



BRIDGING THE GAP

Policies and Practices on Indigenous Peoples' Natural Resource Management in Asia



Contributors

Jannie Lasimbang • Sadeka Halim
Raja Devasish Roy • Chingya Luithui
Colin Nicholas • Susmita Chakma
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PREFACE

Natural Resource Management and access to and control over resources are identified as a critical concern faced by indigenous peoples throughout Asia. To address this, UNDP's Regional Indigenous Peoples' Programme (RIPP) conducted analytical studies on indigenous natural resource management systems and their interface with national laws and policies in Bangladesh, Cambodia, Malaysia and Thailand.

Consultations carried out with indigenous communities, governments, NGOs and academics have enriched and informed the studies and enabled the inclusion of a wide range of perspectives. The regional synthesis paper draws on the country assessments to identify gaps in policy and practice, and compiles key recommendations for further work on this issue.

The series provided substantive input at the 8th Conference of the Parties (COP8) to the Convention on Biological Diversity (CBD) in Curitiba, Brazil in March 2006. They also inspired the Regional Dialogue between government and indigenous representatives on Natural Resource Management in November 2007 in Chiang Mai, Thailand. Through these processes, UNDP-RIPP aims to strengthen regional cooperation and dialogue to assist indigenous peoples and governments in adopting more inclusive and participatory approaches to natural resource management.

Several individuals, organizations and bodies have played a key role in realizing this Natural Resource Management series. We acknowledge and are grateful for the support provided by the UNDP Country Offices involved, particularly in Bangladesh and Cambodia, and for the generous sharing of information, knowledge and experiences by indigenous communities and governments. We would like to express our appreciation to PACOS Trust and COAC, Malaysia; IMPECT, Thailand; ICSO and NGO Forum, Cambodia; and Taungya, Bangladesh for their cooperation in this endeavour.



Special thanks also goes to all the NRM teams who have made the country studies possible and enabled wide consultations among communities and governments, and to Helen Leake for editing the reports.

AIPP is both an organization and network of indigenous peoples groups in Asia, with a secretariat based in Chiang Mai, Thailand. It has several activities to advocate for indigenous resource management including coordinating participation of indigenous representatives in international fora such as the Convention on Biological Diversity and the UN Permanent Forum on Indigenous Issues; active engagement by indigenous peoples with national governments; and promotion on indigenous systems.

UNDP's Regional Programme on Indigenous Peoples aims to strengthen policy dialogue at the local, national and regional level on indigenous peoples' rights and sustainable development in the Asia region. The programme focuses on policy dialogue, advocacy and capacity-building measures and is part of UNDP's Regional Cooperation Framework for Asia-Pacific (2008-2011).

We hope this publication will help bridge the gap between policy and practice, and inspire greater collaboration and engagement towards participatory and inclusive natural resource management in Asia.

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Photos: Colin Nicholas



Regional Synthesis

Jannie Lasimbang

AIPP FOUNDATION

Regional Synthesis



Chewong in their forest hamlet, Krau, Pahang

Photo: Colin Nicholas

1. Introduction

This regional synthesis paper covers the natural resource management country studies conducted in Thailand, Malaysia, Bangladesh and Cambodia in 2005 and 2006. It draws some key conclusions and recommendations, as well as an overall comparison of the situations found in the individual studies.

In the country studies, there are various terms used to refer to indigenous peoples. For example, in Thailand the term used is “indigenous hill peoples”, while in Malaysia they are referred to as “indigenous peoples” generally and “Orang Asli” specifically for the indigenous groups in Peninsular Malaysia. With the exception of Bangladesh, each country study dedicates a chapter to explain the term(s) used in each country and brief backgrounds and histories of the indigenous peoples. In this synthesis paper, the term “indigenous peoples” is used.

2. Indigenous Peoples and Natural Resource Management

2.1 Indigenous Peoples’ Status

With the exception of Malaysia, a common feature mentioned in all studies is the non-recognition by the state of indigenous peoples as distinct groups with their own distinct systems. Nevertheless, this does not indicate the absence of a concept of “indigenous peoples”, and the constitutions and laws of some of the countries do refer to, or have special provisions for, indigenous peoples.

Table1: References to indigenous peoples in Constitutions and relevant laws

	References in the Constitution	References in various Laws
Cambodia	No special provisions	<i>Land Law 2001</i> (indigenous communities) <i>Forestry Law of 2002</i> (local communities)
Malaysia	"Natives" of Sabah and Sarawak "Orang Asli" of Peninsular Malaysia	Various laws in Sabah, including: <i>Land Ordinance 1930</i> ; <i>Inland Fisheries and Aquaculture Enactment 2003</i> ; <i>Forest Enactment 1968</i> ("Natives" or "Anak Negeri"); <i>Aboriginal Peoples Act 1954</i> ("Aborigine" or "Orang Asli")
Thailand	"Original" or "local" communities	"Thailand National Forest Policy 1985" ("Hill Tribe Minorities")
Bangladesh	"Backward Section of Citizens" includes indigenous peoples	<i>HADC Act 1989</i> ("tribe" or "tribal"); <i>Act 12 of 1995</i> ("Primitive Hill Dwellers")

A common feature in all of the countries studied, even where the status of indigenous peoples is recognized, is the experience of discrimination and exclusion by indigenous peoples in regards to land ownership and natural resource management. Even when there is historical evidence showing indigenous peoples are rights-holders of particular resources, governments have still ignored these and continued to alienate land to companies and government agencies, and to resettle outsiders on indigenous peoples' lands.

In a landmark court case brought by the Orang Asli in Peninsular Malaysia, the judges decided that the government had failed in its fiduciary duties to the Orang Asli. In Thailand, the enforcement of the Citizenship Act and the fact that most indigenous people could not speak Thai at the time of the nationality surveys made it difficult to prove their origin even if they had been living in Thailand for hundreds of years. In Bangladesh, the government's population transfer programme of the 1980s into plain lands and gently sloping lands, already occupied and owned by indigenous peoples on the basis of formal private titles or customary law, resulted in violent land-grabbing in which state security forces have been directly implicated. As a result, large numbers of indigenous peoples were forced to seek shelter in the remoter hill and forest areas, putting pressure on existing inhabitants of those areas and depleting the available resources.

2.2 Indigenous Resource Management Systems

The studies note that natural resources of indigenous peoples include land, forest, agricultural areas, and rivers and coastal areas, in which land is central and often understood to encompass all natural resources collectively. Traditional communities have a close relationship to land and resources and see themselves as part of the whole ecosystem. Natural resources are significant not only as a means of production, but also as part of indigenous peoples' spiritual and cultural traditions, central to their identity as peoples. Indigenous knowledge, innovations and practices on natural resource management are little understood by outsiders yet are highly complex systems, closely interlinked with other indigenous systems. They incorporate a keen awareness of the environment, an appreciation for conservation and continuity, encourage sustainable innovation, and place the long-term well-being of the community as the focus of all activities. Natural resource management involves both the physical and spiritual realms and is easily embraced by every indigenous person in their daily activities, such that it has become a way of life for the community. Indigenous peoples believe that the balance between the spiritual and physical realms determines the condition of the universe as well as the immediate environment, including that of the people.

Indigenous resource management systems are closely linked with other indigenous social, cultural, spiritual, economic, governance, juridical, health, technological and learning systems. Examples provided in the studies include juridical systems with clear concepts of punishment, such as that of the *Brao* community in Cambodia, and the indigenous peoples of Sabah, Malaysia. In all case study countries, customary management of natural resources has been established for generations and unwritten laws transmitted by parents or elders in the community. Institutional control over resources is still strong in traditional communities with traditional elders, such as the *mauza* headman and village *karbaries* in Bangladesh, and those in Cambodia, using customary laws and socialization of the whole community to ensure effective management of resources.

All the studies cite non-recognition of indigenous resource management systems as a serious issue that stems from:

- i. lack of understanding by the state of indigenous resource management;
 - ii. lack of official recognition of traditional administrations;
 - iii. conservation ideas that do not recognize other systems of resource management, particularly those that are considered “non-scientific”;
-

Table 2 : Indigenous Resource Management System

	Cambodia	Malaysia	Thailand	Bangladesh
Land	<ul style="list-style-type: none"> • Maintain clear territorial boundaries between community land • Sub-divide land into several individually managed plots • Rotate farm plots and maintain evenly dispersed populations • Festivals and ceremonies are tied into agricultural cycles 	<ul style="list-style-type: none"> • Traditional ownership of a plot of land • Traditional ownership is confirmed by a headman and is identifiable by the presence of certain signs of land-ownership • Practice of leaving the last fruits 	<ul style="list-style-type: none"> • Choose farming sites carefully, based on cultivation methods • Use traditional knowledge on soil identification suitable for specific crops • Prevent exploitation of land beyond what it can sustain • Leave the land fallow for seven to ten years • Communal ownership of land • Land only cleared during dry season • Practice swidden cultivation 	<ul style="list-style-type: none"> • Able to retain possession, and at least partial control of their homesteads and farmlands • Subsistence-based agriculture
Forests	<ul style="list-style-type: none"> • Forest spirits are kept as protectors • Only old or knowledgeable herbalists, mostly women, are allowed to collect medicinal plants • Many plant species are protected based on similar beliefs as for wild animals (see below) 	<ul style="list-style-type: none"> • Ensure forest resources are not taken freely without permission of the owner • Ensure forests are healthy and productive • Unnecessary cleaning and cutting of trees is prohibited 	<ul style="list-style-type: none"> • Identify forest areas which are cultivable • Forests are categorized and differentiated based on a number of factors 	

Wildlife	<ul style="list-style-type: none"> • Demarcate hunting areas • Certain breeding areas are not disturbed • Discourage over-hunting 	<ul style="list-style-type: none"> • Ensure wildlife continues to thrive • Practice selective hunting • Demarcate community hunting areas and have community wildlife wardens 	<ul style="list-style-type: none"> • Believe there is an owner for each and every life form • Believe that wildlife and forest environment are interdependent and related to each other • Conduct a ceremony before any hunting expedition 	
Rivers, Watershed and Aquatic Life	<ul style="list-style-type: none"> • Only allow fishing methods that do not deplete fish resources • Outsiders are not allowed to fish • To ensure a constant supply of fish communities prohibit the cutting down of fruit trees that are known to be a good source of food for aquatic life 	<ul style="list-style-type: none"> • Mark a stretch of river as “no fishing” zone for a certain period of time (six months to a year) 	<ul style="list-style-type: none"> • Beliefs and taboos against disturbing any watershed area or springs 	<ul style="list-style-type: none"> • Streams and other aquifers situated within the community-managed mauza reserve forests are protected from bank erosion and siltation
Traditional Medicines	<ul style="list-style-type: none"> • Collected from forest areas that are conserved by communities for curing certain ailments 	<ul style="list-style-type: none"> • Believe medicinal plants have a spirit and that respect is necessary before taking any plants • The concept of “use and protect” ensures plants and animals with medicinal properties are not over-harvested, and promotes practices such as taking only what is needed 		
Seeds and Plants	<ul style="list-style-type: none"> • An intricate system of seed sharing and exchange 	<ul style="list-style-type: none"> • An intricate system of seed sharing and exchange 		

- iv. the pursuit by states of profits, modernization, and a development paradigm that is in conflict with indigenous resource management: such development ideas have led to the alienation of the rich resources in indigenous territories from the traditional owners.

The country studies also mention only a limited recognition of customary resource rights within the laws of the country. This is discussed in more detail in Chapter 4.

3. Laws and Policies on Natural Resource Management

All the studies involved an extensive review of natural resource management laws and policies that relate to indigenous peoples and identified gaps in their provisions. Natural resource management laws in Bangladesh and Malaysia appear to have common provisions and underlying concepts, perhaps derived from the laws of colonial Britain. For example, forest laws and policies tend to reject community management of forests in favor of management through government bodies — usually, the Forest Department — which integrates policing and administrative functions. Land laws incorporate customary laws but these are limited and often have inaccurate concepts of land ownership and management, undermining the limited recognition provided.

3.1 Institutional Framework on Natural Resource Management

Management of natural resources in the four countries studied is administered by the following:

- i. Government Departments or Agencies

Natural resources are compartmentalized and placed under the jurisdiction of specific government departments. Malaysia, as a federation of 13 states, has placed land and forest matters under state control. The Federal Constitution accords them substantial powers over land use and natural resource management. Also, as every state is independent under the constitution, federal legislation in most cases is not binding on the states, so the government departments managing natural resources are directly under the purview of state law. In the other countries, these departments are centralized and under the direct control of the central government.

- ii. District/Provincial Council/Body and Sub-District Council/Body

The implementation and monitoring of natural resource management laws is decentralized to councils/bodies at the district or provincial level, and subsequently to the sub-district

Box 1 – Tambon (Sub-District) Administration

In Thailand, the Constitution of 1997 heralded a significant benchmark towards a more inclusive participatory approach. Moreover, the Tambon Council, *Tambon Authority Act* and *Decentralization Act*—if implemented effectively and sincerely—have the potential not only to overhaul the bureaucratic set-up of natural resource management, but also the whole administrative structure. In Tambons, such as the Ban Luang Tambon Administrative Organisation, where there is a strong representation of indigenous communities, there are already signs of the local administration being more receptive to resource management initiatives of indigenous peoples. Although community forests do not have a legal basis, authorities have informally started recognizing them, indicating a more open interpretation of laws.

Note, at the time of publication the Constitution of 1997 had been overturned by the coup of 2006, with a new constitution in the process of being drafted. It is not clear which provisions for local participation will be retained in the new constitution.

level. For the Chittagong Hill Tracts (CHT) in Bangladesh, the Hill District Council is rather pluralistic in that it includes traditional, bureaucratic and elected regional authorities with separate, and sometimes concurrent, responsibilities. It is at the district or sub-district level that indigenous peoples are more likely to influence decisions on natural resources.

3.2 Summary of Laws and Policies on Natural Resource Management

The laws and policies on natural resource management identified in the country studies are summarized in Table 3, with a brief outline of the gaps in the provisions that relate to indigenous peoples. Gaps not related to the implementation of the laws and policies are outlined later in this chapter.

