proper verification, shall record their land and ensure their land rights”.

²⁹ At a luncheon workshop on the CHT Accord and the Constitution of Bangladesh,

might directly lead to the extinguishment of custom-based rights as such survey processes are based upon mainstream individual title traditions that have no room to accommodate customary, rotational, inter-generational, non-intensive and community-oriented manners of land use, with which survey officials are not familiar.

Conflict of systems in land dispute resolution

Land dispute resolution by the CHT Land Disputes Resolution Commission

The Chittagong Hill Tracts Land Disputes Resolution Commission Act 2001 provides that there will be a commission on land to be headed by a retired judge of the Supreme Court of Bangladesh which will include as members the chairperson of the CHT Regional Council (or her/his representative), the concerned hill district council chairperson, the concerned circle chief and the Divisional Commissioner/Additional Divisional Commissioner, of Chittagong. The commission is to function for three years, but its term of office may be extended by the Government of Bangladesh (GOB) in consultation with the CHT Regional Council (CHTRC). The commission is to provide decisions on land-related disputes brought before it in accordance with “laws, customs and systems prevailing in the CHT”.³⁰ It has the authority to declare land grants illegal and to restore possession. Therefore, although called a commission, its main function is to hear disputes and provide decisions, rather than recommend, as is usually the case for bodies that are called “commissions”.

The commission was set up, following the letter and spirit of the CHT

held in Dhaka on 18 September 2010, and attended by CHT leaders, civil society leaders and senior representatives of the press and media, as well as the author, member of the CHT Commission and renowned academic, Dr. Shapan Adnan, expressed his fear that the conduct of a survey was aimed at rehabilitating the government-sponsored Bengali settlers on lands found to be without title, and hence, in the eyes of the district land administration officials, open to the government to allot out. For a detailed account of CHT land disputes, see Adnan 2004.

³⁰ CHT Land Disputes Resolution Commission Act 2001 (Act LIII of 2001).

Accord of 1997, to provide expeditious, cost-free justice, accounting for customary law, to deal with the lingering and huge numbers of instances of land-grabbing, land alienation, fraudulent deals, multiple registration and so forth.³¹ There are dysfunctionalities and other problems in the work of the commission (which has not yet provided its decisions on actual disputes presented before it), as mentioned below, but if it could overcome them, *the CHT Land Disputes Resolution Commission may be one of the best examples of a system of land dispute adjudication involving indigenous peoples that includes some of the key elements on indigenous peoples' land rights that were identified in the UN Declaration on the Rights of Indigenous Peoples, in that (i) it is inclusive (it has a majority of indigenous persons as members); (ii) it accounts for customary law; (iii) its procedure is simple, and excludes the application of complicated court procedure (and legal practitioners) and hence is expected to decide disputes expeditiously; and (iv) the forum's decisions will have the status of a court decision and hence, the executive backing of the State.*³²

The work of the commission has, however, become extremely controversial, particularly due to clear disagreements between its chairperson – the retired judge – and the indigenous members, particularly the traditional chiefs. There are three main areas of dispute. In the *first* place, the indigenous leaders do not wish to start actual dispute settlement work unless and until the concerned law is amended to remove inconsistencies with the CHT Accord.³³ *Secondly*, these leaders disagree with the chairperson's unilateral

³¹ Roy 1997

³² The UN Declaration on the Rights of Indigenous Peoples (UNDRIP), Article 26(3): "States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned." UNDRIP article 27: "States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognise and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used."

³³ Among the defects of this law, two are of paramount importance. One concerns

decision to precede the dispute resolution work by the conduct of a land survey, for the reasons mentioned above.³⁴ *Thirdly*, they disagree with the format for providing information to the commission by the applicants and respondents because they believe that it does not provide adequate opportunities for rights based upon oral customary traditions, as opposed to rights based upon written title, and that it is therefore biased against indigenous peoples.³⁵

Simple system of litigation versus mainstream civil procedure

Quite apart from the fact that litigants on land in the CHT have the opportunity of accessing the Land Commission (which is to provide expeditious and cost-free redress, not involving legal practitioners), the system of administration of justice in the CHT is different from other parts of the country in some very crucial ways. *Firstly*, with regard to disputes between indigenous people, except for civil litigation involving commercial suits and criminal offences of a serious nature, State courts are barred from trying these cases, which are triable by the Circle Chiefs and *mauza* headmen.³⁶ *Secondly*, with regard to civil litigation, the complex Code of

the quorum for the commission, which would be complete even in the absence of two out of the three indigenous members of the concerned district or chief's circle. Secondly, in the case of absence of consensus among its members, the decision of the chairperson is to be regarded as the decision of the entire commission.

³⁴ See, for example, the views expressed in writing by the three traditional chiefs in a memorandum to the Land Commission chairman; reported in *The Prathom Alo*, Dhaka, 15 July 2010.

³⁵ Based upon discussions with members of the CHT Commission (the writer himself is one of its members), including J. B. Larma, chairperson, CHT Regional Council, Raja Saching Prue Chowdhury, Mong Chief, and Chaw Hla Prue Chowdhury, representative of Bohmong Chief, on several occasions in May-September 2010.

³⁶ Extracts from sections 8(3) and 8(4), CHT Regulation, 1900 (as amended in 2003): "(3) The Rangamati, Khagrachari and Bandarban districts of the Chittagong Hill Tracts shall constitute three separate civil jurisdictions under three District Judges. (4) The Joint District Judge as a court of original jurisdiction, shall try all civil cases in accordance with the existing laws, customs and usages of the districts

Civil Procedure governing process of summons, discovery, pleadings, relief, execution and so forth does not apply to the region. In its place, a simple system prevails, meant to facilitate expeditious and inexpensive litigation, including a recommendation to resolve disputes through *viva voce* examination, except where necessary.³⁷ *Thirdly*, the civil judges are obliged to try cases in “accordance with the laws, customs and practices” of the CHT, which clearly includes customary law, even in civil litigation tried by civil judges.

Despite the aforesaid prescriptions recognising the specialised justice administration system in the CHT, some civil judges in the CHT recently tried to impose the Civil Procedure Code in the civil courts in Rangamati and Bandarban districts. This would have meant that all the complex formalities would have to be observed in every case, and suits could be barred or delayed on grounds of procedure alone. This would have meant great hardship for many litigants, including for land cases (where they do end up involved in them). This attempt was ultimately thwarted by a combination of court boycotts by local (including indigenous) lawyers and informal interventions from judges of the Supreme Court of Bangladesh at the behest of indigenous lawyers.³⁸ *Thus, this case illustrates both attempts by mainstream-oriented individuals to assimilate the CHT justice administration and legal system into the mainstream national system, and attempts by local leaders and lawyers, to resist such attempts (albeit with limited success).*

concerned, except the cases arising out of the family laws and other customary laws of the tribes of the districts of Rangamati, Khagrachari and Bandarban respectively which shall be triable by the Mauza Headmen and Circle Chiefs”.

³⁷ Extract from the CHT Regulation: Rule (1): “The Administration of Civil Justice shall be conducted in the most simple and expeditious manner compatible with the equitable disposal of the matters or suits”. Rule (2): “The officer dealing with the matter or suit will in the first instance endeavour, upon the *viva voce* examination of the parties, to make a justice award between them. Witnesses should not be sent for, except when the officer is unable without them to come to a decision upon the facts of the case.”

³⁸ Interviews with Advocate Pratim Roy and Advocate Dinanath Tanchangya, members of the Rangamati Bar Council, August-September 2010.

Likely trends: challenges and opportunities

Reforms to the Land Commission Law

Recent trends show a mixed bag of events. No doubt the challenges confronting the indigenous peoples are difficult, but they are perhaps not insurmountable. As regards the Land Commission, a likely positive development is a forthcoming meeting to be hosted by the Minister for Land, to which indigenous leaders from the CHT have been invited, to discuss possible reforms to the Land Commission Law.³⁹ This is the fruit of relentless lobbying by indigenous activists and by progressive civil society actors.