- **Inter-Departmental Coordination**

As a way to manage natural resources, all the countries involved in the study have compartmentalized natural resources, with laws governing the use and management of

Box 2 – Sabah Wildlife and Sabah Foundation

The Sabah Wildlife Department Pilot Project (See pages 210 -211) highlights inter-departmental coordination as one of the major constraints in making sustainable resource management in collaboration with local communities successful. It also highlights the hurdle for communities in exercising their rights to participate in natural resource management as stipulated in various enactments and policies such as the Forest Enactment and the Sustainable Forest Management System. In this case the Sabah Foundation, which was granted a 100-year term to manage a forest area sustainably, is not willing to recognize the Community Hunting Area identified by the Murut community in Inarad. The Sabah Foundation plans to allow logging at this site. Community Hunting Areas are recognised under the *Sabah Wildlife Conservation Enactment 1997*. There is ongoing dialogue between the Sabah Wildlife Department, communities and relevant government agencies to make Sabah Foundation comply with their obligations under the Sustainable Forest Management System, and for them to recognize the importance of involving local communities in natural resource management.

these resources. While this may provide focus for the specific department or unit charged with a certain resource, it could also prove to be a setback. As pointed out in the country studies, the lack of inter-departmental coordination has only exacerbated problems and defeats the purpose of managing resources effectively.

- **Non-conformity with National Constitutions**

In some cases, there appears to be non-conformity between some laws and the national constitution. In Thailand, for example, Article 46 of the Constitution states that:

“Individuals who form traditional, local communities have rights to preserve and revive their customs, local knowledge, arts or culture at the local and national levels; and to participate in the more balanced and sustainable management, maintenance, and utilization of natural resources and the environment. This must be in accordance with the enacted law.”

Yet Thailand’s laws on natural resource management do not provide for indigenous peoples to participate effectively in natural resource management; nor are there provisions

which respect indigenous peoples' culture, particularly culture related to natural resource management. As a further example, in Malaysia, the judge in a landmark case brought by the Orang Asli (*Sagong Tasi v Kerajaan Negeri Selangor*) ruled that relevant portions of the *Aboriginal Peoples Act 1954* "had to be brought into conformity with the Constitution".

- **Negative Perceptions on Indigenous Peoples**

The Bangladesh study notes that historically, indigenous peoples have been systematically denied access to lands that were required by the empires, kingdoms or colonizers. The legacies of these past policies have continued in different forms up to the present day, particularly with regard to lands categorized as "forests" or required for state forestry. In Thailand, indigenous peoples were initially excluded from getting titles over land on the basis that they were not Thai citizens when the *Land Code* came into being. More recently, exclusion from ownership rights has been based on the watershed classification that designates most highland areas as off limits for any human activity. In Cambodia, challenges in developing partnerships and mutual learning are enormous as this goes against the history of relationships between indigenous peoples and outsiders. For indigenous groups, particularly in Northeast Cambodia, the slave trade, which continued over such a long period and with such intensity, was cultural rape. The disharmony continued with the relocation of *Brao* and *Kavet* people to lowland villages adjacent to the Sekong and Se San Rivers in the early 1960s, in order to "educate" and "Khmerise" them; then with the draconian policies of the Khmer Rouge to make wet rice paddy rice cultivators out of swidden agriculture farmers; and finally, with the policies of the Cambodian government to keep the people in the lowlands.

Box 3: Thailand National Forestry Policy 1985

Thailand's National Forestry Policy (TNFP) contains discriminatory attitudes towards indigenous peoples. This is most evident in the key aims of the Policy: "to formulate guidelines to deal with *forest degradation problems e.g. shifting agriculture, forest fires, forest clearing by the hill tribe minorities* etc; incentive for reforestation by the private sector; and rural settlement planning to conform with national natural resources management and conservation plans" (emphasis added).

- **Poor Implementation of Laws**

More progressive natural resource management laws have emerged in the last few years in Sabah, Malaysia, and Cambodia, while the fate of the Community Forestry Bill in Thailand remains unclear. However, for other laws which have been in existence for quite a while, the common complaint has been the poor implementation of laws that support the rights of indigenous peoples. In Bangladesh, for example, the study found that most of the land reform laws have hardly been implemented due in large part to structural prejudices deeply ingrained in the society, and reflected through all sorts of bad governance, vested interests, existing power structures and corruption, among other factors.

- **Contentions over Sub-surface Resources**

Although not discussed in the country reports, contention over sub-surface resources found in indigenous territories continues to be an issue. According to the laws of the countries studied, mineral rights fall under the control of the state. In Malaysia, state-federal conflicts have also ensued because mineral rights are directly under the Federal Government. Apart from sub-surface resources, there is also contention over above ground resources, such as timber, which also fall directly under the purview of state governments.

Table 3 : Provisions and Gaps in NRM Laws and Policies

Cambodia			
Title of Law/ Policy	Subject	Provision	Gap
Constitution of Cambodia 1993	Individual and collective ownership of property	Article 44: All persons, individually or collectively, shall have the right to ownership; citizens of Khmer nationality shall have the right to own lands	No specific recognition of indigenous identity for land ownership
Constitution of Cambodia 1993	State property	Article 58 stipulates that land, water, airspace, air, geology, ecological systems, mines, energy, petroleum and gas, rocks and sand, precious stones, forests and forest products, wildlife, fish and aquatic resources, economic and cultural centers are all state property	No provision for access for indigenous peoples

Constitution of Cambodia 1993	Protection and management	Article 59: The state shall protect the environment and balance of abundant natural resources and establish a precise plan of management of lands water, air, wind, geology, ecological systems, mines, energy, petrol and gas, rocks and sand, gems, forests, and forest products, wildlife, fish and aquatic resources	No guarantee on inalienability of natural resources that are essential for livelihood subsistence; lack of definition of the term 'state'
Land Law 2001	Definition of indigenous peoples and recognition in Cambodia	Article 23: Definition of indigenous peoples as a group of people residing in the territory of Cambodia, manifesting ethnic, social, cultural, economic unity, who practice a traditional lifestyle and who cultivate the lands in their possession according to customary rules of collective use	"Lands in their possession" may exclude lands that have been taken by others through fraud
<i>Land Law 2001</i>	Self-Identification	Article 24: An individual who meets the criterion of article 23 of being part of an indigenous community, is recognized as a group member by the majority of such group, and who accepts the unity and subordination leading to acceptance into the community shall be considered a member of the community	No recognition of customary law for procedure
<i>Land Law 2001</i>	Lands of indigenous communities	Article 25: Lands where the said communities have established their residences and where they carry out traditional agriculture, not only lands actually cultivated but also reserves necessary for the shifting of cultivation	Provision that such lands should be those "recognized by the administrative authorities" weakens the article immensely
<i>Land Law 2001</i>	Communal Title	Article 25 gives indigenous communities the right to claim for communal title based on negotiations with neighboring villages and authorities "according to the factual situation as asserted by the communities"	Dependent on negotiations
<i>Land Law 2001</i>	Alienable rights	Article 26 stipulates that ownership rights related to the immovable property of an indigenous community includes all the rights and protections enjoyed by private owners, including rights to dispose of the land	Provides opportunity for indigenous peoples to sell land and resources

<i>Land Law 2001</i>	Transfer	Article 27 mentions the possibility to transfer land rights to individuals within the community	No guarantee for collective ownership
<i>Land Law 2001</i>	Rights of indigenous peoples	Article 28: No authority outside the community may acquire any rights to immovable properties belonging to an indigenous community	
<i>Land Law 2001</i>	Transforming possession into ownership	Article 38: In order to transform into ownership of immovable property, the possession shall be unambiguous, non-violent, and notorious to the public, continuous and in good faith	Unclear whether land left fallow as part of the traditional cultivation system is an obstacle to acquisition of ownership
<i>Land Law 2001</i>	Transfer of ownership	Article 69 provides that the transfer of ownership shall be considered valid only upon the registration of the contract of sale with the Cadastral Registry Unit	Land can be legally transferred through a contract between the buyer and the seller without the requirement of registration
Forestry Law 2003	Identification of local communities	Articles 11(ii) and 37(i) – Identification of local communities	
Forestry Law 2003	Rights of traditional users	Article 2 ensures local communities have traditional user rights over timber products and non-timber forest products	Does not specifically mention indigenous peoples' communities
Forestry Law 2003	Full public participation	Article 4: All government decisions that have potential impact on concerned communities, livelihoods of local communities and forest resources	
Sub-decree on Customary Management 2003	Criteria of local minorities	Article 5 – Criteria for local community identification: Local community as a minority, as ethnic community, or a group of local residents with original settlement in one or more villages	No mention about collectivity; no clear distinction between indigenous and non-indigenous minorities
Environmental Protection and Natural Resources Management 1996	Environmental plan	Articles 2 and 3	
<i>Environmental Protection and Natural Resources Management 1996</i>	Protection and Sustainable resources Management	Article 3	

<i>Environmental Protection and Natural Resources Management 1996</i>	Environmental Impact Assessment	Article 6 requires an Environmental Impact Assessment to be conducted for any project	
<i>Environmental Protection and Natural Resources Management 1996</i>	Participation of the public	Article 16 provides for participation of the public in protecting and managing natural resources	No clear procedural provision
<i>Commune Administrative law 2001</i>	Opportunity to have a say	Recognition of a Commune Council provides indigenous communities the opportunity to have a say in local affairs	No clear provision to make commune chief accountable to the community

Thailand			
Title of Law/ Policy	Subject	Provision	Gap
Constitution of Kingdom of Thailand 1997	Recognition of the rights of traditional local communities; participation	Article 46: Persons from traditional local communities have rights to preserve and revive their customs, local knowledge, arts or culture at the local and national levels; and to participate in more balanced and sustainable management maintenance, and utilization of natural resources and the environment provided by law	
Constitution of Kingdom of Thailand 1997	Legal protection for quality, healthy and consistent survival	Article 56: The right to collaborate with the state as well as community in the maintenance and benefit sharing of natural resources and biological diversity, and protection, promotion and preservation of the quality of the environment for usual and consistent survival in the environment which is not hazardous to health and sanitary condition, welfare and quality of life shall be protected by law	No specific mention on the rights of indigenous communities
Constitution of Kingdom of Thailand 1997	Right to be informed, explained to and reasoned with	Article 59: Individuals have the right to be informed, explained to and reasoned with, by government organizations, state agencies, enterprises, or local official organizations prior to the approval or implementation of a project or activity that may affect the quality of the environment, health, quality of life, or other communities, and the right to express their opinion on such an issue as well as the right to have a public hearing	No specific mention of indigenous communities

Constitution of Kingdom of Thailand 1997	State obligation to encourage and promote peoples' participation in preserving, maintaining and utilizing natural resources and biological diversity	Article 79: State shall promote and encourage public participation in the preservation, maintenance and balanced exploitation of natural resources and biological diversity and in the promotion, protection and maintenance of the quality of the environment in accordance with the persistence of development principles as well as control and eradicate pollution	
Constitution of Kingdom of Thailand 1997	Conservation of natural resources in accordance with the law	Article 69: Every person shall have a duty to protect and pass on and conserve natural resources and the environment as provided by law	
Constitution of Kingdom of Thailand 1997	Powers and duties of local government	Article 290: Local government has powers and duties as provided by law to preserve natural resources and environment	No clear provision for indigenous peoples' participation at the local level
Thailand National Forestry Policy 1985	Key aims	Maintaining <i>40% of the country area under forests with 25% as protected forest and 15% as production forest</i> ; encouraging <i>reforestation and export of wood and wood products and community forestry such as reforestation on public land by private sector, tree planting on marginal agricultural land</i> ; to formulate guidelines to deal with <i>forest degradation problems e.g. shifting agriculture, forest fires, forest clearing by the hill tribe minorities</i> etc; incentives for reforestation by private sector	Many negative perceptions and effects on resources of indigenous peoples
<i>Forest Act 1941</i>	Definition of "forest"	Section 4(1): Land not acquired or possessed under the land law considered as forest	Control swidden farming
<i>Forest Act 1941</i>	Prohibited activities	Section 54 prohibits the clearing, burning, occupying or possession of forest land; breach punishable by fine of B50,000 to B100,000	Prohibits traditional methods of indigenous farming and alienates indigenous peoples from traditional territories
<i>National Reserved Forest Act 1964</i>	Forest domain	Section 4: Forest includes mountain, creek, swamp, canal, marsh, basin, waterway, lake, island and seashore not acquired by a person in accordance with the law	Lawful acquisition does not include customary ownership

<i>National Reserved Forest Act 1964</i>	Prohibited activities	Section 14: No person shall occupy, possess exploit or inhabit the land, develop, clear, burn the forest, collect the forest products or cause by any other means whatsoever any damage to the nature of the National Reserved Forest	Adverse affect on indigenous way of life
<i>National Reserved Forest Act 1964</i>	Logging or collection of forest products	Sections 15 and 16: Logging or collection of forest products and logging of reserved timber species may be carried out after obtaining permission from the Director General	No consideration for indigenous peoples' opinion
<i>National Reserved Forest Act 1964</i>	Possibility for inhabitation	Section 16(1): A person can apply to inhabit and exploit the deteriorated lands	
<i>National Reserved Forest Act 1964</i>	Punishment on offence	Persons involved in any activities against the provision of the Act shall be fined B500 to 15 years imprisonment	
<i>National Park Act 1961</i>	Prohibited activities	Section 16: No person shall: (1) occupy or possess land including build up, or clear or burn the forest; (2) collect, take out or alter any act whatsoever things, endanger or deteriorate timber gum, resin, wood-oil, turpentine, mineral or other natural resources; (3) take wildlife out or alter any act whatsoever things or endanger the wildlife, take in any domestic animal or beasts or burden without permission of competent officer; hunting, cause fire etc in a way that affects the National Park	Direct affect on indigenous people who have an inalienable livelihood relation with the forest
<i>Wild life Preservation and Protection Act 1992</i>	Prohibited activities	Sections 16–21 prohibit various activities such as propagating or breeding, possessing, trading, collecting, or endangering nests or any protected and preserved wildlife	Affects hunter-gatherer indigenous peoples
<i>Land Code 1954 and Land Code Promulgation Act 1954</i>	Application for land certificate	Section 5: Anyone occupying forest land as of November 30, 1954 can apply for land title using a claim certificate provided they prove their claim within 180 days	Most indigenous peoples' lands have been encroached on because there is no proper mechanism to provide notice; also limited awareness of this provision

<i>Land Code 1954 and Land Code Promulgation Act 1954</i>	Land and state ownership of land	Section 1 identifies land surface everywhere, including mountains, hills, streams, ponds, canals, swamps, marshes, waterways, lakes, islands and sea coast as land; section 2 declares that land identified in section 1 shall be vested in state ownership	Disregards indigenous land ownership systems
<i>Land Code 1954 and Land Code Promulgation Act 1954</i>	Issuance of land title documents	Chapter 4 has various provisions for applying for different land title	Complicated procedures disregard indigenous peoples' situations and alienate them from their traditional lands
<i>Enhancement and Conservation of National Environmental Quality Act 1992</i>	Participation of NGOs	Sections 6–8 articulate ways the public may participate in the management of matters affecting the environment, and lay down a framework for collaboration between government and NGOs. A private individual can lodge a petition against a person who violates laws on the conservation of natural resources	
<i>Enhancement and Conservation of National Environmental Quality Act 1992</i>	Environmental Impact Assessments in protected areas	Sections 32–51 stipulate that environmental quality standards, management, planning, conservation and Environmental Impact Assessments are mandatory for specified projects in protected areas	Management standards do not coincide with indigenous peoples' standards

Malaysia			
Title of Law/ Policy	Subject	Provision	Gap
Article 153 of the Federal Constitution	Recognition of rights of Sabah's indigenous peoples	Indigenous peoples or "natives" of Sabah are accorded special rights and privileges	
Article 73(b) of the Federal Constitution	Decentralization	Empowers the states of Sabah and Sarawak to enact their own laws through their State Legislative Assemblies	
Article 161A(5) of the Federal Constitution	Land rights of indigenous peoples	State laws in Sabah and Sarawak may provide for the reservation of land for indigenous peoples or for giving preferential treatment in regards to the appropriation of land by the state	

Land Ordinance 1930	Ordinance provides for Native Lands		
Land Ordinance 1930	Native Customary Rights (NCR) to lands	Section 15 states that land included under NCR is land possessed pursuant to customary tenure; land planted with 20 or more fruit trees per acre; fruit trees, sago, rattan and other plants of economic value that are planted, maintained and regularly enjoyed as personal property; grazing land stocked with cattle or horses; land that has been cultivated or built on within 3 years; burial grounds and shrines; and right of way for people and animals	Some provisions are archaic, do not recognise land under fallow period, and place importance on plants of economic value
Land Ordinance 1930	Attempts to incorporate indigenous customary law	Section 15 attempts to incorporate indigenous peoples' customary law on land ownership into the land law	Gaps in existing process of land delineation; not completely able to incorporate indigenous natural resource management systems such as fallow in rotational agriculture cycle
Land Ordinance 1930	Contradictory provision	Section 28 provides authority to the Governor to alienate land for "public purpose", seen to supersede section 15	Used as a tool to alienate indigenous peoples' lands
Land Ordinance 1930	Notice	Section 13 provides for the posting of a notice and validation on the ground in any application	No access to information for indigenous peoples because notices are put up in English in the district Lands and Survey Department
Land Ordinance 1930	Special provision for protection of indigenous ownership over native lands	Section 17: Except with the written permission of the Minister, all dealings in land between non-natives and natives are expressly forbidden and no such dealings shall be valid or recognized in any court of law	Many indigenous peoples have lost their traditional lands by circumventing this section

Land Ordinance 1930	State rights over surface and sub-surface resources	Sections 23 and 24 give ownership rights over sub-surface and surface resources to the state, including minerals, timber or other forest produce, any earth, gravel, stones, coral, shell, guano, sand, loam or clay, or any bricks, lime cement or other commodities manufactured from these materials	Affects forest dwellers and indigenous peoples
Land Acquisition Ordinance	Land subject to compulsory acquisition	Section 2(h) states that any land may be subject to compulsory acquisition by the state if it is deemed to be for a "public purpose"; includes resettlement, conservation and exploitation of natural resources	Avenue for indigenous peoples' land to be alienated
Land Acquisition Ordinance	Limitation on complaint mechanism	Section 9 allows only 3 months for the owner to register their interest and provide notice to the authorized officer	Most indigenous peoples have already lost lands due to lack of notice
Inland Fisheries and Aquaculture Enactment 2003	Recognition of indigenous resource management	Section 35 allows for the declaration and recognition of indigenous system of resource management	
Inland Fisheries and Aquaculture Enactment 2003	Creation of a Committee	Sections 36 and 37 create a Community Fishery Management Committee	Does not recognize traditional authority
Wildlife Conservation Enactment 1997 and Wildlife Regulation 1998	Recognition of community hunting area	Sections 7 and 32 recognize community hunting areas and honorary wildlife wardens from the community	
Wildlife Conservation Enactment 1997	Native or traditional rights perpetuated	Section 9(2)(c) provides an explanation on "Native and Traditional rights" that will continue to be exercisable	
Wildlife Conservation Enactment 1997	Community summarized representation	Section 9(2)(d) requires a summary of representations to be made by communities likely to be affected	Inadequate time-frame to give notice (90 days)
Parks Ordinance 1984	Park Management	Park Management controls, manages and maintains all Parks, including both inland and marine ecosystems	Restricts access of indigenous peoples living within Parks
Parks Ordinance 1984	Bio-prospecting, tree plantations and commercial enterprises	Section 20 of the Parks (Amendment) Enactment 2002 empowers a Park Board of Trustees to carry out bio-prospecting, develop tree plantations as well as commercial and industrial enterprises	Impacts indigenous knowledge and livelihood of indigenous peoples living within Parks

Conservation of Environment Enactment 1996 and Environment Protection Enactment 2002	Use of land and activities	Use of land (section 28); activities affecting vegetation (section 33)	No provision on indigenous peoples' rights; sections impose restrictions on swidden cultivation
SAFODA Enactment 1981	Compulsory acquisition of land	Section 39(1) provides for compulsory acquisition of land	Results in loss of NCR land
SAFODA Enactment 1981	Status of SAFODA	Section 47: SAFODA deemed a "native" entity for any law relating to land	Results in loss of NCR land
SAFODA Enactment 1981	Appeals		No mechanism to notify owners or to record and settle land disputes in an organized manner
Biodiversity Enactment 2000		Require accompanying Rules	Cannot be implemented until Rules are adopted
(National) Land Conservation Act 1960	Planting and clearing of hill land	Section 5 provides that no person shall plant any hill land with short term crops without an annual permit from the Collector of Land Revenue; section 6 goes on to prohibit the clearing of hill land	Detrimental to Orang Asli communities who live in forest and forest fringe areas and who still depend on the traditional swiddens for their subsistence
<i>(National) Land (Group Settlement Areas) Act 1960</i>	Alienation of land to government agencies	Enables land agencies such as the Federal Land Development Authority (FELDA), the Federal Land Consolidation and Rehabilitation Authority (FELCRA) and other agencies such as the Pahang Tenggara Development Authority (DARA) to take over state land and to develop it for the purpose of land settlement, which culminates in the issue of land titles to the settlers	Orang Asli traditional areas have been converted to such land schemes without enjoying either the fruits of the programme or entitlement to land titles
<i>(National) Protection of Wildlife Act 1972 (Act 76)</i>	Wildlife reserves and sanctuaries	Wildlife reserves and sanctuaries may be declared by the state	Does not allow Orang Asli to sell wildlife; may only be use for family needs

<i>National Forestry Act 1984</i>	Administration, management and conservation of forests	Forest produce is the property of the state; harvesting requires a license	Treats Orang Asli harvesters of such forest produce as labourers subservient to traders who possess licences
<i>National Parks Act 1980 (Act 226)</i>	Establishment and control of National Parks	Provides for the establishment and control of National Parks	No ownership and control over Orang Asli traditional territories
<i>Aboriginal Peoples Act 1954 (amended 1974) Peninsular Malaysia only</i>	Orang Asli Areas and Orang Asli Reserves	Provides for the establishment of Orang Asli Areas and Orang Asli Reserves; also grants the state authority the right to order any Orang Asli community to leave – and stay out of – an area	Orang Asli are “tenant-at-will”; the state is not obliged to pay any compensation or allocate alternative land
<i>Aboriginal Peoples Act 1954 (amended 1974) Peninsular Malaysia only</i>	Power of Minister and Department of Orang Asli Affairs (JHEOA)	Accords the Minister concerned – or his representative, the Director-General of the Department of Orang Asli Affairs (JHEOA) – the final say in all matters concerning the administration of the Orang Asli, and in matters concerning land, to the state authority	Gives the Federal and State Governments a tremendous amount of leverage against the Orang Asli

Bangladesh

(Note: Country Research did not provide details of the law)

Title of Law/ Policy	Subject	Provision	Gap
National Forestry Policy (1979 and 1994)	Preservation and management of forest	Highlights the need for preservation and “scientific management” of forests and optimal extraction of forest produce for economic development and ecological balance	No attention given to indigenous peoples’ participation in augmenting forest resources in the country
Forestry Master Plan (1994-2013)	Optimizing the forestry sector	Optimizes the forestry sector’s ability to stabilize environmental conditions and assist economic and social development	No recognition of community management of forests

<i>Forest Act 1927</i>	Reserved Forest	Section 28(1) empowers the government to assign to any village community the right to govern land that has been designated a reserved forest	Indigenous people living within reserved forests have no formally recognized right over the lands in which they live
<i>Forest (Amendment) Act 2000</i>	Social forestry	Formally introduces the concept of social forestry	<ul style="list-style-type: none"> - Limited scope for recognition of common user rights of forest dwelling communities - Erosion of indigenous peoples' traditional rights; erosion of the rich tradition of forest conservation - No focus on extension services to village communities or homestead foresters
Land Reform Policy (1972 and 1984)	Land reform	Many progressive articles on redistribution of land	Non-implementation of the law
<i>CHT Regulation 1900</i>	Land acquisition by non-residents	Amendment to Rule 34: Allows non-residents to acquire land rights within the Chittagong Hill Tracts (CHT) for homesteads, commercial plantations and industrial plants	Loss of traditional land by indigenous peoples in the CHT
CHT Accord of 1997	Administration of the CHT	<ul style="list-style-type: none"> - Devolution of land administration to the hill district councils - Resolution of land related disputes by a Commission on Land 	Dysfunctional CHT administrative system, including lack of cooperation between the CHT councils and line ministries in Dhaka

4. Interface between Indigenous & State Processes in Natural Resource Management

4.1 Indigenous Peoples and State Legal and Policy Framework on Natural Resource Management

- **State Natural Resource Management Framework**

With the exception of Thailand, legal provisions recognizing the ownership rights of indigenous peoples over their natural resources do exist, and there are many instances where customary processes are incorporated into national and state laws. However, attempts to incorporate customary processes into legal provisions have shown a sad lack of understanding by government staff. In law enforcement, it has also become apparent that there is a stark difference between indigenous and non-indigenous insights. The study in Sabah, Malaysia notes the attempt to incorporate indigenous peoples' customary law on land ownership into section 15 of the Native Customary Rights (NCR) Land of the Sabah Land Ordinance 1930. The attempt shows a lack of understanding of indigenous peoples' concept of land and natural resource management, and has resulted in misrepresentation of customary law. This has in turn resulted in gaps within the process of land delineation. Experiences in the titling of indigenous peoples' lands have also shown that the failure of the authorities to recognize indigenous resource management such as fallow periods in swidden agriculture cycle has delegitimized customary land ownership.

In all country studies, it was found that use rights in many cases may be granted but the right is not consistent and is often complicated by gaps in the law. Communities candidly refer to this as the "close one eye" policy, indicating the fact that it is not an official policy of the government. The examples from Sabah, Malaysia, Bangladesh and Cambodia also acknowledge the limited legal recognition of use rights of natural resources for indigenous peoples. In Thailand, indigenous peoples' rights over natural resources have a long way to go.

- **Traditional Administrative System**

Recognition by the Cambodian *Land Law* 2001 of traditional indigenous authority and customary law as a legal process in the determination of legal claims is very important. However, with the introduction of the commune councils and the Commune Council Law, coupled with tendencies by most governments to recognize leaders who are literate or support regulations that are in line with state laws and policies, it can be very easy to replace traditional authorities and customary laws. If this happens, it would pave the way for illegal land acquisition, land concentration and over-exploitation of resources that

Illustration 4 : Land Tenure and Use Rights in Thailand

Much of the insecurity over land tenure, and the consequent impact this has on natural resource management, is centered on the manner in which the government has approached and viewed natural resources as the legitimate domain and subject of state policy-making, without considering other rights holders. The Thai government has been extremely inconsistent vis-à-vis its policies for natural resource management. Policies have been modified or changed radically to suit economic or political interests, especially when such policies intersect with indigenous peoples. For instance, while laws and policies on National Parks and Wildlife Sanctuaries do not allow settlements or use of resources within their borders—which has resulted in relocation of indigenous peoples—tourism is widely promoted and infrastructure and private construction for tourism allowed. Use-rights of resources within national reserve areas and wildlife sanctuaries are ambiguous, and give authorities vast leverage to use the law at their convenience. Only when there is a strong collective community initiative are indigenous communities able to negotiate use rights with the local authorities.

could result in serious conflicts within the community and with authorities. In Bangladesh, areas outside the reserved forests (“*mauza-circle*” lands) are administered by “circle chiefs” or *rajas*, and below them, the mauza headmen (*mauza* chiefs or heads). The headmen are responsible for resource management, land and revenue administration, maintenance of law and order, and administration of “tribal” justice.

- **Conflict in Development Paradigms**

As far as the state is concerned, natural resources seem to be mainly for acquisition and exploitation for infrastructure development and other expenditures of the state. There is no regard for indigenous peoples’ own concepts of development, which are often considered unproductive, and therefore indigenous peoples’ customary use of natural resources is not encouraged or developed. Policies on large-scale development through exploitation of natural resource management have resulted in either social exclusion or discrimination against indigenous peoples, or loss of culture and way of life. The majority of indigenous peoples still live in rural areas, but increasingly they are migrating – either temporarily or permanently – to urban areas as livelihoods deteriorate due to natural resource exploitation and insecure land tenure.

Indigenous peoples are increasingly joining, or being forced to accept, mainstream development and commercialization. This poses a challenge to natural resource management especially in and around sensitive areas. Parks and other protected areas have also become important factors that have led to unresolved conflicts between the state and indigenous communities, due to loss of access to or restricted use of resources within these areas.

In Thailand, the study concluded that laws drafted before the last decade expressly exclude the utilization of resources within national forest reserves and other protected areas. They criminalize the activities of indigenous communities which they have traditionally carried out for their sustenance. Although there are thousands of communities managing and protecting their local forests successfully, their activities are deemed illegal. Current laws and regulations prioritize the private sector and/or state activities in these lands.