Conduct of a land survey

The aforementioned proposed land survey is a disturbing development, but it can perhaps be resisted if the indigenous leadership is united. So far they seem to be, at least on this issue. In this regard, the Hill District Councils could perhaps play the most assertive role, since they are mandated by law to have the last say on land allotment and transfer matters. Whether a land survey should be carried out is entirely a matter for them to decide, where they deem it appropriate, *after all the refugees and displaced people are rehabilitated*, as stipulated in the CHT Accord, and when so proposed by the CHT Regional Council.

The Hill District Councils have not framed any *regulations* to help them guide them in their land administration and land management role. The Government has not framed any *rules* either (which it is obliged to frame in consultation with the councils). However, the District Councils are now constituted with government appointees – pending elections – and it is uncertain to what extent they will act in an independent manner. None of the

³⁹ The meeting is scheduled to be held on 22 September 2010 in the Ministry of Land, which is expected to be attended by the author in his capacity as a member of the commission, along with the chairpersons of the CHT Regional Council and the hill district councils.

district councils or even the CHT Regional Councils have framed a land policy on their respective area of jurisdiction. Nor has the Government of Bangladesh. If they were accommodative of customary land rights, such policies could have helped protect these rights.

Litigation in the Supreme Court of Bangladesh and constitutional reforms

Two sets of cases are pending in the Appellate Division of the Supreme Court of Bangladesh in which crucial matters of self-government and land issues will be decided, after rulings by separate benches of the High Court Division declaring invalid some CHT laws that recognise indigenous peoples' rights, including those drawn upon customary law principles. It is expected that the cases will come up for hearing in the apex court over the next year or so. In one, the legality and very existence, of the CHT Regulation of 1900 - which provides a special legal and administrative status to the CHT- is under review.⁴⁰ In another two, the existence of the CHT Regional Council, and some provisions of the Hill District Council Acts of 1989, including the electoral roll for the councils and laws on permanent residence requiring a certificate from the Circle Chief, and affirmative action-based appointments in council posts for "tribals", among others, are under scrutiny.⁴¹

The aforesaid debacle in the High Court has prompted renewed demands for constitutional recognition of the status of indigenous peoples and on safeguards for the special legal and political system of the CHT region.⁴²

⁴⁰ *Rangamati Foods v, Commissioner of Customs & Others*, 19 BLC 2005, 525.

⁴¹ Writ Petition No. 4113 of 1999 (*Shamsuddin Ahmed v Government of Bangladesh and Others*) and Writ Petition No. 2669 of 2000 (*Mohammed Badiuzzaman v Government of Bangladesh and Others*) in the Supreme Court of Bangladesh (High Court Division).

⁴² Daily Prothom Alo, Dhaka, 19 September, 2010, reporting on a meeting on 18 September, 2010 on *The CHT Accord Implementation & Constitutional Reforms*, hosted by the CHT Citizens Committee and supported by the national NGO, ALRD. The report quoted retired Justice G. Rabbani, CHT Citizens Committee convener Gautam Dewan and the author (in his capacity as the Chakma Chief).

Activists suggest that the hearing should be concluded soon, and within the period of rule of the current government, whose major component, the Awami League, is committed to implementing the CHT Accord and promoting indigenous and minorities' rights. Thus, if the decision in the Appellate Division was to go against the indigenous peoples, they could still lobby the government for constitutional reform to recognise or entrench the concerned laws. The present government has the constitutionally required two-thirds majority for bringing in constitutional reforms and this is perhaps as good an opportunity as ever, for bringing about the required constitutional changes.

On the opportunity side of the ledger is the unity among different indigenous peoples and organisations in resisting the land survey and in bringing forth amendments to the Land Commission law. Despite tremendous pressure from government authorities – including civil bureaucrats and military officers (the CHT is still heavily militarised despite the signing of the CHT Accord and the de-commissioning of arms by the former guerillas) the *mauza* headmen have refused to give in to agreeing to land surveys and land demarcations. As mentioned earlier, the relative remoteness of large swathes of the CHT has also, perhaps by accident, if not design, prevented further land alienation.

Customary law, especially where it is formally recognised, *is one of the most vital tools that indigenous people have in protecting and promoting their rights*. It is something that they define, and they amend. But of course, the asymmetry of relations – all too often favouring mainstream laws (favouring the State, business interests and co-opted indigenous elite) as against indigenous customary law (often seeking to protect indigenous communitarian interests) thwarts the exercise of customary rights, even where the formal acknowledgment of customary law is present. Therefore, concerted efforts at capacity-raising, organisational strengthening, networking, proactive litigation (by “civil rights” lawyers, including through “Public Interest Litigation”) and other synergised activities can often play a vital role in tilting the balance in favour of indigenous

peoples.⁴³

Engagement in international human rights mechanisms can be another important channel in protecting customary land rights. Bangladesh has ratified several international human rights treaties and therefore engagement with the concerned treaty bodies, such as the Special Rapporteur mechanisms of the United Nations and other relevant UN processes, including those specifically dealing with indigenous peoples,⁴⁴ can result in putting pressure upon the government. Some positive impacts of engagement in the above-mentioned fora are already apparent. Sustained and enhanced engagement could bring further results.

Lessons for asserting indigenous land rights

Some lessons emerge from the above discussion with regard to the possible ways in which customary land rights may be effectively secured, or at least defended to some extent. Some of the examples from the CHT may be relevant for other countries inhabited by indigenous peoples, particularly those where legal pluralism is recognised. These are briefly mentioned below.

However, the biggest lesson that we can draw from the CHT, and many other parts of the world, is that unless indigenous peoples have a role in framing the “rules of the game” – e.g. through involvement in legal reform (such as for the national constitutions) and in the process of administering them (through executive or judicial action) - the gains will no doubt be limited. Where it is not a “level playing field” (which is the prevalent mode), indigenous peoples may seek to make the ‘playing field’ more ‘even’. Of course, that is a very tall order.

⁴³ Roy 2009:60-63

⁴⁴ These mechanisms include the UN Permanent Forum on Indigenous Issues, the UN Expert mechanism on the Rights of Indigenous Peoples and the UN Special Rapporteur on the human rights and fundamental freedoms of indigenous peoples.

Where that is not possible (in the vast majority of the cases), it is perhaps best to try to create some hillocks or ‘bumps’ so that the encroachers and others who trample upon indigenous customary land rights do not find the field “too level”, in cases where indigenous peoples still retain possession. This is another way of saying that one can still try to take the “battle” to terrain with which indigenous peoples are more familiar. Furthermore, retaining physical possession of their land, territories and resources is also important (although this may be begging the question to some extent) to continue such struggle from *terra firma*. In any event, the following are some ideas to create such hillocks and “bumps”, and to take, or keep, the struggle, to a familiar field, be it even or uneven.

Recognising, or accounting for, the asymmetry that exists between mainstream laws and customary laws

Despite the presence of formally recognised legal pluralism in countries such as Bangladesh, *the asymmetry of relations - between mainstream law (or mainstream interpretation of laws) and customary law, all too often works against customary rights*. Thus it is necessary to address, or at least to adequately account for, such asymmetry, in attempting to address indigenous customary land rights.

Addressing the asymmetry between mainstream and indigenous legal traditions

Addressing the asymmetry between mainstream and indigenous legal traditions may be the best way, and perhaps an ideal solution (but perhaps impracticable in most countries), to resolve this problem of asymmetry. This may call for active engagement in mainstream politics to bring in new legislation (as occurred in the CHT in the case of the post-Accord laws). It may be noted that the CHT laws provide a simple and ‘blanket’ recognition to customary laws without defining (and perhaps thereby reducing) the rights concerned, rather than attempting to re-produce them in a written code. In this respect, *the risks of reducing and ‘freezing’ customary rights*

*through formal codification, which is different from simple 'recognition', may be a relevant, and important, distinction, to be borne in mind.*⁴⁵

Legal and 'judicial'/'juridical' pluralism

*The extent to which customary land rights are implemented may be enhanced in systems that not only practice legal pluralism, but also in which there is also 'judicial' ('juridical') pluralism, involving indigenous peoples in dispute resolution. Membership of indigenous peoples' representatives in justice administration bodies (e.g. "tribal" courts in the CHT and in Northeast India, the Land Commission in the CHT) can make a big difference.*⁴⁶ Where such bodies are absent or impracticable to bring about, alternative 'access to justice' mechanisms may be lobbied for, with a view to reducing dependence upon State bureaucratic or mainstream justice mechanisms, in which indigenous peoples are disadvantaged on account of their marginality.