In Bangladesh and Cambodia, partnerships between government and foreign companies to exploit mineral and gas resources in indigenous lands occur without obtaining the free, prior and informed consent of affected communities, and raises serious questions about environment destruction and threats to people's health..

4.2 Harnessing Indigenous Natural Resource Management

- Incorporation vs Recognition of Customary Law and Processes

The Bangladesh and Malaysia country studies note that recognition of indigenous resource management combines aspects of the traditional management system with state/national laws. However, such a strategy may not necessarily capture indigenous resource management concepts adequately. It also does not recognise customary *law per se*. In Cambodia, while the *Land Law 2001* recognises customary law, it remains unclear how this will be put into practice.

Since customary law in general, and on natural resource management in particular, is not well-understood or documented, there is often a fear of recognizing it on the part of government. Unfortunately, past efforts by governments to recognize customary law has often meant codification, which goes against the diverse customary laws of communities. The other weakness is the tendency to form committees to manage resources, taking away the control that was traditionally held by the community. Although such committees may in fact allow more participation, particularly from women and youth, it nevertheless means that already weakened traditional structures are further sidelined. In the long run, it will further dis-empower indigenous communities in their aspirations for self-determination and a pluralistic society. Perhaps rather than adapting indigenous institutions to a rigid

structure with codified rules and regulations, statutory provisions should be flexible enough to accommodate the malleable nature of indigenous institutions.

4.3 Engaging Institutions - Cooperation between Donors, Government, NGOs and Community Organisations

The studies show varying experiences and degrees of success in engaging institutions in the different countries. Generally, NGOs that have good relations with government have facilitated engagement between communities and the relevant government departments, while the capacity of communities to engage directly with governments and donors is growing.

The most positive example is the case of Sabah, Malaysia, where indigenous organizations have been able to directly contribute to the implementation of laws or introduction of new laws through close cooperation between donors, government, NGOs and the media.

In Cambodia, donors and NGOs have been especially crucial in supporting indigenous peoples not only to link with government but also in the process of building community organizations, since indigenous peoples are still unable to effectively engage with government, local and international NGOs and UN agencies alone. Due to the unique political history of Cambodia over the past two decades, donors and UN agencies have played a very important role in shaping the laws and policies on natural resource management in that country.



Chewong harvesting the oily *perah* fruit, Teris River, Pahang

Photo: Colin Nicholas

NGOs in Thailand have been instrumental in positively or negatively shaping policies on natural resource management, depending on their perspective as illustrated in the development of “Light Green” and “Dark Green” NGOs (see chapter 6). Donors have been instrumental in influencing the government to undertake programs and projects for highland development, with most projects having a strong component focus on a decentralized natural resource management model that seeks to ensure livelihood and socio-economic needs of affected groups. Community organizations have been active in negotiating with different players within the natural resource management setting in developing a people-centric approach to natural resource management. They have been able to create cultural spaces to express indigenous traditional knowledge, concepts, and beliefs in the use and management of natural resources. Most importantly, they have been able to put into place self-governing rules on natural resource management within communities.

In the CHT, Bangladesh, pro-people NGO interventions are especially pertinent because of the disadvantaged situation of the region’s population with regard to access to social extension services of the government. Organizations working to facilitate the spread of formal education, functional literacy, vocational skills improvement, accelerating women’s access to education and training opportunities, among other initiatives, are still very limited in the CHT. The Bangladesh study viewed the strong role NGOs play in natural resource management positively but stresses the importance of maintaining the requisite balance between inaction and overly active interventions that weaken local self-dependent efforts. However, national NGOs—as in the case of government agencies—need to be sensitized prior to starting operations in indigenous-inhabited areas.

4.4 Mechanisms and Issues on Participation of Indigenous Peoples in Natural Resource Management

In many instances, talk of indigenous participation pays mere-lip service to the concept to pacify communities, with input on natural resource management often ignored. Participation processes through institutional reforms and capacity-raising initiatives noted in the Bangladesh study are similar to the processes in other countries. The process often first involves the representation of indigenous peoples—both men and women—in decision-making, policy reviews and reforms, and in legal and programme implementation. An adaptive approach is then taken to incorporate the positive aspects of indigenous knowledge systems related to natural resource management.

Another important mechanism is information dissemination, which has to address

language and cultural barriers. A major challenge is encouraging government staff to spend more time in villages, to learn from local people and increase interactions with key elders in the communities. Submission of written comments on natural resource management by communities is yet another mechanism for participation. Participation would of course be enriched if decision-making occurred with the free, prior and informed consent of indigenous peoples throughout the process.

5. Gender and Natural Resource Management

In most countries, and particularly in Bangladesh, laws and constitutions prohibit discrimination on the basis of sex, although this is not reflected in governments' natural resource management policies.

Women's primary responsibilities, such as cooking, fetching water and gathering firewood, are directly related to the use and management of natural resources. Although generally women are part of the work allocation and labor responsibilities in cultivation, the ability of women in plant and seed conservation and experimentation means they play a crucial role in preserving the diversity of traditional medicines and food sources and natural resource management in general.

Women suffer numerous hardships when ecological degradation occurs in forests and other common pool resources, making it difficult for them to go about their traditional activities, such as the preparation of food, medicines and handcrafts. Women also feel more burdened with the responsibility of looking for scarce income-generating alternatives, especially if they are denied access to natural resources for food, water and firewood. The degradation of natural forests results not only in the extinction of many plants—adversely impacting the economic well-being and health of the family and society—but also negatively affects indigenous women's knowledge systems.

Gender roles within indigenous communities are changing continually as a result of state policies. Thus, it is necessary that any policy formulation on natural resource management takes gender equations into account. There is a need to acknowledge the specific needs, perspectives, and roles of women in natural resource management.

Box 5: Indigenous Women in Bangladesh

Indigenous women in Bangladesh are traditionally regarded as occupying a lower social standing than men. The indigenous women's status is low in terms of the right to inheritance, legal and political rights, decision-making powers, as well as other spheres. One of the most acute problems faced by indigenous women is the denial of access to customary owned land. This is added to the gender-based discrimination faced by them in other ways. Land scarcity among indigenous communities generally affects women more adversely than indigenous men. The inheritance laws of most indigenous peoples, including the most numerous groups such as the Chakma and the Santal, tend to discriminate against women. The notable exceptions are the Khasi in greater Sylhet, the Mandi or Garo in the plains, and to a lesser extent the Marma in the southern Chittagong Hill Tracts. Apart from these exceptions, the common trend in indigenous communities is for sons to inherit landed property.

The denial of indigenous women's substantive participation in the political spheres further reinforces their low status in society and they remain substantively invisible in the eyes of the policy makers.

6. Challenges and Drawbacks

The country studies cite very specific challenges and drawbacks relating to the promotion and recognition of indigenous peoples' rights and participation in natural resource management. A summary of these challenges and drawbacks is set out below, with a brief explanation on some points.

a. Citizenship Rights

Denial of citizenship to a high number of indigenous peoples in Thailand has compounded land tenure insecurity and has directly affected natural resource management. Possession of citizenship documents is essential to accessing any facilities or services and to prove rights over land and natural resources.

b. Donors' Policy on Indigenous Peoples

It is important to ensure that in bilateral aid, donors adhere to their policy on

indigenous peoples based on accepted international human rights standards, and apply this policy to help raise awareness of the departments being aided.

c. Obtaining Free, Prior Informed Consent

Sufficient time must be set aside to ensure indigenous communities understand the issues at hand and that NGOs working with indigenous peoples are able to provide sufficient information for the communities to make informed decisions. Free, prior and informed consent also means that communities have the right to say no to a proposed development initiative.

d. Competing Discourse on Natural Resource Management

In Thailand, the conflict in ideological discourse between different NGO camps—the Dark Green and Light Green camps—also impacts on indigenous peoples and natural resource management. Dark Green NGOs, whose concept of nature is associated with an idealistic but self-contradictory notion of “undisturbed” nature, have been quite successful in blocking promising initiatives, such as the Community Forest Bill, because of middle class support and elite representation. The opposing discourses are not as simple as a disagreement in approach to natural resource management: it also involves power relations, class equations and social structuring. These need to be taken into account while addressing this challenge.

e. Misused/Misinterpreted Community Consultations

When hiring consultants, especially those dealing with communities, careful consideration should be given to ensure that the consultant is willing to listen to other perspectives, especially community perspectives. Consultation and meaningful participation are often viewed as interchangeable by governments and donors, yet they are two very different processes. This needs to be clearly acknowledged, and meaningful participation should be the goal for all communities in an area of influence of a given development initiative.

f. Enhancing Capacity of Indigenous Communities

The Cambodia study explicitly mentions the need to enhance the capacity of indigenous institutions and other support institutions for indigenous peoples. It seems that many groups of indigenous peoples are not aware of legislation that exists to protect their rights. Further, they do not find institutional channels to actualise their demand for the enforcement of those rights.

g. Non-Recognition of Indigenous Natural Resource Management System

h. Illegal Land Sales and Land Grabbing

- i. Land Alienation for Logging and Plantations
- j. Ambiguous Policies on Reserved Areas
- k. Large-Scale Development Projects
- l. Use of Criminal Laws and Police in Land Conflicts
- m. Participation of Indigenous Peoples in Policy Formulation
- n. Customary Land Rights: Gender Based Discrimination
- o. Ensuring Inter-Departmental Coordination
- p. Use of Criminal Laws and Police in Conflicts on Natural Resource Management
- q. Settlement Policy of Landless Bengalis in the Chittagong Hill Tracts of Bangladesh and its Impact on Natural Resource Management
- r. Research Processes and Selection of Consultants
- s. National Implementation of International Instruments

7. Conclusions and Recommendations

7.1 General Recommendations

This chapter deals mostly with the recommendations made in the country studies. It also includes recommendations from the author with the aim of making these recommendations more coherent.

7.1.1 Comprehensive Legal or Policy Review

7.1.1.1 Legal and Policy Review and Reforms

The studies recommend a *comprehensive review of laws and policies regarding lands and other natural resource management*. They also identify the reforms needed. Although the research and consultations identified the laws and policies that relate to indigenous peoples and pointed out gaps, they could not delve into the necessary level of detail. This would have to be conducted in each country in a manner where indigenous peoples and other actors, including human right workers, development planners and social scientists, can contribute effectively.

Legal and policy reforms should then follow a comprehensive review. In any such reforms, the importance of indigenous resource management processes needs to be acknowledged

as far they are appropriate to the socio-economic and cultural needs of indigenous peoples today. Policy reforms also need to be cautious to incorporate representation on the basis of ethnicity, class and gender.

7.1.1.2 Natural Resource Management Laws and Policies to be brought into conformity with the Constitution

Where recognition and protection of indigenous peoples' rights are provided in the Constitution, the highest authority in any country, natural resource management *laws and policies that are contrary should be brought into conformity with the Constitution.*

7.1.1.3 Enactment of Laws on Natural Resource Management

Where necessary laws on natural resource management do not yet exist, but where the needs are expressed by indigenous peoples, *enactment of new laws is needed.* These laws should be in line with existing and emerging international instruments that recognise the rights of indigenous peoples.

7.1.1.4 Implementing Policies

The Bangladesh study provides some clear recommendations on implementation of policies that may be applied to other countries. Recommendations include the development of detailed administrative guidelines, particularly in situations where government officials lack knowledge on indigenous culture, and where discriminatory attitudes exist among non-indigenous officials in government positions. These could include:

- a. Increasing indigenous representation in key decision-making positions;
 - b. Disseminating information to indigenous peoples regarding their rights;
 - c. Providing educational institutions, government training programmes and NGOs with greater access to information on indigenous peoples, their language, culture, economic systems and cultivation patterns;
 - d. Supplementing existing policies with indigenous-focused administrative guidelines and express references to customary laws and practices;
 - e. Accepting the plurality of indigenous peoples' situations. It is vital for the interests
-

- of indigenous peoples that these differences are understood prior to the design and implementation of major development interventions;
- f. Following the principle of free, prior and informed consent (FPIC) before any major decision is made that involves the rights and welfare of indigenous peoples;
 - g. Acknowledging indigenous technology and innovations as rational and scientific (such as practiced in agriculture, forestry, watershed management, etc) in line with Agenda 21 (Chapter 26) and the Convention on Biological Diversity and related processes;
 - h. Developing policies to redistribute state-appropriated common forest lands to indigenous communities, conditional upon their sustainable use;
 - i. Involving indigenous peoples and other forest-dependent communities in collaborative management of state-managed forests and to share the resources of such forests in an equitable and practical manner;
 - j. Taking effective measures for the practice of autonomy or self-government of indigenous peoples, especially in relation to development issues, policies and programmes.

7.1.2 Recognition of Indigenous Peoples

7.1.2.1 Acknowledgement of Customary Resource Rights

Existing laws on natural resource management have *to include provisions on the recognition of customary rights to land, and in particular the settlement of claims by obtaining the consent of prior or existing settlers*. As illustrated in the Sabah Land Ordinance, however, the interpretation of rightful occupation does not necessarily coincide with indigenous peoples' concept and customary law on land ownership.

This also implies the *recognition of collective customary resource rights* for indigenous peoples to preserve collective identity. *Collective customary resource rights would include a community's access to, and control over, lands and resources, and also ensure participation in, and control over, decision-making*. The study in Bangladesh, in recommending acknowledgement of customary resource rights, noted that this provision could be far more equitable to indigenous communities—and far more likely to result in successful promotion of state-indigenous forestry—than the over-centralized and bureaucratized system currently practiced by the Forest Department.

7.1.2.2 Recognition of Traditional Administration

In Cambodia, where *traditional authority is recognized in land claims*, measures should be taken to ensure they are implemented. In other countries, like Sabah, Malaysia and Bangladesh, even though this is not provided for in the law, it has been conventional practice to involve traditional headmen in validating land claims. Newer village administrative institutions, like the Commune Councils in Cambodia and the JKKK in Malaysia, should not replace the traditional authority. In fact, efforts to *assist traditional authorities such as keeping ethnographic records and resource maps* should be provided by the state. Traditional authorities can also be given *training to help resolve natural resource conflicts*.