Substantive fairness in justice systems versus procedural fairness: moving away from adversarial models

The mainstream models of justice administration, particularly, in "common law" countries tend to be 'adversarial' in nature with the judge supposedly playing a neutral umpire's role. Where asymmetrical relationships are present, this leads to unfair results against the interest of the weaker party. Thus, reforms to such justice systems, such as through "public interest litigation", trying to undo the rules of "interest", "standing" etc. may help put marginalised justice seekers on a stronger footing.

Registration and survey: State versus indigenous models

Sometimes customary land rights are recognised but are regulated within

⁴⁵ For an argument against formal codification of customary law, see Roy 2004a, Roy 2005.

⁴⁶ For an overview of strong indigenous and 'hybrid' State-indigenous justice systems involved in administering customary law, see Roy 2005.

land registration, land survey and land delineation systems that depend upon concepts and practices (system dependent upon documentary evidence) that are alien or unfamiliar to indigenous peoples. *In such cases, it is necessary to seek to amend the systems concerned, and/or to set up alternative registration, survey and delineation systems, preferably with formal State recognition.* This may be a way to “customise’ land mainstream management systems.

6. Legal pluralism in Indonesia's land and natural resource tenure

A summary of presentations

Myrna A. Safitri

Introduction

Supported by the Forest Peoples Programme, Learning Centre HuMa/Epistema Institute and partners carried out socio-legal research concerning land and natural resource tenure in Indonesia in 2010. The research aimed to understand how various socio-political contexts resulted in different understandings and uses of legal pluralism in order to secure communities' rights to land and natural resources. With this in mind, we undertook a national legislative review and three case studies on districts that represent different social and legal problems: Pidie of Aceh, Sigibiromaru of Central Sulawesi and Lembata of East Nusa Tenggara. Findings were presented by Indonesian researchers - Myrna Safitri, Andiko, Taqwaddin Husein and Dahniar - and by a local parliamentarian, Bediona Philipus, at a Regional Meeting on Securing Rights through Legal Pluralism in Southeast Asia, held in Bangkok by Forest Peoples Programme and RECOFTC in September 2010. This paper summarises those presentations. It consists of the following sections: (i) trends in legal pluralism in colonial and contemporary Indonesia; (ii) conflicts of law regarding land and natural resources; (iii) different sources of law to build Aceh legal pluralism; (iv) complex societies and their impact on conflicts and legal pluralism in Sigibiromaru; (v) efforts to use customary law in policy advocacy in Lembata.

Indonesia's legal pluralism: different understandings in colonial times and in the present

Legal pluralism has been conceptualised as a situation where different sources of law exist in a community. Tensions between laws usually take

place and attempts to harmonise them are undertaken with differing degrees of success. Dutch colonial rulers had a strong grasp of the pluralistic legal systems in Netherlands East Indië - the name of Indonesia at that time. They invested resources into researching local systems of law to guide policy-making in the colony. The general understanding of the colonial government was that State (colonial) law was to be separate from peoples' law. The latter consisted of customary (*adat*) and religious (mainly Islamic) laws.

Indonesian independence on August 17th 1945 led to a fundamental change in the legal system. A national legal system was set up to replace the colonial one. The dualism of State and peoples' laws as recognised during the colonial period was now denied. *Adat* law and in certain cases Islamic laws were now considered to be the pillars of national law. The Basic Agrarian Law (Law 5/1960), for example, clearly states that the national agrarian (land and natural resources) law is based on *adat* laws.

In Suharto's New Order period, however, *adat* law was never considered as part of national laws. Several laws on natural resources either ignored or limited the recognition of *adat* laws. A revival of *adat* laws – and also Islamic laws – took place in the beginning of *reformasi* – a period after the resignation of Suharto. Some district regulations were enacted to recognise certain *adat* communities and their land. A law on special autonomy was also enacted in 2001 for Papua, recognising the role of *adat* institutions and the implementation of *adat* law in that province. Similarly, after a peace agreement between Indonesia's government and Aceh separatist organisation GAM, *Gerakan Aceh Merdeka* (Aceh Independence Movement) a law on special autonomy for Aceh was enacted, allowing the implementation of Islamic law in that region.

It appears that gradually, the State law has adopted both *adat* and Islamic law. Yet, in many fields, people continue to struggle to get their *adat* laws respected and recognised by the State. The three case studies presented in the meeting illustrated how these attempts were carried out.

In addition to the fact that State and peoples' laws are often in tension with each other, the case of Indonesia also highlights the pluralistic nature of

State laws on land and natural resources, a field in which numerous disharmonised laws coexist. For general provisions/directives concerning land tenure, environmental management and spatial planning, the following documents are of relevance:

- Decree of the Consultative People's Assembly (TAP MPR) Number IX/2001
- Law 5/1960 (Basic Agrarian Law, BAL)
- Law 26/2007 (Spatial Planning)
- Law 32/2009 (Environmental Protection and Management)

For specific natural resource management, the following laws exist:

- Law on Forestry (Law 41/1999)
- Law on Conservation of Natural Resources (Law 5/1990)
- Law on Plantation (Law 18/2004)
- Law on Water Resources (Law 7/2004)
- Law on Fishery (Law 31/2004)
- Law on Coastal Management and Small Island (Law 27/2007)
- Law on Oil and Natural Gases (Law 22/2001)
- Law on Geothermal (Law 27/2003)
- Law on Mineral and Coal Mining (Law 4/2009)

Each law established an independent regulatory system implemented by different State agencies at different levels.

In addition, we also find that so-called customary (*adat*) laws consist of several types:

- Customary law in-use (the actual practices of customary/*adat* norms in everyday life of communities)
- Customary laws as interpreted by communities' leaders
- Judge-made customary laws (as in court decisions)
- Jurist-constructed concept of customary law
- State-formulated customary laws (customary law in legislation, see e.g. Law 5/1960).

Given these legal developments, it must be understood that legal pluralism in Indonesia is not a dualism of State versus peoples' law, but rather a complex situation in which laws of both the State legal system and people's normative systems interact and coexist. The following sections elaborate on the impact of these complex systems on securing the rights of local people.

Conflicting land and forestry laws in national legislation and other challenges of legal pluralism

The 1945 Constitution of Indonesia and its amendment recognises the rights of *adat* communities to their local identities, culture and land. The Basic Agrarian Law (BAL) clearly states that the national land and natural resources law is based on *adat* law. However, as previously stated, other laws tend to ignore the *adat* law. Forestry laws - the old and present ones - are clear examples of this neglect. By incorporating forest controlled by *adat* communities into State forests, Law 41/1999 undermines the existence of *adat* communities and their laws. In this respect, Law 41/1999 is also contrary to the BAL.

Overlapping and contesting claims of *adat* communities and the State occur as a result of conflict between State law - in this case the Forestry Law - and *adat* laws, and conflict among State laws (Forestry Law vs. BAL). In several respects, the BAL and a regulation enacted by the Ministry of Agrarian Affairs (Ministerial Regulation 5/1999) are more progressive in terms of recognising the land rights of *adat* communities. Nevertheless, this Ministry also threatens the existence of communal lands of *adat* communities through its policy of land titling - partly supported by the World Bank.

Without adequate regulations and existing legal concepts concerning communal land rights, fragmentation of such communal land rights into individual rights is occurring. Contestation of *adat* and State laws reoccur in the cases of land conflicts within an *adat* community. Initiatives to find a legal solution have been carried out, particularly in West Sumatra among other places, by issuing land titles in the name of *adat* leaders or by

recording all the names of *adat* community members in the title. Rather than resolving the problem, this initiative leads to new problems of abuse of power by community leaders. As a result, internal conflicts within *adat* communities have arisen.