7.1.2.3 Revitalisation of Indigenous Resource Management System

Natural resources are viewed by some indigenous communities as individual property rather than collective resources, creating competition that leads to unsustainable resource utilization. The challenge of re-establishing communal responsibility, and to revitalize indigenous resource management systems so that resources can be utilised in a sustainable manner for the wellbeing of the community, first need to be realized. Moreover, *efforts towards this end by the communities themselves need to be supported by donors, governments and NGOs. Recognition and revitalisation of traditional governance and administrative systems, and indigenous development concepts will go hand-in-hand with these efforts*. In many communities, and at the regional level through regional organisation such as the Asia Indigenous Peoples Pact Foundation, ongoing community reflections and exchanges to revitalise indigenous resource management and an indigenous development concept have already started.

7.1.2.4 Harnessing Indigenous Natural Resource Management

If poverty reduction is to be effective, indigenous peoples' customary use of natural resources in their territories needs to be harnessed along with conservation strategies. The challenge is to *use a combination of effective joint management strategies and recognition of the rights of communities over their resources*. Strengthening indigenous management systems is also the best way to reduce tension between state and customary systems, and to create synergy.

A management plan that outlines benefits and responsibilities for both government and indigenous peoples will help ensure indigenous culture is protected, sustainable incomes from

the natural resources is assured, and wildlife and biodiversity is conserved. *Collaborative management efforts in protected areas* need to be supported and appropriate legislation amended to ensure participation is legally recognized within collaborative management structures.

Indigenous peoples' detailed knowledge can be used in community mapping to identify important cultural sites, terrestrial habitats and place names in their traditional territories, and so on. Traditional resource management systems and the traditional legal systems of indigenous peoples can also be integrated with other resource management systems. And in remote areas, traditional legal systems may continue to be used to resolve local conflicts. Active engagement with communities themselves in these efforts needs to be taken.

7.1.3 Participation of Indigenous Peoples in Legal and Policy Formulation

Participation of indigenous peoples in legal and policy formulation may already be accepted practice, and is often mentioned by policy makers themselves, but perceptions on the process may differ. *Effective participation implies not only accepting opinions of indigenous peoples, but also involving them in decision-making throughout the whole process of legal and policy formulation. This also implies empowerment of indigenous organizations and communities.*

7.1.4 Provisions and Mechanism for Obtaining Consent

Free, prior and informed consent (FPIC) was quoted by all of the studies as a prerequisite for sustainable and acceptable natural resource management. *As such, legal and policy provisions for FPIC need to be ensured, and the mechanism for obtaining such consent needs to be developed.* At the international level, guidelines and principles for FPIC already exist: these can be used to develop such provisions and mechanism.

7.1.5 Removing Discriminatory Attitudes

Discrimination against indigenous peoples is noted in all of the studies. Recommendations to eliminate discrimination include acknowledging indigenous peoples' contributions to the country's political, social, economic and cultural integrity, as well as its development process. This includes acknowledgment in the official versions of the national histories and in other national discourses and public information systems; providing exposure

to indigenous culture, history, life style, etc, especially for government functionaries with major responsibilities for indigenous issues; and to use state-sponsored media and encourage private media to help dispel these attitudes.

7.1.6 Promoting Gender and Equity in Natural Resource Management

As pointed out earlier, there is a need to acknowledge the specific needs, perspectives, and roles of women in natural resource management. Women's active participation in decision-making, and the equitable sharing of benefits between men and women is crucial to ensure the long term sustainability of natural resource management.

The recommendations elaborated in the Bangladesh report are also relevant for the other countries. Bringing about gender equity in natural resource management requires committed support from all actors in all countries—including political, social and community leaders, and local and international NGOs. Due to longstanding gender-insensitive practices ingrained in customary beliefs, religious and social conservatism, etc, this is a matter that requires consistent and urgent attention. Policies that are generally aimed at addressing discrimination faced by non-indigenous women may not be appropriate: it is important to ensure that laws and policies are relevant to preventing discrimination against indigenous women. Other important interventions include addressing the human rights issues of indigenous women who are under-represented in political bodies and local government units; the lack of funds available to mobilize women; and the need to raise awareness about the negatively discriminatory inheritance laws.

7.1.7 Enhancing Capacities of Indigenous Peoples, Traditional Leaders , NGOs

There is a crucial need to support indigenous initiatives—such as those aimed at organizing communities or implementing leader training programmes—in which indigenous organizations and traditional leaders engage in their own capacity building exercises. However, where NGOs are willing to assist in building the capacity of indigenous communities, there is a need to provide resources and support in a manner that is sensitive to the communities. Capacity enhancement aimed at building community organizations should also recognise that for such an initiative to be effective it requires much effort, resources and long-term partnership.

7.1.8 Research and Information Dissemination

There are also many institutions that involve government, local and international NGOs and UN agencies in developing tools and models for participatory action on natural resource management. There are several good examples in Cambodia of research conducted with indigenous communities that can be used as models elsewhere in the region.

The challenge of inaccessibility and remoteness of some indigenous communities needs to be taken into account in the dissemination of information. A further challenge is producing information that is easily understood. In Cambodia, there are many indigenous peoples who have not had access to formal education, thus using creative and adaptable ways to convey information is important. Use of popular media such as radio and audio-visuals are good examples.

7.1.9 Advocacy at National and International Level

Where serious conflicts over land and natural resource management exist, the studies recommend the development of effective strategies and tools for advocacy at both the national and international levels.

National level advocacy programmes would focus on the implementation of agreements (the CHT Accord in the case of Bangladesh), constitutional provisions, as well as recommendations made in relevant strategy documents, such as the Poverty Reduction Strategy Papers (PRSPs). Strengthening the capacity of both informal institutions (traditional leaders and other community level organizations) and formal institutions on customary laws and practices would enhance advocacy goals.

International advocacy should aim to make effective use of the international inter-governmental processes, including the mechanisms of the UN human rights treaty bodies, the Human Rights Council, and the offices of Special UN Rapporteurs. In particular, these should refer to international customary laws and international treaties ratified by governments.

Strengthening existing national, regional and international networks, while creating further networks, would further enhance progress in this area. Given the situation of extreme political, social and economic disadvantage suffered by most indigenous peoples, this needs to be an integral strategy perspective for quite some time in the foreseeable future.

7.2 Specific Recommendations

Some specific recommendations made in each country studies are:

a. Inter-Ministerial Committee (Malaysia)

In Malaysia, a national consultation process recommended the formation of an Inter-Ministerial Committee: a body with sufficient authority at the state and national level to review the various policies and laws on natural resource management and indigenous peoples, with the view to streamline such laws and policies to protect indigenous peoples' rights. Such a Committee would also be expected to identify laws and policies that should be amended, and the obstacles to the implementation of such laws and policies.

b. Policy for Highland Peoples' Development (Cambodia)

In Cambodia, the adoption of the Policy for Highland Peoples' Development was specifically mentioned.

c. Implementation of the CHT Accord of 1997 (Bangladesh)

In Bangladesh the CHT Regional Council Act 1998 obliges the government to consult the CHT Regional Council prior to the passage of any new laws on the CHT region.

d. Democratization and Decentralization (Thailand)

Democratization and decentralization, with emphasis on indigenous peoples' participation, are identified as key processes in Thailand. The Thailand study notes that a lack of indigenous participation in natural resource management in the country has stymied most of the policies and laws before they were implemented. Involvement of indigenous peoples as rights holders would therefore ensure a sense of ownership and successful implementation of laws and policies.

e. Land Demarcation (Cambodia)

The lands of indigenous peoples, as a vital part of their lives and cultures, must be clearly demarcated. Some specific issues on the process in Cambodia are noted in the box below.

Cambodia: Considerations on Land Demarcation

There are some serious issues in the policy process and sequencing that need to be considered.

1. Definition, identification and agreement on what constitutes state public property: this requires a set of subsidiary processes to clarify what can sit within this overall category.
2. Definition and identification of lands of indigenous communities.
3. Definition and identification of core forest areas that should be retained under a protected area system and areas of high environmental service function (such as watersheds).
4. Definition and identification of those areas of forest that could be managed under some form of production. Actual institutional arrangements would need to be determined, but may involve groups such as communities or communes, small-scale “industrial” forests, concessions, direct management by the public sector, etc.
5. Definition and identification of those areas that are available for agriculture. Actual institutional arrangements would need to be determined, but may involve family farms, small scale “industrial” farms, large-scale concession agriculture, etc.



Photo: Devasish Roy

Bangladesh

The Interface of Customary and State
Laws in the Chittagong Hill Tracts

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Bangladesh

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Glossary

ADB	Asian Development Bank
AC (Land)	Represents the District Commissioner's (DC) land and revenue administration at the upazilla level and is subordinate to the UNO. Where AC (Land) posts are vacant (such as in most upazillas of the CHT), the UNO carries out the functions of the AC (Land)
ADC (Revenue)	Assists the DC in their land and revenue administration duties
BFD	Bangladesh Forest Department
CEDAW	Convention on the all forms of Discrimination Against Women
CHT	Chittagong Hill Tracts
FD	Forest Department
FGD	Focus Group Discussion
Headman	Head of a mauza and charged with revenue, land and 'tribal' justice administration at the mauza level. The Headman supervises the work of the karbari and is responsible to the circle chief and the District Commissioner
HDC	Hill District Councils
JFM	Joint Forest Management
Karbari	Village chief or elder, an office that is largely hereditary.
ICC	International Criminal Court
NRM	Natural Resource Management
PRSP	Poverty Reduction Strategy Paper
PCJSS	Parbotto Chattagram Jana Samati Samity
RDC	Revenue Deputy Collector. Assists the DC and ADC (Revenue) in the latter's land and revenue administration duties
RC	Regional Council
RF	Reserve Forest
UNO	Upazila Nirbahi Officer
UNDP	United Nations Development Programme
Upazilla	A local government unit below the district
USF	Un-classed State Forest
UP	Union Parishad
VCF	Village Common Forest

Bangladesh

The Interface of Customary and State Laws In the Chittagong Hill Tracts



Bamboo traders, Chittagong Hill Tracts

Photo: Chris Erni

1. Introduction

1.1 Context

Since the 1860s, when the Chittagong Hill Tracts (CHT) region was annexed to the British province of Bengal, policy makers' approaches to the region have been marked by a desire to make the natural resources of the region profitable to successive administrations. Bangladesh, with an area of a little more than 130,000 square kilometers, is a small country roughly the size of England, but with a staggering population of 130 million. The south-eastern Chittagong Hill Tracts region covers about a tenth of the country but the region's population accounts for barely 1% of the national population. There are significant natural resources in CHT including land, forest, fisheries, and water bodies.

The major policy imperatives of the British when they administered the region were twofold: (i) to increase revenue earnings; and (ii) to bring forth a stable administrative system. The first was achieved by the Imperial Forest Department appropriating the forest commons of the hill peoples and encouraging plough cultivation, which gave higher yields and consequently higher revenue than *jum* cultivation. The second objective was achieved partly by formalizing the rule of the most influential rajas or chiefs through a uniform system of local administration.

After the birth of Pakistan (1947), the policies of the past were largely followed, but forest conservation proved to be even more difficult. Natural resource constraints and falling harvests from swidden (*jum*) land led to imaginative innovations in horticulture in the 1950s, led by the Bawm and Pangkhua and followed by the Chakma. The construction of the Kaptai Dam in 1960 affected both plough farmers and *jum* cultivators. The Jumias remain uncompensated. In response to the significant loss of farming land many farmers migrated to India or took up *jum* cultivation, an occupation that had been forsaken by their ancestors some generations before. The negative impacts of the Dam, encompassing social, political, economic, cultural and environmental dimensions, were so deep that discontent with its effects fuelled anti-government feelings and eventually led to the autonomy movement that began in the early 1970s (Roy, 2002b: 1). Further, the government's policy to bring thousands of Bengali settlers into the region, with the help of military and other security forces, created (and continues to create) more pressure on the use of natural resources. In 1979, as part of the anti-insurgency measures, the Government of Bangladesh (1979-1985) re-settled between 200,000 and 450,000 Bengali-speaking migrants from various parts of Bangladesh into all three hill districts of the CHT.¹ Reportedly, there are still instances of further resettlement through covert government encouragement; however this phenomena requires further investigation. This is reflected in the issuing of commercial leases over CHT lands to outsiders in the 1980s and 1990s. One of the effects of these policies was to heighten the political unrest that began in the early 1970s.

The CHT Accord of 1997, which brought to an end an insurgency, has attempted to address many of the vital issues of the region including land disputes, devolution of land administration authority to the hill district councils, land grants to landless hill people and cancellation of non-resident leases. However, there has been little or no implementation of the terms of the CHT Accord in the ten years since it was signed. Communications infrastructure in the CHT is rudimentary, and it does not have any industries that can provide alternative employment to agriculture. Therefore, a

very large part of the population of the region is dependent upon its natural resources for their sustenance or secondary and tertiary sources of livelihood.

Despite the significant negative impacts of past and present policy approaches and decisions, there are also positive developments. Civil society, including local NGO leaders in the CHT, has become increasingly conscious about land rights, resource conflict, and existing standards for the protection of basic human rights and fundamental freedoms. Vocal representatives of civil society and development practitioners have, in various local, national and international fora, demanded larger roles in the development process for indigenous and rural communities and further democratization of the CHT polity to allow more equitable representation for the less numerous indigenous peoples and for women.

It is against this context that the report examines the interface between indigenous systems of natural resource management and the formal government laws and policies applicable in the CHT.

1.2 Process Documentation

The research location is the Chittagong Hill Tracts region in south-eastern Bangladesh, encompassing the three hill districts of Rangamati, Bandarban and Khagrachari. The case study attempts to understand existing patterns of natural resource management (NRM). The researchers observe that, in the case of NRM, the major causes of natural resource depletion are policy decisions historically originating from outside the Hill Tracts. Among these are the British colonial policies in the 19th century, and the forest and land policies of the post-colonial nation states of Pakistan and subsequently Bangladesh.

The term ‘natural resources’, according to the indigenous respondents in this research, refers to all types of resources that originate in nature, including soils, hills, forests, rivers and other water bodies – both discovered and latent. Shrubs, herbs and trees grown on lowlands or in the hills, and cattle, animals, insects, reptiles, fish and minerals are all included in the term ‘natural resources’. In order to secure a livelihood, the indigenous peoples of the Chittagong Hill Tracts have been using and preserving many of these natural resources for hundreds of years.

The limited availability of natural resources was already approaching crisis proportions by the 1950s, prior to the construction of the Kaptai Dam in 1960 (Sopher, 1963). A direct consequence of the construction of the Kaptai Dam and the Karnaphuli reservoir it created was the (so far) permanent inundation of two-fifths of the entire plough lands of

the Hill Tracts and a large part of the Rangamati Reserve and other small reserved forests, further limiting the available resources in the Hill Tracts.