Seeking a comprehensive solution in recognising *adat* communities' rights to their land and in resolving conflicts of State laws on land and resource tenure is necessary for Indonesia. The existence of the Decree of People's Consultative Assembly Number IX/2001 provides one option, but there has been no political will expressed yet on the part of the Government of Indonesia to implement this Decree in an effective or consistent manner.

Integrating *adat* and sharia into State law in Aceh

As noted earlier, Aceh is a special autonomous province (Law 18/2001). The Law states that *sharia* (Islamic law) can be the source of law and be implemented in governmental and social affairs in Aceh. In addition to this, *adat* law of the Acehnese has an important function in everyday life. The challenge for the Aceh government is thus to reconcile State law, *adat* law and *sharia*. These efforts can be seen in the formation and function of the local government structure. The lowest level of this local government is *gampong* (village) and *mukim* (federation of villages). Interaction between State law, *adat* law and *sharia* clearly exists at the *gampong* and *mukim* levels.

Conflicts between *adat*, *sharia* and State laws are likely to emerge. The government of Aceh has attempted to limit these conflicts by integrating *adat* and *sharia* into State law. Local legislation called *qanun* is an arena for such integration. The government's policy states that *sharia* and *adat* law are the sources of *qanun*-making. A regulation concerning 'qanun mechanism' states that *qanun* must not contravene *sharia* and *adat* law. Furthermore, according to article 19 of Qanun Pidie 8/2007, several cases can be resolved by *adat* authorities, such as inter-family conflicts, inheritance, fighting, livestock, agriculture-related disputes, distribution of ricefield water, border rice fields, land disputes, borderlands, ill-treatment,

murder, sexual harassment and divorce. State legal officials should prioritise the *gampong* government in settling disputes in their village. Only if the *gampong* government fails should the cases be handled by State officials.

Complex society and its impact on conflicts and legal pluralism in Sigibiromaru

With 70% of its land covered by conservation forests and subject to State control, the District of Sigibiromaru in Central Sulawesi does not have an ample area of land for its *adat* communities. However, the problem of *adat* communities in this area is not only related to their limited access to land and forest. It is also related to the fact that forest communities are in fact highly complex social groups. These can be sub-divided into three main groups: indigenous peoples, spontaneous migrants and migrants from colonial and national government-sponsored development projects.

As a newly established district, Sigi has no legislation yet concerning communities' rights to land and natural resources. However, there is an initiative from local legislators to draft district regulations concerning the management of natural resources based on peoples' law and to make the forest and local cultural traditions a form of tourism investment. This initiative appears to be in contrast to the existing problems of forest communities in this district. Firstly, the complex reality of *adat* communities in Sigi requires a specific legal concept and policy. Secondly, there remain many unresolved conflicts, most of which involve communities versus conservation/local forestry offices, and conflicts between local communities and resettlement projects for *adat* communities. In the absence of legislation, conflicts are generally resolved in two ways: by agreements made between the government and the communities, or by local communities reclaiming their forest land.

Land, forestry and mining conflicts in Lembata: the use and misuse of *adat* and State law

A small island district surrounded by seawaters, Lembata, in the province of

Nusa Tenggara Timur, is inhabited by several tribes. Each can be considered as an autonomous *adat* community. The two biggest *adat* communities are Kedang and Lamaholot, each group shaped and defined by different socio-economic and political structures.

Conflicts over land and natural resources in Lembata have involved both conflicts between *adat* communities and district government and conflicts among *adat* communities. In some respects, *adat* has been successful in resolving conflicts among communities. In others, *adat* communities were unable to put an end to conflictual relations because political groups affiliated to their members/leaders had contributed to an escalation of the disputes.

Adat has been used by both district government officials and NGO activists in the conflicts related to a mining concession plan. The officials have used their traditional kinship connections and co-opted some *adat* leaders to support their plan of mining development in Lembata. NGO activists have also reactivated *adat* ceremonies to strengthen the solidarity of *adat* communities' members in their struggle against the district government.

State law has also been used by the district government and NGO activists. In line with their objectives, the district government has enacted regulations and issued licenses to support their mining policy. NGO activists, through their representation in district parliament, have struggled in trying to promote and implement a district regulation that would protect the rights of *adat* communities. They have been partially successful in enacting a regulation for community forestry, but must accept that the regulation does not allow the communities to own their land. In line with the national policy of community forestry, the land must be under direct control of the government. Once again, it is clear that customary laws in Indonesia are often considered of inferior legal importance in comparison with State laws. Furthermore, they risk being instrumentally manipulated by the State or individuals with ulterior motives, against the wishes and rights of the local communities in which *adat* laws are historically rooted.

7. Securing rights through legal pluralism

Communal land management among the Karen people in Thailand

Prasert Trakansuphakon

Introduction

Thailand lies in the heart of Southeast Asia bordering Laos and Cambodia to the northeast and southeast respectively, Malaysia to the south, and the Andaman Sea and Myanmar to the west. Thailand comprises seventy six provinces over an area of 513,115 km with a total population of 62,418,054.¹

The indigenous peoples of Thailand are most commonly referred to as “hill tribes”, sometimes as “ethnic minorities”, and the ten officially recognised groups are usually called “*chao khao*” meaning “hill/mountain people” or “highlanders”. These and other indigenous peoples live in the north, north-western and western parts of the country.

The redrawing of national boundaries in Southeast Asia during the colonial era and in the wake of decolonisation resulted in the division of many indigenous peoples living in remote highlands and forests. There is thus no single indigenous group that resides only in Thailand. The ten ethnic groups officially recognised as “hill people” living in the north and west of the country are the Akha, Hmong, H'tin, Karen, Khmu, Lahu, Lisu, Lua, Mien and Mlabri.

According to the Department of Social Development and Human Security,² the total population of officially recognised “hill-tribe” populations is of 925,825, distributed across twenty one provinces in the north and west of

¹ Central Census Bureau publication of the Kingdom of Thailand, including Bangkok, the surrounding area and the provinces. 31 December 2005.

² Ministry of Social Development and Human Security 2002

the country. The Karen represent the biggest group among the indigenous peoples of Thailand with a population of around 411,670, most of whose livelihood is still strongly based on agriculture and rotational farming (henceforth RF).

Throughout the last five decades, but also historically, the indigenous peoples of Thailand have faced pervasive negative stereotyping and discriminatory government policies, as is the case in many parts of the world. Underlying numerous Thai laws, policies and programmes targeting indigenous peoples, one finds the same prejudices and widespread misconceptions of indigenous peoples as drug producers who pose a threat to national security and to the environment.

The indigenous peoples of Thailand, however, do not have the right to their traditional occupation or livelihood practices. Rather, seizure or exploitation of resources by private companies on the one hand, and the imposition of fines or arrests for practising their traditional occupation and livelihood systems on the other hand, have been of frequent occurrence. Furthermore, the problems associated with RF agriculture, which the indigenous communities in the uplands have been practicing for their livelihood for centuries, remain a significant problem. Officials of the State have been arresting indigenous peoples for engaging in such activities without respite. In addition, villagers are now being penalised for “causing deforestation and rises in temperature”. Thus, making specific reference to climate change has added a new dimension to the nature of their so-called “crime”.

Stereotyping and Discrimination

In 1959, the term *chao khao* was coined by the Thai State to refer to “hill tribe” peoples living in the forest. This Thai term can also mean “other people”. This new term emerged as part of and in support of a hegemonic discourse during the nation-building process aimed at building national unity. In particular, during the American war in Vietnam and during the Cold War era, the so-called “hill tribes” came to be regarded as troublemakers with respect to national security, drug production and abuse,

and deforestation.³ One result of this is the persistent negative connotation of the term “hill tribes”. These highland peoples effectively became “others” or “aliens” from the perspective of the Thai people and the Thai nation-State.⁴ The “hill tribes” continue to be seen as a national problem by the State due to their practice of “shifting cultivation” which the State claims causes deforestation and environmental degradation despite a growing body of scientific evidence proving the contrary.

The forest management policy of the Forestry Department adopted in 1960 aimed at preserving 50% of the total national landmass as forested areas. However, this policy was decidedly unsuccessful and paradoxical as the government simultaneously promoted the clearance of forests in relatively flat areas in order to grow cash crops for the export market. In 1992, the government lowered its target and subsequent forest zoning was directed at achieving a total forest cover of 40%, with at least 25% comprising conservation forests. The figure of 40% derives from a water yield study that indicated a need for at least 38% forest cover, especially in head watershed areas.⁵

The goal of the Royal Forestry Department (RFD) was to develop forest areas, but the resulting reality was that it opened up channels to create commercial tree plantations rather than areas of forest.⁶ This policy confusion created opportunities for logging companies to replant trees in plantations after having cut down the existing and far more ecologically valuable forest trees (Art. 8). Private companies and government tree plantations as well as paper industries used the economic plantations for fast-growing tree varieties, such as eucalyptus and pine (Art. 11 & 12). Soon after, the government declared the Forest Orchard Act in support of these efforts, which formed the genesis of the tree-planting project implemented through the RFD.⁷

³ Highland Communities First Master Plan 1992-1997

⁴ Thongchai 2002:56; Renard 2002:79-80

⁵ Thailand Forestry Sector Master Plan (TFSMP) 1989 vol.5 p.30

⁶ National Forest Policy, Articles 4 and 5

⁷ Anan et al 2004: 33-34

The RFD played the leading role in launching reforestation programs in highland areas, often through the Watershed Area Management Units (WAMU). One such unit will be examined more closely in this study, which investigates the situation in the *Mae Lan Kham* river basin, where this unit has been active.

Key issues and challenges

Land ownership and conflict over land issues between the State and the people

The nation of Thailand covers a total area of around 320 million rai.⁸ Roughly 47 million rai consist of water or sea. 82 million rai are covered by forest, of which 39 million rai have been designated for use. 104 million rai of land belong to the State. Land designated as titled land consists of around 130 million rai (if allocated equally, each person in Thailand would have 2 rai).

The richest 10% of the population (or 6.5 million people) own 90% of the land. Out of the other 90% of the population (the middle class and poor), 58% own the remaining 10% of land, representing less than 1 rai per person. Approximately 811,871 families have no land of their own for farming. At the same time, around 30 million rai of land lie neglected by their owners.⁹

Problems of legality and land ownership have affected 2,700 communities (1,200,000 people) who settled and began farming in areas of land which were only later designated by the State as protected areas. These people have effectively become trespassers on their own land and their settlements and farming are considered illegal by the State. They have been forced to resettle away from their customary lands, face limits and restrictions on their development projects, are arrested, sent to court and put into jail, and

⁸ The rai is a *unit* of area, equivalent to 1600 square metres, used for measuring land area in Thailand.

⁹ Based on research by Pricha Vathanyu, expert on land economics at the Land Development Department. "Pracha Thai Newspaper", Jan 1 2009.

finally have had their lands invaded by commercial plantations or reforestation schemes, both carried out under the directive of the State.

Moreover, many villagers in this situation face serious economic difficulties. Although rotational farming as traditionally practised by local people can be a sustainable form of agriculture, its sustainability is threatened when it is not recognised as a legitimate practice by the State. This leads some villagers to migrate to the city to find work as labourers, whilst other villagers find themselves having to shift into unsustainable cash crop cultivation. Even when villagers are able to pursue more sustainable agricultural practices such as planting fruit trees, they may find it difficult or impossible to sell the products, or may be forced to sell them at low prices. Ultimately, if farmers find themselves unable to survive in these conditions, they may be forced to cut their fruit trees and resort to planting corn and other cash crops.

The cabinet resolution passed on June 30th 1998 stipulated that for villagers to continue using land, they must farm the same area of land on a permanent basis, with the additional stipulations that a) farming of the area in question must not be deemed harmful to the ecosystem and b) the land must have a slope of less than 35 degrees. The implementation of the resolution relies on complicated procedures and a scientific model of land use which does not support the rights of farmers to land as owners. As a result of these inadequacies, from 1998 to 1999, only 9,687 cases or 16% of the 61,249 submitted cases were approved and 51,567 cases or 84% were rejected.

The following details show the breakdown of court cases related to trespassing in forest areas:

Table 1. Cases of accusation of trespassing in forest areas

Year	Number of cases	Area trespassed (rai)
2007	6,711	35,988
2008	2,265	19,039

Source: Ministry of Resources and Environment 2009

Table 2. Cases of accusation of trespassing in areas of reserve forest and national parks in Northern Thailand

Year	Number of cases in reserve forests	Number of cases in national parks
2005	981	91
2007	1144	103
Total cases	2125	194

Source: information from Appeal Court with regards to Chiang Mai, Chiangrai, Lampun, Maehongson, Phayao, Nan and Phrae 2008

Rights to land, forests and resources

The right of communities over their lands, forests and resources is clearly stipulated in the 2007 Constitution of Thailand in Chapter 3, Section 66. However, the various forestry laws and Cabinet Resolutions of Thailand are major obstacles to the realisation of these rights. The majority of these laws had come into force before the passing of the present Constitution. They classified the areas inhabited by indigenous peoples as part of reserved forests, protected watersheds, national parks or wildlife sanctuaries, thus disenfranchising indigenous and other communities who have been living in these areas for many decades but have no official title deeds to prove their ownership over their land and forests. These laws have been used as tools by the State to establish control over forests and the country's natural resources. This is evident in the Land Law according to which all land that does not have a title is owned by the State. Consequently, the State claims ownership of all forest land, and therewith the territories of indigenous communities, for which no titles exist.

With these laws and resolutions, indigenous peoples' access to land and resources have become severely restricted. Those who have lived and farmed on these lands for generations find themselves treated and considered as encroachers and violators of the law. Many communities, especially in the mountainous, upper Northern provinces are thus living in constant fear of being arrested or relocated. Moreover, since farming has been severely restricted, yields are insufficient, resulting in food insecurity and increased poverty.

The change of leadership in the government of Thailand brings hope to this longstanding issue of lack of land ownership, especially for those communities living in classified forest reserves and national parks. On December 30th 2008, the Democratic Party presented their policy which tackles land rights issue to the Parliament. This policy aims to allocate land to landless people and to accelerate the process of issuance of land title deeds for those occupying State owned lands (i.e. national parks, forest reserves) in the form of community land titles. This policy is consistent with Article 85 (1) of the new Constitution. The discussion on community land titling has been ongoing for years but it is only the new Government that has actually passed a policy on this matter.

In March 2009, the National Land Reform Network, composed of civil society organisations and landless people, including indigenous peoples, staged a rally in front of the Government House in Bangkok, demanding the issuance of a law or mechanism that would effectively deal with land titling. In response, the government established six sub-committees to deal with land issues. The sub-committee that directly concerns indigenous peoples is the sub-committee on Land in Forest Areas chaired by the Minister of Natural Resources and Environment.

Rights to traditional occupations, livelihood and food security

The rights to traditional occupations and livelihoods are basic rights that all Thai citizens and therefore also indigenous peoples should enjoy in accordance with the Constitution of 2007, particularly Sections 43 and 66. Furthermore, Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that “the State must guarantee the rights of free employment and livelihood, including the provision of continuing technical advice and support”. Thailand’s indigenous peoples, however, do not have the right to their traditional occupations or livelihood practices. Rather, seizure or exploitation of resources by private companies on the one hand, and the imposition of fines or arrests for practicing their traditional occupation and livelihood systems on the other hand have been of frequent occurrence.