The majority of indigenous peoples in Bangladesh reside in the frontier regions in the north-west, north, north-east, south and south-east of the country. The hilly portion of south-eastern Bangladesh, known as the Chittagong Hill Tracts region, has the largest concentration of indigenous peoples in the country. The largest indigenous groups in the CHT are the *Chakma*, *Marma*, *Tripura*, *Mru* and *Tanchangya*, and together they make up about 90% of the indigenous population of the region. The other indigenous peoples of the CHT are the *Bawm*, *Chak*, *Khumi*, *Khyang*, *Lushai* and *Pankhua*. The total indigenous population of the CHT, according to the 1991 Census, was 501,144. The Census carried out in 2001 is not ethnically disaggregated and thus fails to project the total indigenous population in CHT.

This study acknowledges that both internal socio-economic changes within the CHT and a variety of government-sponsored programmes have led to the erosion of customary resource rights. These include a growing number of applications for, and issue of, private titles among indigenous peoples; land occupation by Bengali settlers with the complicity of the security forces, and the subsequent conversion of common forest, swidden and grazing lands into private landholdings.

The Government of Bangladesh has instituted a variety of policies to address the situation of the CHT, including deployment of the military, population transfer from lowland areas, development policies (forestry development in particular), on-going political negotiations, and limited devolution of authority to semi-autonomous units. These are briefly analyzed in the context of NRM in the following sections of the report. The social and political dynamics of the different indigenous and settler groups on the basis of ethnicity, class and gender, are also analyzed. Finally the study identifies the major gaps and challenges in protecting natural resources and in incorporating indigenous knowledge and systems in state recognized NRM practices to avoid further depletion of natural resources.

This research is based on both primary and secondary data (published books, journals, reports, etc). Primary sources of data collection are based on field visits in three hill districts, observation, interaction through Focus Group Discussions (FGDs) and informal interviews with local leaders, Headmen, *karbari*, development workers, and women participants. Unstructured discussions were held in many places, such as in bazaars or market centers, and within reserve forest areas to discuss how previously natural resources were protected in different parts of Rangamati, Bandarban and Khagrachari districts. Personal observation and research experience of the core researcher and advisor is another

important data analysis tool used to fulfill the objectives of the research. A local consultation meeting was held on 19 February 2006 in one hill district, with 60 indigenous participants coming from three hill districts, including indigenous participants from Monipuri and Khasi community located in greater Sylhet.

Specific Objectives of the Research

- To review and analyze current laws and policies regarding NRM, land tenure and resource access
- To assess the current situation of access and control over natural resources
- To identify operational guidelines regarding indigenous peoples' access to natural resources
- To explore the roles of Local and National Institutions
- To identify the gaps and challenges

2. Major Natural Resources in the CHT

The most important categories of land in the CHT include government managed forests, community managed forests, swidden (*jum*), grazing and grassland commons, water bodies, and privately owned lands. Apart from forest produce and these land types, important natural resources include minerals and gas.

2.1 Government Managed Forests

The reserved forests (RFs) constitute the most important category of government-owned forest areas in the CHT, covering about a quarter of the region. In the CHT, they are also the only category of land directly administered by the Forest Department. Another category of government-managed forests in Bangladesh is protected forests. However, the area of protected forests – whose resources are protected through specific restrictions – is negligible in the CHT. Reserve forest areas are divided into a few large areas, and several smaller ones. The smaller RFs together cover only 15,018 acres (24 square miles). (Webb & Roberts, 1976: 2).

Remaining stands of natural forest in the CHT are confined to the northern Kassalong RF and Sangu RF. Large sections of the middle and southern Kassalong RF and the other RFs – apart from Sangu RF – were converted into planted woodlands, particularly for teak,

beginning in the British period, and followed in the Pakistani (1947-1971) period and after the independence of Bangladesh in 1971, up to the present day. Due to the high price of teak, the teak plantations have been badly affected by theft, often with the connivance of corrupt government officials. In some parts, the Department of Forests (DOF) has planted pulpwood and other ‘softwood’ species to provide raw material for paper and pulp industries, particularly around the industrial centers of Kaptai and Chandraghona within Rangamati district. In the creation of both of the above types of plantations, there has been a net loss of biological diversity, and denial of access of indigenous communities.

From a regional CHT perspective, one can see differing situations in different parts of the forest areas. Very large parts of the RFs – particularly the central Reingkyong RF – have been denuded of large tree cover, most significantly since the 1970s (Webb & Roberts). The situation in the northern Kassalong RF and Sangu RF has worsened too, both on account of logging of the remaining natural forests accelerated by connecting the road depot at Baghaihat Bazar in Kassalong RF and Alikwadang (‘Alikadam’), near Sangu RF, to the national highway network, and the increase in settlements of conflict-affected internally displaced people (Roy & Gain, 1999: 22; Roy, 2002: 27). The DOF manages these forests, although the DOF does not appear to have any direct control over the more remote areas. Regional institutions and district and sub-district administrations have little



Chakma river bank farming

Photo: Chris Erni

or no role in the affairs of these areas. By default the communities residing in the remoter parts of these areas are left to manage their own affairs. Most depend upon swidden or *jum* cultivation for their major source of livelihood, supplemented with limited cash income from the sale of spices, dried chili peppers, and cattle (including the semi-wild bison or *bos frontalis*).

2.2 Community Managed Forests

The most important category of community-managed forests is the *mauza* forest commons or village common forests (VCFs). These are mostly small (average 50-300 acres), consisting of naturally grown or regenerated vegetation, and are traditionally managed, protected and utilized by village communities under the leadership of the *mauza* Headmen and village *karbaries* (traditional elders).

The existence of these forests is acknowledged in the CHT Regulation of 1900 (at Rule 41A), the main legal instrument for the administration of the region. A number of ancillary executive orders of the district administrations were passed during the British period (circa 1930s) and in the Pakistan period (circa 1960s), but have otherwise suffered from policy neglect since then (Roy & Halim, 2001b; Roy, 2004 b). Although the law does recognize the existence of VCFs, it does not recognize the full ownership rights of the community concerned, or provide express safeguards against alienation and privatization. This responsibility would appear to rest upon the *mauza* headman without whose advise land grants are generally not made in the CHT, although there are some notable exceptions.²

2.3 Swidden Grazing & Other Commons

Apart from the DOF-administered RFs, traditional commons used for swidden cultivation, grazing, gathering of thatch and other grasses, as cremation grounds and graveyards are situated within the *mauza* boundaries. Most are not registered as a separate category of lands in the land registers. The indigenous communities and their headmen and *karbaries* possess knowledge about them as handed down through the generations. Communities regard these commons as their 'property' to manage or use as the community collectively decides, or in some cases, as the influential headmen and *karbaries* suggest. In the eyes of most plains officials of the district and sub-district administrations, these are '*khas*' lands belonging to the state. The same lands are regarded by DOF officials as 'unclassed state forests' as they are concerned with 'forests', and all lands in the CHT belong to one or other category of 'forest' (Halim & Roy, 2004). From the perspective of indigenous peoples'

resource rights, which are also closely related to conservation and sustainability concerns, the traditional system has both advantages and disadvantages. The major advantage is that the communities may adapt and amend their resource utilization and management patterns at will as long as the community's consent is there. No legal or documentary formalities are involved. However, the biggest disadvantage is that, as in the case of the *mauza* forests mentioned above, there are no formal written records that recognize these lands as a separate category of forest, utilized community forests for swidden, or grazing or other activities. Therefore, the risk of these lands being taken, especially where the *mauza* headmen are bypassed, or if the headman himself is party to such land transfer. Therefore legal and administrative reforms are required to both maintain such flexibility, and yet bring about entrenched safeguards, including through the vesting of major resource management responsibilities upon an elected local body. In other words, the land management responsibilities of the headmen need to be strengthened while at the same time providing checks and balances to the headmen's authority by subjecting it to the scrutiny and consultative prerogatives of the general public of the *mauzas*.

2.4 Water Bodies

As in the case of forest and other commons mentioned in sections 2.2 and 2.3 above, customary law treats all water bodies as common property, although this is not reflected in the land registry documents, as government officials prefer to regard such resources as state property. Some parts of the Karnaphuli reservoir have been leased out for fisheries, but so far privatization of water bodies is not a major issue of contention in the CHT. This can of course change. Due to massive deforestation of the government-managed reserved forests – including several headwater reserves (such as the Maini, Thega, Subalong and others) – river-bank erosion and siltation of the river and reservoir beds is a major problem in the CHT. Ultimately, one cannot but hold the *colonialist* pattern of RF management responsible for this. The stark contrast in the case of the *mauza* reserves illustrates the point: streams and other aquifers situated within the community-managed *mauza* reserve forests are generally well protected from bank erosion and siltation. Had indigenous communities been involved in RF management and ownership, the overall situation of the RFs in the CHT today might have been quite different. Thus, the examples of the RFs suggest that the right of the indigenous communities over these water bodies – as owners and managers – needs to be recognized.

2.5 Privately Owned Tree Plantations

There are two major categories of privately owned tree plantations in the CHT. There are those that belong to non-resident lessees based in major cities outside the CHT, and there are the smaller tree plantations of indigenous farmers and town-dwellers. Although the exact area of these lands is not known, the extent of indigenous peoples' plantations is much larger than that of the absentee lessees. Teak and gmelina – a valuable timber species – are the favorite species for plantations, with kori and other local species predominating. The system of plantation generally involves the *taungya* method, an innovated form of agro-forestry based upon the swidden or *jum* method, whereby a swidden farm includes tree planting along with the usual crops. Thus, after the first or subsequent harvest of upland rice and other crops, the canopy of the planted teak and other trees – along with that of the naturally regenerated Kori – spreads and converts the land into a plantation in a few years. This technology has also been used for the government reserves, but official sources seldom acknowledge the indigenous roots of this innovated technology, in contravention of the Convention on Biological Diversity (Roy, 2004).

The biggest problem surrounding privately owned tree plantations is the cumbersome and corrupt permit process. According to one estimate, about 50 percent of the harvest sales value is spent in obtaining permission to bring this same harvest to market (ADB: 38), as a timber extraction and export permit is mandatory. Despite this problem, tree plantations are on the rise, since the timber is a good source of wealth for otherwise impoverished farmers. Simplification of the permit process and government assistance through land grants and credit facilities would greatly enhance tree and bamboo production. Indigenous farmers' plantations are generally far better maintained and protected than the government-owned ones. Again, this is another area where the indigenous communities have demonstrated their superior knowledge and management skills, largely unnoticed by policymakers in Dhaka and elsewhere.

2.6 Other Privately Owned Lands

Other relevant types of privately owned lands, excluding market and urban centers, are the orchards and fruit gardens. The most favored species in the CHT is pineapple, but due to the fickle price and perishable nature of the commodity, and the short harvest season, expanded production is not possible. Soil erosion is a serious problem facing orchard farmers. According to soil scientists the soils of the CHT are suitable mainly for forestry and fruit gardens. The sloping lands do not permit irrigation-oriented plough or hoe

agriculture. Here too local innovation has produced some positive results, such as in the case of developing banana plantations through an innovative *swidden*.

2.7 Mineral & Other Resources

In partnership with foreign companies, the government has been exploring the potential for exploiting the gas resources of the Sylhet region. In recent years the government has conducted seismic surveys in the CHT in partnership with international gas and oil companies. This has been cause of concern to some people in the CHT because mining may pose a threat to the local environment, and threaten the rights of the *jum* cultivators. The demand of the indigenous leaders is that, if mining is to be conducted in the CHT, it should only be done with the prior and informed consent of the peoples of the region. Further, if such consent is provided, mining should be done in such a way as to avoid any dislocation, and to ensure that the hill district council get their share of royalties, as provided for in the CHT Accord of 1997 and the Hill District Council Acts of 1989 (Roy, 2004: 2).

Examples of mineral extraction in other parts of Bangladesh do not bode well for further development of this industry in the CHT. In greater Dinajpur, in four *upazilla* where approximately 50,000 indigenous people are living (in nine unions and sixty-seven villages), the Asia Energy Corporation (Bangladesh) Pty Ltd under a Production Sharing Contract (PSC) was planning to establish Phulbari coalmine project. To stop the proposed open-pit extraction of coal, civil society, the National Adivasi Parishad (greater North Bengal), the National Committee for the Protection of Oil, Gas, Mineral Resources, Energy and Port, Citizens Committee for the Protection of Gas, Oil and Coal, under the auspices of the Economic Association, had organized several protest meetings, rallies and seminars. Indigenous activists are arguing that the proposed coal mine is in violation of ILO 107. On 26 August 2006 at least seven people were killed and 300 injured as BDR (Bangladesh Rifles) opened fire on a demonstration while it was advancing towards the office of Asia Energy in Dinajpur. Thousands of demonstrators, mainly farmers and indigenous peoples including women armed with bows and arrows and sticks, joined the protest against the massive eviction and loss of farmland that was expected as a result of the Phulbari coalmine project (Star, August 27, 2006).

This has become a serious concern for indigenous peoples, because coal extraction is going to displace them from the ancestral land like their fellow indigenous peoples in CHT, when Kaptai Dam was built in 1960. Most of the indigenous peoples living in the flood zone of the Kaptai Dam had recorded documents for the land; however the government

is disregarding it and has now offered compensation. The government, after negotiating with the protesters, announced that it had agreed to say 'no' to Asia Energy and instructed them to wrap up their operations in Bangladesh. No open-pit mineral mining will be allowed in the country (Star, August 31, 2006). However, Asia Energy in a statement said it has not received any communication from the government that it is canceling agreements with the company (Star, September 1, 2006). The agreement to withdraw is yet to be implemented by the government. The people from Phulbari are saying that the government has betrayed them. The risk of permanent eviction from drilling sites cannot be ruled out. If these matters are not negotiated in an equitable manner it will adversely affect the indigenous peoples and other Bangladeshis living within the project area, potentially leading to dislocation and further unrest.³

3. Law and Policy

3.1 National Forest Policy

The Government of Bangladesh has several policy documents on forestry. These include the National Forestry Policy (1979 amended in 1994) and the Forestry Master Plan (1994-2013). In addition, the government's policy can also be observed from its various programmes and projects. The First National Forest Policy for Bangladesh of July 8, 1979 was not significantly different from comparable policies of the pre-independence period. It emphasized the need for preservation and 'scientific management' of forests and the optimal extraction of forest produce for economic development and ecological balance. No attention was given to 'peoples' participation' in the management of forest resources in the country (Halim, 1999: 86).