The Karen people have practised rotational farming for centuries, yet every year, Karen individuals are arrested by government forestry agents. In March 2008, Mr. Dipaepho (80 years old) and Ms. Naw He Mui Wingwittcha (35 years old) from Mae Omki Village, Mae Wa Luang Tambon, Tha Song Yang, Tak Province, were arrested by forestry officials as they were preparing their fields for planting rice and upland plants. The charges made against them related to the clearing of land, the felling trees, and the burning of trees within a national forest. This was condemned as contributing to the degradation of national forest land, damaging water sources without permission and causing a rise in global temperature.¹⁰

Mr. Dipaepho was charged with damaging 21 rai and 89 wah (8.2 acres) of land at a cost of 3,181,500 baht (US\$91,000). Mrs. Nawhemui was charged with damaging 13 rai and 8 wah (5.2 acres) of land at a cost of 1,963,500 baht (US\$56,000). Furthermore, the court ordered Mr. Dipaepho's imprisonment for two years and six months, but since he confessed to the so-called "crime", the sentence was reduced to one year and three months. Mrs. Nawhemui was also condemned to imprisonment for two years but her sentence was later reduced to one year after she too confessed to the so-called "crime". Both of them are now out on bail under the guarantee of the land titles of their relatives worth THB 200,000 (USD 6,259) each. Both of them have also petitioned to the Appeal Court in reaction to their treatment.

The concept and practice of legal pluralism

The link between rotational farming (RF) and legal rights

A key factor in the rotational farming (RF) cultivation system is the right of access to natural resources. Forestry and RF are different sides of the same coin, depending on the definition. This has been a chronic problem as the Government Forestry Department manages natural resources in a linear or

¹⁰ Report on the Situation of Human Rights and Fundamental Rights of Indigenous Peoples in Thailand Submitted to Prof. James Anaya, United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People. Presented on 19 January 2010, Chiang Mai, Thailand.

monolithic way. Only government officers have rights to manage the forest, and therefore its impact on RF. Local people are not allowed to manage or even co-manage their own resources. However, in the same highland areas, some highland projects working with cash crops in cool/cold climates enjoy full rights of access to the forest, supported by government policy. At the same time, local people are not allowed to farm their ancestral lands and practise traditional RF as governmental policy excludes and criminalises them.

This amounts to discrimination against local/indigenous occupations and cultural rights, and creates natural resource competition between those with traditional and those with legal/policy rights. The indigenous peoples must negotiate their rights based on the Thai Constitution and the present community forest law, which accords rights to communities that were previously managing their own forests for more than ten years. Even in Yellowstone National Park in the US, local residents now have the right to co-manage natural resources in the park. It can be said that if resource management is to be democratic, then co-management of resources must be the method of choice.

The Forestry Department claims to manage natural resources for the security of the nation. However, the nation is defined by its “people”, those who live in this nation State. Thus, if the security of the people in the “nation” is not supported, how can the Forestry Department claim to preserve the security of nation? The management of natural resources must be open to diverse and alternative solutions which can only emerge through an iterative process of negotiation. This in turn requires a variety of open forums and joint decision making processes.

The Thai government is currently pursuing a single path regarding land rights and that is to bring land rights into the domain of individual property rights through the use of individual land titles. The reasoning behind this policy is that by giving land titles to individuals, such titleholders would then have greater security in maintaining possession of their land. However, in reality, this position creates problems. First, it will drive up land prices by permitting those individuals who hold land titles to sell that land. Second, it will cause corruption and exploitation by opening up the possibility of

obtaining land titles by fraudulent means and making it possible for those with land titles to clear and develop forested lands.

When poorer local communities raised concerns over this issue, it was discovered that in reality, it is possible to have different types of land titles; not only individual land titles but also community land titles in the form of community forests. Having different types of land titles may protect local communities from land grabbing and other forms of exploitation of land rights legislation. With communal land rights, poor local people will gain greater life security providing them with the flexibility to work outside their communities (as labourers, for example) but also to return to work their land if and when they need to. This constitutes flexibility in terms of livelihood strategies.

Although it would be beneficial to have other options such as this, as of yet, the Thai government is not pursuing alternative forms of land entitlement. In our research, we found that local people need different forms of land entitlement, not only individual land titles. Communal land titles have scope beyond individual ownership, allowing groups, clans, organisations and communities to share ownership of the land. This would also help stop the increase of commercial land development in previously undeveloped forest areas.

A further consideration would be the granting of rights for communal land use, which could be considered a form of local control, giving communities the right to control the land not just in terms of ownership, but also in terms of how it is used. Therefore, in the future, the government needs to establish a law for communal land titles and communal land use to increase local communities' control of their lands.

Another option, in line with a capitalist system, is for land ownership to be controlled by a proportional land tax, with those owning larger amounts of land paying higher taxes than those owning smaller amounts. This could help reduce land prices and increase the likelihood that poorer people can access land. Government support for this would lead to more equitable land distribution.

All this means that it is necessary to change the structure of land

management and land ownership to establish laws, and not just create policy. This does not mean that rich people must give land to the poor, but that for national development, land allocation should be based on a principle of justice. To give local communities rights to land allocation is an important mechanism for distributing land in a just and equal manner for society.

Karen communal land management

The highlands of Northern Thailand are home to numerous ethnic groups who live by a diversity of socio-cultural and economic systems. Geographical limitations and ecological conditions have resulted in these ethnic groups practicing a pattern of dry rice cultivation, or “rotational farming” in the highland area. The Karen or Pgaz K’Nyau people have practised such a system of rotational farming based on short periods of cultivation and long periods of fallow for centuries.

In order to understand the communal land management of the Karen, one must be familiar with the Karen traditional farming system. Rotational Farming (RF) is a cultural and physical integration of forest and agriculture. It is a type of agro-forestry which stresses the connection between the agriculture system and the ecosystem. RF incorporates the dynamics of management and continuous adaptation required by the ecosystem. The fields are left fallow, allowing for the regeneration of the soil and land. The fallow period is a key part of the cycle of farming, promoting rich nutrients in the soil and balancing the quality and availability of land, water and forest to provide for a sustainable system of agriculture. The cycle aids the regeneration of fauna, flora and consequent biodiversity, conserving both animals and plants. Without a thorough understanding of the local ecosystem and cultural systems, it is difficult to suggest practical ways of investing in traditional land management which fit well with the local conditions and people’s ways of living.

Karen traditional knowledge and practices are embodied in their poem “*Auf baf auf baf dau hif, Saf wi saf wi dau hif*”, meaning “if there is food enough to eat, the whole village will eat together. If there is lack of food to eat, the whole community will go hungry together”. The key concept here is that all

produce is to be equally shared among all members of the group. This concept resonates with and directly supports the communal land management of the Karen as the basis of their daily livelihoods. Where some individuals face a lack of produce resulting from a poor harvest or poor soil conditions, other members of the community will provide them with these resources in order to re-establish a balance of distributed supplies across the group. Labour and produce are also supplied by the community to orphans and widows in lack of both.

This communitarian principle also underlies the way the Karen make use of and control fire. Setting fire to one area will inevitably impact upon other adjacent areas, including fallow lands. Every decision regarding where and when fires are lit is understood as having an impact on the whole village which shares out the land equally among its inhabitants, and therefore must be taken with consideration for its sustainability in terms of the entire community. The Karen strongly believe that all resources belong to the collectivity. However, this traditional concept is now becoming eroded in many places, particularly when young people come under the influence of foreign private ownership or governmental policies regarding individual rights.

In considering communal land management, it is important to understand that rights to land guardianship are not based on the same assumptions as those of land ownership. From the findings of this study, it appears that communal land management is organised in such a way that the selection of land and how it is used is determined by community members during participatory meetings, which rely on a traditional, rights-based approach. This rights-based approach can be divided into three levels: usability (usufruct), management and guardianship. This is not based on land use being limited to individual ownership but rather on giving whole communities rights of access to land, which is particularly beneficial to poorer members of the group.

State interference can damage or destroy the flexibility of the traditional rights-based systems of indigenous peoples. When the State limits or denies communal land rights, communities become weak, losing their land to people with power and influence. Their level of debt increases and their

degree of food security decreases. Communities are sometimes able to resist or adapt to this by expanding their wet rice paddy fields, changing their occupations by opening their villages for tourism, producing handicrafts for sale, taking on labouring work or using their land to produce cash crops.