The current forest policy was adopted in 1994 and officially announced on 31 May, 1995 (Bangladesh Gazette, July 6, 1995: 241-244). The policy initiated a 20-year Forestry Master Plan (FMP). The Asian Development Bank (ADB) and the United Nations Development Programme (UNDP) took leading roles in preparing the FMP. The plan aims to optimize the forestry sector's ability to stabilize environmental conditions and assist economic and social development. Three imperatives were identified: sustainability, efficiency and people's participation. These agendas are in tune with the Forest Principles, which were adopted along with Agenda 21 at the United Nations Conference on Environment and Development at Rio, Brazil in 1992 (Mustafa, 2002: 118). In addition to these framework policies, the most important forestry related law of Bangladesh is the Forest Act of 1927 (amended in 2000), from the British period, and which continues to apply – in amended form – in India as well.

Statistics on the extent of forests in Bangladesh tend to vary considerably from one source to another. The Forestry Sector Master Plan (FSMP) is considered the key reference source, with its statistics cited widely. According to the FSMP, forested land accounts for 2.56 million hectares or 17.8 percent of the total land area of Bangladesh. This includes classified forestland (1.49 m ha), unclassified forestland (0.73 m ha), state forestland (2.22 m ha), village forestland or home gardens (0.27 m ha), and tea estates and rubber gardens (0.07 m ha) (GoB, 1993). The Bangladesh Bureau of Statistics (BBS1999) estimates that the total forestland in the country is about 2.25 million hectares, about 14 percent of the total land area of Bangladesh. The World Bank (1997) reported that Bangladesh had forest cover of about 1.47 million hectares, or 11 percent of the total land area, and that 6 percent of forestlands had tree cover of at least 20 percent. However, the striking reality is that much of the country's designated 'forestland' is devoid of trees (Khan, *et al*, 2004: 17). (See Appendix I for stock of forest).

The forest laws and policies of the British period rejected recognition of community management of forests in favor of management through a government agency, the Forestry Department. This department was given two key functions, policing (or enforcement) and administration. It has been observed that the evolution of public forest policy and practice in post-colonial nation-states in South Asia (including Bangladesh) manifest two interrelated trends: (i) state-sponsored commercialization of forestry; and (ii) the progressive alienation of forest based communities from forest use and management (Khan, 2001). The depletion of forest resources begun under colonial administrations continues unabated.

The Government of Bangladesh has responded to the problem of deforestation in many ways, including by undertaking 'social forestry' projects in degraded forest areas, imposing stricter penalties for theft of forest produce, declaration of moratoria on the extraction and sale of certain forest produce, among others. In 2000, the government passed the Forest (Amendment) Act 2000 (the '2000 Act'), which amended certain provisions of the Forest Act of 1927 and formally introduced the concept of social forestry. This law has however been severely criticized as being 'anti-environment' and 'anti-people' (Roy & Halim 2001; Halim & Roy; 2006: 5; RIPP). The *Social Forestry Rules* of 2004 were passed in accordance with the newly introduced sections 28(4) and 28(5) of the 1927 Act. These rules contain detailed provisions for social forestry projects, and ethnic minorities (including those groups legally classified as indigenous, tribal or aboriginal) are among those to be given priority in selection as beneficiaries of the project along with landless people and destitute women (Roy, 2006).

The 1927 Act provided limited scope for recognition of common user rights of the forest dwelling communities. Common lands became revenue lands and government acquired complete control over vast territories. This marked the beginning of ‘scientific management’ of forests that led to the erosion of traditional rights of the people and the erosion of the rich tradition of forest conservation in the subcontinent. Although the underlying aim of the 1927 Act was said to be for the protection of forests, the over-arching aim of raising revenue and meeting industrial needs completely subverted conservationist approaches to forest management (Roy & Halim, 2001a: 9).

Some of these measures were provided for in major policy documents such as the successive *National Forestry Policies* of 1979 and 1994 and the National Forestry Master Plan of 1994. Despite improved provisions for indigenous peoples’ participation, however, the emphasis on raising revenue and meeting industrial needs was not changed. Although forestry programmes of a more participatory nature were also implemented, the Forestry Department has consistently failed in its obligations and commitments to provide extension services to village communities or homestead foresters.

At the international level, the government continues to participate in various fora on forestry and biodiversity. Yet, on the ground, the situation continues to spiral in a negative direction, with some very limited exceptions, including the *strip plantation* project that involved the raising of trees on roads, embankment and dam strips. It was in the strip plantation programme that direct participation from indigenous peoples, mostly women, was ensured and regarded as more participatory (Halim, 1999).

3.1.1 Management of Forestry

Forests in Bangladesh can broadly be classified into the following categories:

- Hill forests
 - Un-classified state forests
 - Plain land state forests
 - Mangrove forests
 - Coastal forests
 - Home gardens
-

Classified government forestlands, including reserved, acquired and vested forests, are managed by the Forestry Department (FD). Privately owned plantations, tea estates, home gardens, etc, are under private ownership. Between these two categories are what the Forestry Department refers to as ‘un-classed state forests’ (USF), which are under the control of the Ministry of Land. The land administration authorities generally regard these areas as *khas* (state-owned) lands while at the same time these lands are regarded by resident indigenous peoples as their traditional commons. These differing perspectives on the ownership and management of these lands, coupled with lack of interagency coordination, especially between the Forest and Land Revenue departments, makes the management of these lands complex. There has been a 17 percent decline in the resource base of these forested lands in Bangladesh over the last 25 years (Bhuiyan, 1994; cited in Khan, *et al*, 2004: 20). In comparison, home gardens have been far better managed. In addition, in the CHT there are the community-managed mauza reserves or *village common forests* and the small plantations discussed above.

3.2 National Land Policy

After independence Bangladesh reformed the land laws of the country in the Land Reform Policy of 1972. The major characteristics of this policy are:

- The ceiling of maximum land ownership, which was fixed earlier at 125 acres or 375 *bighas*, was reduced to 33.33 acres or 100 *bighas*.
- The surplus land acquired by the government was distributed among the peasants.
- The new diluvial as well as accelerated land would be acquired by the government and regarded as *khas* land.
- Land owners holding less than 25 *bighas* or 4.33 acres were exempted from paying land revenue.
- A law relating to usufructory mortgage was adopted for a period of 7 years.

Further changes were introduced in 1984 with an amended Land Reform Policy which brought about the following changes:

- Reduction of the maximum land ceiling from 100 *bighas* to 62 *bighas*.
 - Introduction of an ordinance prohibiting *benami* transactions—the purchase or transfer of land in the name of another person to conceal the actual possession of land holding.
-

- Prohibition of eviction of people from a paternal homestead.
- Introduction of an ordinance recognizing the rights of *bargdari* or share croppers whereby the landowner would get one third of the produce and the share cropper one third for their labor. The remaining third would be distributed according to the proportion of the cost of cultivation borne by each.

In 1997, the government created an additional policy for distribution of *khas* land, identifying the following applicable groups for land distribution:

- Landless families without a homestead and dependent on agriculture
- Landless families with homesteads and dependent on agriculture

It can be seen from these policies and laws that the government has introduced a number of efforts aimed at alleviating poverty and addressing issues of landlessness and mis-management. However, the majority of the above described laws remain largely unimplemented. The reasons for such intractable non-implementation of policies over decades are deep seated. Barkat points to issues of inept and corrupt governance, alliances between wealthy and influential people to side-step national law, the innate power structures and the class system in Bangladesh, widespread corruption and powerful market forces, among others. (Barkat, *et al*, 2001: 29-30).



Swidden cultivators' homes in Reingkyong Reserve near frontier with India

Photo: Subrata Chakma

3.3 Forestry in CHT

As mentioned earlier in section 3.1.2, the 1927 Forest Act is the major legal instrument used in the administration of forest management. The Act applies all over the country, but its application to the semi-autonomous CHT region is subject to the extent of its consistency with the CHT Regulation of 1900 and the rules framed pursuant to the Regulation (Roy, 2002). According to the CHT Regional Council Act of 1998, the government is obliged to consult the CHT Regional Council prior to the passage of any new laws on the hill region, although such consultation did not occur for the 2000 Forest Law amendment. Another recently passed set of rules, the Social Forestry Rules of 2004, which were developed through consultation over some years beforehand, have also been heavily criticized by indigenous peoples and environmentalists for being contrary to human rights (Roy & Halim, 2001a: 6). The SF Rules provide for social forestry programmes involving the Forest Department, NGOs and landless rural residents (Ibid).

The indigenous peoples of the CHT began to lose control over and access to many of their forests under the British colonial government, which took over the direct administration of the region. The trend of extending state control continued during the Pakistan-administered period (1947-1971) and has been reinforced by the successive Bangladeshi governments from 1971 to this day, barring a few exceptions that brought in somewhat more participatory approaches to forest management.

Foresters today recognize four kinds of forestland in the CHT. These are as follows:

- Reserved forests (RF) covering about a quarter of the CHT; administered by the FD.
- Protected forests (PF), which covered about 1% of the CHT, but most of which have recently been re-categorized as RF; administered by the District Collectorate; forest resources are controlled and managed by the FD.
- Private forests, most of which are owned by small-scale indigenous farmers, except for a few plantations owned by non-resident individuals and companies based in cities outside the CHT (their extent is unknown).

- Un-classed state forest (USF) covering the rest of the CHT. USFs are a residual category of partly forested land under the control of the District Collectorate and District Councils, in conjunction with mauza headmen, which the indigenous peoples consider as their own forest and swidden commons.

(Source: Roy, 2002a: 16-17)

Section 28(1) of the 1927 Forest Act empowers the government to assign to any community the right to own and/or manage any land that has been declared a reserved forest. Since significant numbers of indigenous peoples live within reserved forest areas, in the CHT and in other parts of Bangladesh (such as north-eastern Sylhet division, in the north-central greater Mymensingh, and within Chittagong and Cox's Bazaar districts of Chittagong division), this provision has important implications for their rights. Section 5.1 of this report discusses the situation of reserved forest communities of indigenous peoples in the CHT and elsewhere. In practice, however, this law has been invoked in a limited manner only in Sylhet division. This means that indigenous communities living in the reserved forests in the CHT, Cox's Bazaar and elsewhere, continue to have no formally recognized right over the lands in which they live (Roy & Halim 2001a: 21; Roy, 2006: 9). Apart from the provisions for social forestry, the major part of the 2000 Act deals with activities that are prohibited within reserved forests (RFs) and protected forests (PFs) under sanction of imprisonment. Many RF and PF residents cultivate wet-rice and upland rice in RFs and PFs in the CHT (Roy & Halim, 2001a: 13). Thus these types of sanctions have major implications for their rights and livelihoods.

With a narrow interpretation of the 1927 Forest Act, the ownership rights over reserved forests are vested in the state alone, all other minor rights, if any, of RF residents, are regarded at best as 'concessions' (Roy & Halim 2001a: 9). The British Indian Forest Department used to consider the categorization of forestlands into 'reserved forests' as the most efficient way to manage and protect forests, yet much of these lands were cleared of their natural stands and converted into industry-oriented plantations. This policy is essentially being followed until today by both the successor Pakistani and Bangladeshi Departments of Forest. The Pakistani government (1947-1971) started a number of 'softwood' plantations of pulpwood species to feed pulp and paper factories, and this practice of maintaining similar plantations still persists. Similarly, the Government of Bangladesh declared a large part of Kukacchhari *mouza* of Rajasthali sub-district of Rangamati district (which includes the lands of the Khyang

people),⁴ as a reserve forest in 1984-85, and trees such as Acacia, Gamar, Kadam (mostly used as pulp wood) were planted. No attempts have been taken to facilitate natural regeneration rather than planting of selected commercial species. The RF in Kukacchhari supplies the raw materials for state enterprises including the Karnafuli Paper Mills (KPM) and other industries. The Khyang community was displaced in the late 1990s when approximately 100,000 acres of land were declared reserved forest and almost all of the Khyang people have been evicted without compensation (Feeny, 2001). According to PCGSS, the government has now undertaken a programme to acquire a further 218,000 acres of land, 72,000 of which fall under direct control of the Bandarban district (Skinner, 2005).

From the 1990s up to the first few years of the new millennium, the government has continued to expand its area of reserved forests within the CHT, a process that has been vehemently resisted by indigenous farmers who rallied around a mass organization known as the *Movement for the Protection of Forest and Land Rights in the CHT* (CK Roy, 2000: 178-180). The last major forests of heterogeneous stands are confined to small parts of the Kassalong and Sangu reserves.

The USF lands are regarded as state owned, but they also contain the common lands of hill peoples, including those that are used for their homesteads, swidden cultivation, grazing lands, village common forests, and other needs (Adnan, 2004: 120). The USFs have been subjected to heavy illicit commercial exploitation. In addition to this, private forests have been built up by a number of hill peoples, involving 'tree farming' on lands under their possession. The largest section of the USFs that still contain large trees, bamboo brakes or other dense vegetation and wildlife include the *mauza* reserves or village forest commons that are managed by indigenous village communities. By law, the *mauza* headmen are formally charged with the management and administration of these forests, but there seems to be clear policy neglect concerning the protection of these forests on the part of the government (Halim & Roy, 2006; Roy & Halim, 2001b).

3.4 Land Laws of CHT

Unlike in the case of the forest-related laws, policies on the ownership and use of non-forest CHT lands underwent significant shifts, starting from the British period through the Pakistani period and post-independence Bangladesh. Private leases for plough lands started to be recognized in the first quarter of the 19th century. Private ownership of hillside lands, however, has only been recognized since the 1950s (Roy, 2002a; Roy 2002b). However, a more drastic change, at least in the eyes of the indigenous peoples, was to come with the opening up of land ownership within the CHT to non-resident individual and corporate

bodies. An amendment to Rule 34 of the CHT Regulation of 1900 in 1971, and then again in 1979 (the 1979 law is almost a verbatim copy of the 1971 law), reduced the area of unclaimed public land that could be settled or leased out to local farmers from 25 acres to 5-10 acres (Roy, 2002: 19-20; Roy & Halim, 2003). At the same time, the new law allowed non-residents to acquire land rights within the CHT for homesteads, commercial plantations and industrial plants. In the case of the latter, leases for hundreds of acres could now be obtained (by non-residents) without the knowledge and consent of the Chiefs and headmen, which was hitherto nearly impossible. This was contrary to the letter and spirit of the CHT Regulation, which regarded the CHT primarily as a homeland for its indigenous peoples, and whose primacy with regard to land and resource rights was guaranteed as against outsiders. The main land laws for the CHT are contained in the CHT Regulation of 1900 (Act I of 1900) and in the Hill District Council Acts of 1989.