Traditionally, the management of land use in the highlands has been organised under a system of communal rights¹¹ which in principle has meant that rights for land use (usufruct) rest with those who actually use the land. Although this may seem to resemble a type of family land ownership, when the land is not in use, it returns to the system of communal rights and is rotated so that other members of the community may use it. Therefore, the management of Rotational Farming depends on a complex mixture of private and communal rights.¹²

However, after the establishment of the Thai nation State, State power expanded, bringing communities which had lived independently under the control of central government and causing these communities to lose their traditional systems of land management¹³ due to policies which designated parts of the highlands as conservation areas without taking into account traditional communal land management. In most cases, communities had settled in these areas of the highlands long before the State designated them as conservation areas.

This created many problems as the conservation areas overlapped with areas in which communities had traditionally used the land.¹⁴ Conflict between the State and local people increased in frequency and violence as State government agencies centralised power to fully manage natural resources, thereby ignoring the complexity and diversity of traditional, local resource management, overlooking traditional knowledge and customary rights of indigenous peoples and denying communities the right to participate in these processes. State laws give priority to a system of private land ownership, but do not recognise the customary laws of indigenous peoples

¹¹ Anan 1987

¹² Anan et al 1992

¹³ Hirsch 1990:156-66

¹⁴ Chalardchai 1993; Chupinit 1991

on rights for communal land use (usufruct).¹⁵ All of the State's forest and environmental laws diminish the rights of people in local communities, by claiming the State's absolute right to control and manage natural resources.¹⁶

This conflict between State and customary law is evident in the case of land management and rotational farming for Karen communities because the State only recognises individual land rights, while Karen communities traditional land rights are based on rights for land use (usufruct) in which land rights belong to the family/clan who themselves determine the pattern of land management. The State's policy of private land ownership which equates land management with private ownership creates problems for communities, like the Karen, who use a communal land rights system.¹⁷ The State's system of land rights puts pressure on indigenous peoples by limiting their rights to land use and cannot coexist with or allow for the system of Rotational Farming which requires enough land to leave fallow areas.

Moreover, the State's current conservation forest policy involves a project of tree planting in areas which overlap land used by indigenous peoples, creating conflict between the forestry department and local villagers. This tree planting project reduces the land available for use by indigenous peoples and so the land that is left for them to cultivate remains small and the period of fallow is reduced, decreasing the fertility of the soil and increasing soil erosion which in turn leads to food shortages.

This increases the likelihood that local people will use their land repeatedly over shorter periods of time, which ultimately leaves them with little option other than planting cash mono-crops which require the purchase and use of fertilisers and pesticides. The ensuing reduction in rice productivity and diversity of planted crops increasingly forces people to move out of their communities to work elsewhere in order to survive.¹⁸ It is clear that such

¹⁵ Anan 1996

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ Kerkasem K & B 1994; Kwanchewan 1996

State conservation policies impact significantly on the sustainable management of rotational farming, forcing indigenous peoples to depend more and more on external production systems and agricultural practices.

An example of how this works in practice is the case of Mae Lan Kham Moo 6 T. Sameong Tai A. SaMeong Chiang Mai Province, a settlement of Karen (or Pgaz K' Nyau as they refer to themselves) people who have practised rotational farming since their ancestors' times, using a ten year cycle of farming, strongly based on self sufficiency. In 1957, a road was built linking the settlement to the outside world, effectively putting the community under more direct control of the State. Following this, in 1977, the State implemented a project of tree (eucalyptus) planting in watershed areas, which overlapped with areas where rotational farming was practised. This has impacted upon the system of rotational farming and Karen people have found themselves having to change to adapt to the new conditions and limitations caused by government-sanctioned tree planting in traditionally farming areas.¹⁹

This case fits with the findings of Chalardchai et al's (1992) study on land use (usufruct) rights for people who have settled in forest areas (e.g. Karen and Lua) which shows that these communities lost their rights to practise rotational farming and that when land was left fallow, people had no rights to return to farm it, forcing them to abandon their traditional fallow land.²⁰ This also meant people were forced to abandon a self-sufficient system of local and communal land control and management. In summary, the loss of local control and communal land rights perpetuated by the policies of the State not only impacts on land use (usufruct) rights but also impacts strongly on indigenous traditional livelihoods, the practice of rotational farming and all systems of traditional natural resource management, as well as on the environment.

Another study, Chanon (1994), considered the consequences of the State not recognising local communities' usufruct system, and found this created an expanding conflict between the State and communities, since the State relies

¹⁹ Prasert 2008

²⁰ Chalardchai 1993

on State law to control the area, while local communities rely on their customary laws which do not depend on land titles, but rather support a system of traditional land inheritance and management.²¹ Under State law and conservation policy, it was found that communities faced many limitations due to prohibitions on the practice of rotational farming and usufruct rights, denying communities the right to manage their natural resources under local control.

Anan's (1996) study shows that land use within a system of rotational farming is complex and not easy to explain or clarify.²² Indigenous peoples' customary land use laws give rights to families to use the land during a farming year, but require that after that year, the land be left fallow to regenerate the soil. After the fallow period, the rights to farm the land again rest with the previous user. However, if they choose not to farm that area, other members of the community are allowed to farm there as long as they inform and consult with the previous farmer. From this it can be seen that even when land is considered communal, the transfer from one farmer to another necessitates careful negotiation to avoid conflict.

Alongside this are many activities which a community will perform together as a form of collective labour. These include: slashing the field to prepare the farming area, collecting or harvesting forest products, managing the irrigation system to preserve the watershed areas, and controlling and managing sacred sites. These examples show the diverse ways in which indigenous peoples traditionally manage their lands. What this reveals is that rotational farming is not only an agricultural system but is about the control and management of all natural resources within the environment upon which the Karen depend.

The complex legality of land ownership in Thailand means that land management is dependent on conditions of access. There are three possible legal categories which define land ownership. In the first two, State property and private property, access to the land is controlled by individual owners or the State. The third category, common property, does not emphasise

²¹ Chanon 1994

²² Anan 1996

ownership but allows for conditions of access to be determined and managed by local communities and/or indigenous peoples. With common property, land use (usufruct) is determined by a system of traditional regulation by indigenous peoples as a mechanism of local control, and not a mechanism of State law.

When land is changed from common property to State or private property, traditional laws governing rights and usufruct which are dependent on local control and management are changed to a law of ownership, which is dependent on State or individual control. In the case of communities who practise rotational farming, such self-sufficient practices become unsustainable and communities are forced to shift to forms of permanent agriculture which make them dependent on financial and technical support from outside their community.

When a situation occurs in which most of a village's families face problems because they find themselves unable to practise rotational farming, villagers try to solve their problems by working together to manage their resources at the community level. In this way, problems which cannot be solved at a family level alone are addressed at a collective, community level. This often results in communities establishing committees, such as village committees, forest committees and committees of elders. Such committees work to adapt their local knowledge and customary laws to solve their problems and manage their resources, for example, by designating and cultivating collective areas to become community forests or bamboo forests to help families gain life security and become more self-sufficient. In this way, communities can support their member families to seek alternatives, to adapt and shift from an insecure system of cultivation to an agricultural system which is more sustainable for them.

At the same time, management at the community level can work to increase the collective space for the community, playing an important role in ensuring life security for its members by increasing the scope for alternative forms of agriculture to be explored. Committees can serve as forums which support a community in investigating and developing sustainable forms of agriculture on its fallow land without having to resort to destructive and unsustainable agricultural practices, such as cash crop farming. For

example, fallow land can be used to plant harvestable and sustainable trees such as tea trees, Makwaen trees, Makhom trees and so on. Such forms of cultivation can become an important source of income for communities and are part of a system of agro-forestry, or integrated farming, which offers sustainable alternatives to rotational farming for development in the future.

Customary land tenure and State policy

The idea of communal land rights/community land ownership is based on the concept of communal land management of the communities who have a history of settlement in that area. This form of communal rights is expressed by community members as using the land together, as exemplified by the management of rotational farming by the Karen and Lua communities, and water management by irrigation by native Northern Thai farmers.

The concept of the communal land title implies the following aspects:

- Ownership by the community
- Rights to use (usufruct) by individuals
- Land passed down through inheritance
- Selling of land to outsiders prohibited
- All members must use the land continuously (including in the form of fallow systems of rotational farming)
- The changing and handing over of land use between different community members is subject to approval by local committee members

During the time of Prime Minister Aphisit Vejchachiva, the Regulation on Communal Land Titling 2008 stipulated the need to “protect and preserve the land which is appropriate for agricultural cultivation and which already has developed infrastructure for irrigation for the sustainability of long term agriculture, recovering the quality of the soil, providing farm land for poor farmers in the form of a land cooperation bank and supporting agricultural development in the form of agricultural land settlement”.

However, a controversial cabinet resolution on forest recovery was passed by the Ministry of Resources and Environment and the Royal Forest Department on April 29th 2008. This resolution was in support of a proposal by the Ministry of Resources and Environment for the recovery of 22.7 million rai of forest. 1,010 million Thai Baht were invested in 2008 alone for the planting and rehabilitation of forest areas, with one million rai of forest to be recovered by 2009. The plans, to be implemented between 2008-2011, called for planting in conservation areas and mangrove forests in three stages as follows:

Target area	Rai
1. Conservation area (national parks, wildlife sanctuaries and botanic department)	7,400,000
2. Area of Reserve Forest area to promote tree plantation (Royal Forest Department)	15,050,500
3. Mangrove forest (sea resources and coastal areas)	329,500
Total	22,780,000

Source: Ministry of Resources and Environment, April 2008

Recommendations

In the light of the situation faced by the Karen people of Thailand, a set of recommendations and strategies can be offered in order to solve the problem of land rights and enable local communities to participate in co-managing forest land in a just and rights-based manner. These include the following:

- Increasing the protection of forests from trespass by clearly mapping and delineating zoning lines
- Solving the problem of farmers losing their land by supporting the adoption of communal land titles and funding community land cooperation projects

- Securing land rights and use by regulations determined and controlled by local communities and supporting the legal code from local municipal organisations
- Preventing people from being forced to prove their rights to land based on the unfair cabinet resolution of June 30th 1998
- Proving and demonstrating with documented evidence that communities are fully capable of managing their own land by themselves in an environmentally sustainable way

Furthermore, cases of conflict, injustice and poverty resulting from diverging legal frameworks and implementation can be prevented by:

- Forbidding trespass on forest land
- Engaging in a multi-stakeholder dialogue between villagers, the State and relevant companies or businesses
- Ensuring that land and land ownership are not taken from farmers who are the original owners and users of that land
- Avoiding changing uses of land from subsistence to commercial or industrial plantations without the free, prior and informed consent of local inhabitants
- Creating and assuring security for local communities in terms of rights, food, income and poverty alleviation such that poorer people can live happy, healthy and fulfilling lives

The 10 step ladder for certifying/proving community land rights

1. Create understanding and consensus in the community regarding land-related laws, policies and rights
2. Map the land at a ratio of 1:4000
3. Develop regulations on land management
4. Conduct a civil society forum to investigate and analyse information on the land and its management
5. Produce documents concerning communal land titling
6. Establish a land cooperation fund
7. Issuing of municipal laws for protecting land rights by administration organisations or municipal administration organisations
8. Develop and encourage forms of land use which are environmentally sustainable
9. Establish a land management learning center
10. Push to have certification rights recognised in State government policy

Source: Prayong 2009²³

Using policy and law to support the issuance of communal land titles

Thai policy and law can indeed act as mechanisms by which the problems of land management can be resolved and the rights of indigenous communities to their land recognised and supported. Article 85 of the Constitution of the Kingdom of Thailand 2007 stipulates that the State must carry out and follow its policy on land resources and the environment as follows:

“To disseminate justice on land ownership and carry this out by giving ownership, or land ownership to farmers who practise agricultural cultivation by land reforming or others

²³ Prayong 2009

methods/processes. This includes providing water resources for farmers so they have enough for the purposes of cultivation appropriate to their chosen form of agriculture.”

Article 66 states that:

“Persons who gather together to become a community, whether that be understood as a local community or traditional community, have rights to preserve or recover their customary rights, local knowledge, local arts/culture and to participate in the management of the natural environment and resources promoting biological diversity in a balanced and sustainable way.”

Article 67 states that:

“Persons/individuals have the right to participate together with the State and community to conserve/preserve, nurture, take care of and receive the benefits from natural resources and biological diversity, and to protect, support and nurture the environment in order to have normal livelihoods and survive without danger from issues of health, security or poor quality of life. In this, they should receive the appropriate protection.”

In addition to the above mentioned clauses in the Thai Constitution that are of direct relevance to the situation of the Karen in terms of land and modes of livelihood is the Prime Minister’s Office’s Communal Land Title Regulation, which has already passed in Parliament and awaits signing from the royal decree. This regulation will establish communal land titles in forest lands and recognise the collective right of communities to land ownership. However, one limitation of this regulation is that the community land title is only valid for thirty years, although it is renewable. At the same time, the Royal Forest Department, is contesting this regulation. At the time of writing, the communal land title committee was in the process of carrying out a survey throughout a pilot area.

Whilst the overall findings were deemed suitable to the passing of this regulation, there remains some confusion over rotational farming in terms of the necessary number of cycles of RF and the size of RF land needed for each period of the year. Further research will be essential in order to raise

the awareness and increase the knowledge of the communal land title committee and public or civil society regarding the RF process. At the same time, local communities practicing RF will need to prove themselves capable of managing their own RF processes.

Finally, communal land title regulations will have to be linked to another new cabinet resolution on “Recovering Karen Livelihood in Thailand” which was approved on August 3rd 2010. This Act is considerably clearer regarding support for the rotational farming process which may in turn help the communal land title implementation process related to RF to be approved by the committee and the government.

The Cabinet Resolution Act on “Recovering Karen Livelihood in Thailand” (August 3 2010) stipulates as follows:

In the short term (six months to one year):

1. **Cease the arrest and detention of the Karen people** who are local traditional communities settled on disputed land which is traditional land on which they depend for their livelihoods and subsistence.
2. **Set up a forum, a demarcation committee or another such mechanism to specify land use zoning for local settlements in order to eliminate conflict concerning land use** or land ownership by Karen people and government agencies. This should be carried out by bodies including those other than the official agencies. To resolve the problem of trespassing in State forest area, the participatory nature and process of community dialogue and negotiation must be emphasised, for it is indigenous peoples and local communities who have most to lose from such decisions. Moreover, constructive negotiations should include the active participation of academics and persons who are involved with the people whose cultural livelihoods are at risk, including sociologists and anthropologists, as well as human rights agencies.
3. **Support the biodiversity of highland communities.** This could be achieved by preserving the genetic and species diversity of seeds and plants, and the balance of the ecosystem and the environmental benefits brought

about by the processes of the rotational farming system.

In the long term (one to three years):

1. **Repeal the declarations concerning protected areas, reserve forests and settlements of Karen people** who have already demonstrated their ability to prove that their settlements, livelihoods and use of these lands has existed for a long time and/or since before the declaration of laws or policies that now overlap with these areas.
2. **Support and recognise the rotational farming systems** which belong to the Karen ways of life and livelihood, and which support the sustainable use of natural resources and self-sufficiency, including through the promotion of the Karen rotational farming system as a potential cultural world heritage.
3. **Support self-sufficiency or alternative agriculture** instead of cash crop production or industrial agriculture.
4. **Support and recognise the ways of using the land and the management of local traditional communities**, for example, through the issuing of communal land titles.

The challenge remains as to how these recommendations will be implemented on the ground. A committee for recovering the livelihoods of Karen people will hold a meeting in the near future to design and implement a work plan, as well as request government funding to implement this work plan. The key to the success of this committee will be the inclusion and active participation of different stakeholders including Karen leaders, activists, academics and government representatives with interests in this issue.

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