With a narrow interpretation of the forest and land laws of the CHT, as is usually given by land administration and Forest and Fisheries Department officials, it is the state which is the absolute owner of these resources. However, when we try to interpret the land and forest laws from a more pluralistic perspective, it is apparent that the state cannot totally exclude the local inhabitants' rights over their common resources, as the people are the owners of all state property according to the national constitution (Roy, 2002: 20, 21). This is also supported by the customary laws of the indigenous peoples as recognized by the CHT Regulation of 1900 and the Forest Act of 1927.

3.5 Customary Land and Forest Laws

Some of the customary laws of the indigenous peoples concerning rights over natural resources are recognized through formal legislation, such as in the CHT Regulation of 1900, and the Hill District Council Acts of 1989, while others are regulated by customs that have never been clearly defined by law. The table below mentions the most important customary resources rights of CHT.

The CHT laws mentioned above contain the most substantial provisions with regard to land administration in the CHT, but these are not the only sources of land law. Other important sources include customary law and the executive orders of the deputy commissioners (who are vested with powers of the Collectorate at the district level). Some of the customary rights of the hill people have been directly acknowledged by formal legislation. These include the right to 'occupy' homestead land (Rule 50, CHT Regulation) and the right to use timber, bamboo and other 'minor forest resources' for domestic purposes (Rule 41A, CHT Regulation, CHT Forest Transit Rules, 1973) (See Appendix II). Some customary

rights are indirectly acknowledged by the CHT Regulation, such as the right to engage in *jum* cultivation (Rule 41), and to use forest resources for domestic purposes (Rule 41A) without actually defining such land use as a 'right'. Rule 41A of the CHT Regulation directly protects forest produce gathering rights. Yet other rights such as regarding hunting and the use of water resources, remain without any formal recognition at all (Roy, 2002b: 25). Table I below identifies some of these customary rights, including both those that are formally recognized and those that are not.

In addition to the laws specifically mentioned in Table I, other formal laws that directly acknowledge customary resource rights include the CHT Forest Transit Rules, 1973, the CHT Land Disputes Resolution Commission Act 2001 (Act 53 of 2001),⁵ and the CHT Regulation (Amendment) Act 2003 (Act 38 of 2003).⁶

Table I
Important Customary Resources Rights of CHT

Natural Resources	Rights Holder	Regulation, Law or Custom	Regulating Authority
Homestead lands	Indigenous family	Rule 50, CHT Regulation	Headman
Swidden (<i>jum</i>) land	Indigenous family	Rule 41, CHT Regulation	Headman, DC
Used swidden land	Indigenous family	Indigenous Customs	Headman
Forest produce	Mauza residents	Rule 41A, CHT Regulation	Headman, Karbaries
Grazing land	Mauza residents	Rule 45B, CHT Regulation	Headman, DC
Grasslands	Mauza residents	Rule 45, CHT Regulation	Headman, DC
Wild game	Indigenous residents	Indigenous Customs	Headman, circle chief
Marine resources	Mauza residents	Undefined	Headman
Large water bodies	Mauza residents	Undefined	Headman
Smaller aquifers	Mauza residents	Undefined	Headman
Natural resources	Indigenous family	Standing orders of DC, HDC (Amendment) Acts 1998	Headman, DC

Source: Roy (2002a)

In the case of several customary resource rights – such as for swidden or *jum* cultivation, grasslands and grazing lands – the regulating law, the CHT Regulation 1900, additionally implicitly recognizes the concerned rights.⁷ The 2001 law on the Land Commission and the 2003 law that seeks to amend the system of administration of civil and criminal justice in the CHT both expressly recognize the ‘laws, customs and usages of the CHT’. Both of these laws were passed in accordance with the provisions of the CHT Accord of 1997.

3.6 The CHT Accord of 1997

Despite its various shortcomings, the CHT Accord of 1997 provides a reasonable basis upon which some of the aforesaid issues can be reasonably addressed, if not redressed in whole. Apart from recognizing the legislative prerogative of the CHT councils, the Accord and subsequent legislation provide two important safeguards for indigenous peoples and other residents of the CHT, although they are yet to be acted upon. One of these is the devolution of land administration to the hill district councils, without whose consent no lands are to be settled, leased out, mortgaged, transferred or compulsorily acquired (section 64, Hill District Council Acts, 1989). The other is the resolution of land related disputes by a Commission on Land that is required to adjudicate in accordance with the ‘laws, practices and usages of the CHT’ (CHT Land Commission Act, 2000) (Roy and Halim, 2003).

The implementation of the CHT Accord has, however, run into severe difficulties (Roy, 2000a; Larma, 2003). Land administration is yet to be devolved to the hill district councils as stipulated in the 1997 Accord and the Hill District Council (Amendment) Act of 1998. The dysfunctional state of the CHT administrative system, including the lack of cooperation between the CHT councils and line ministries in Dhaka, needs to be addressed (Roy, 2000b).

4. Institutional Framework: Land & Forest Management in the CHT

4.1 Land Administration Systems in CHT

There are currently two major types of land administration systems in the CHT, one for the reserved forest areas and another for the rest of the region. The latter is administered by the Bangladesh Forest Department (BFD), while the former is administered by several authorities, including traditional headmen at the local levels, by *Upazila Nirbahi* Officers (UNOs) at the *upazilla* or sub-district levels, sometimes aided by Assistant Commissioners (AC) (Land), and the Deputy Commissioners (DCs) at the district level. The DCs are aided by the ADC (Revenue). The DC is responsible to the Divisional Commissioner,

who is in turn responsible to the Board of Land Administration and the Ministry of Land. In addition, the hill district councils exercise supervisory jurisdiction.

4.2 Categories of Land Grants in CHT

The different categories of land grants and the identity of the authorities concerned are provided in Table II below.

Table II
Categories of Land Grants in CHT

Use of land	Identity of Leases	Nature of Grant	Granting authority	Amount (Acres)
Homestead (rural)	Hill people	Freehold	Headman	0.30 acres (0.13 ha)
Homestead (rural)	Any person	Leasehold	DC	Unspecified
Homestead (urban)	Any Person	Leasehold	DC	Up to 0.30 acres (0.13 ha)
Plough cultivation	CHT residents	Freehold	DC	Up to 5 acres (2.25 ha)
Orchard\ Plantation	CHT residents	Freehold	DC	Up to 10 acres (4.5 ha)
Commercial plantation	Any Person	Leasehold	DC	Up to 25 acres (11.25 ha)
Commercial plantation	Any Person	Leasehold	Commissioner	Up to 50 acres (22.5 ha)
Commercial plantation	Any Person	Leasehold	Government	Above 100 acres (40.5 ha)
Industries	Any Person	Leasehold	DC	5-10 acres (2.25-4.5 ha)

Source: Roy (2000a)

4.3 Department of Forest in the CHT

In the CHT, the reserved forests are under the charge of two Conservators of Forest, responsible to the Chief Conservator of Forests who reports to the Ministry of

Environment and Forest. Other than for the administration of civil and criminal justice, the CHT self-government system has no role in the administration of these areas.

4.4 The Hill District Councils

The administration of the CHT is pluralistic in that it includes traditional, bureaucratic and elective regional authorities with specific and sometimes concurrent responsibilities (Roy, 2000). The district councils – called ‘hill district councils’ (HDCs) – administer various ‘transferred’ subjects at the district level, like primary education, health and public health engineering, fisheries and livestock, small and cottage industries, etc. In accordance with the Hill District Council Acts of 1989 (as amended in 1998), the HDCs are to exercise the most important land administration powers in the CHT, including on settlements and leases, transfers and compulsory acquisitions. No such parallels exist in the plains. However, in reality, administration of land, forests (other than reserved forests), law and order, secondary education, etc, are yet to be formally and fully transferred to the HDCs. The CHT Regional Council (RC) supervises the work of the HDCs, general administration and local government institutions. The vast majority of these offices are held by indigenous people, who are predominantly male.

4.5 The District & Sub-District Administrations

This administrative set-up includes the institutions of the deputy commissioners (DCs), in charge of the administrative districts, and their subordinate staff, including the *Upazilla Nirbahi Officers* (UNOs).

4.6 The Traditional Administration

The areas outside the reserved forests are generally known, administratively, as the ‘mauza-circle’ lands, as they are sub-divided into geographical units known as ‘circles’ under circle chiefs or *rajas*, and below them, ‘*mauzas*’, under the *mauza* headmen (*mauza* chiefs or heads).⁸ The headmen are responsible for resource management, land and revenue administration, maintenance of law and order, and administration of traditional justice. The headmen in turn are assisted by *karbaries* or village heads, particularly in maintaining law and order and dispensing traditional justice. The headmen in turn are assisted by *karbaries* or village heads, particularly in maintaining law and order and dispensing traditional justice.

5. Indigenous peoples and Natural Resource Management

5.1 Indigenous Communities & State Reserved Forests

In some state reserve forests, despite numerous instances of oppressive state action, including arrest and prosecution, communities have been able to retain possession, and at least partial control, of their homesteads and farmlands and avoid expulsion from their lands. To illustrate, in the Southern Reinghkyong reserve near Farua village the livelihoods of the inhabitants' are based on subsistence-based agriculture. Some farmers have opted for red chilies, tobacco production and *jum* cultivation. Although the state has absolute *de jure* control over these forests the forest based indigenous communities have become the *de facto* managers of this reserve. In a similar manner in Northern Kassalong most of the inhabitants are internally displaced people exercising *de facto* management and practicing mixed agriculture.

This amount of autonomy over the management of RFs by the forest-based communities is only possible because most of these communities' settlements are in remote locations. It has been observed by the researchers that those forest areas which are in physically remote locations, the FD for whatever reason has limited interference and the formal management is extremely weak. These forest-based communities are socially and economically extremely disadvantaged and have no choice other than to depend on these RFs. Since these inhabitants have no ownership over the trees, these RFs are being denuded quickly. The researchers further observed that the tendency to grow trees (re-vegetate) is low.

The FD has appointed Forest Headmen (not to be confused with the more influential *mauza* headman in the *mauza* circle areas) to hold the influential leadership positions in the reserve forest areas, apart from the elected chairpersons and the members of the small union council areas (where the union council system has extended). Neither the elected representatives nor the Forest Headmen can exert effective power to take measures for the communities. This is largely because these Forest Headman have to depend upon the FD to retain their offices, and moreover, even they cannot call their homesteads their own land. For instance, petitions were sent to the government to de-reserve a small area to enable the community to get state subsidies for their school; however, such subsidies could not be applied for in accordance with the Education Department rules which required school land to be formally registered as the property of the school managing committee, illegal in a reserved forest area (Roy, 2004; Mexico).

The reserved forest communities are technically squatters on their own lands, and cannot take any strong initiatives to lobby for their land rights and other facilities. They constantly

live under the shadow of quit notices and prosecution as illegal squatters on state land, despite having lived in the areas for decades, or centuries. Theoretically, their situation is, in some respects, worse than that of the indigenous inhabitants of the *mauza* circle areas.

In the words of a Taunchangya leader, for the purpose of easy patrolling of the military in Reinghkyong Reserve, many trees have been felled. In this regard the Forest Department could not play any role to stop such felling in terms of the question of providing security in the aforesaid area. Moreover, he pointed out that in Reinghkyong area approximately 600 acres of forestland is under plough cultivation. The forest-based communities demand the freeing up of cultivable forest land and villages from the RF administration, and declare them as mauza forest or provide leases against the families living within the RF.

Tejendrolal Taunchangya, Former UP Chairman, Farua UP Rangamati.

Taungya, a local NGO, and the Forest and Land Rights Committee have assisted forest communities in mobilizing and in community organizing. The election of an indigenous union council member in remote Reinkhyngkine Lake area in 2003 for the first time shows that these communities are eager to engage government and development agencies regarding their rights and welfare. It is particularly important because the number of inhabitants of the reserved forest has actually increased, rather than decreased, since the 19th century, accelerated after the displacement caused by the Kaptai Dam in 1960, and



Chakma swidden

Photo: Devasish Roy

the resettlement of Bengali settlers in the 1980s, coupled with anti-insurgency military operations in the 1980s (IWGIA, 2004: 295; cited in Roy, 2004).

5.2 Resource Management by the Chakma

Village Common Forests

A number of traditional institutions, and very recently, some local voluntary organizations, have been among the few who have sought to help protect village common forests through support of the villages responsible. Foremost among these is the CHT-based social organization called Taungya, which focuses on the protection of these forests, the 'village common forests' or 'VCFs'. The project is supported by the Danish development agency, Danida. Taungya's major activities in the current project are geared towards the achievement of three specific targets. First, to raise awareness among the concerned communities regarding their basic rights; secondly, to strengthen the organizational unity and efficiency of these communities, including through the promotion of gender and socio-economic equality; and thirdly, to prevent the privatization of these commons, including by strengthening the security of tenure or communal title of the communities over these lands (Taungya, 2003). The last report on the current project – which has central Rangamati district as its primary area of focus – states that Taungya has been encouraged by indigenous communities within and near its project area to enter a post-pilot phase in a larger area and with an expanded scope of activities. A striking feature of Taungya's intervention is the introduction of women into the somewhat more formalized forest management committees for the first time. However, to what extent this is leading to a strengthened role of women in actual decision-making processes of the forest communities concerned, it is too early to tell. Moreover, a number of important questions remain with regard to the long-term future of these forests and the impact of Taungya's interventions upon them, and upon the communities who depend upon and manage these commons.

5.3 Resource Management by the Bawm

A Case Study on NRM from Bawm Community

Traditionally Bawm communities would manage their natural resources. In the words of ex-Upazilla Chairman Daowlan Bawm (70 years old), when the population size was small and land was abundant, then they would have boundaries determining their community lands. Within the community land they would have *jum* fields, homesteads and land to be used for other purposes. According to Daowlan this arrangement for the use of natural resources was managed in consultation with the families living within the community. For example, fishing was allowed according to set rules, and anyone found to be killing fish through natural poison would have been fined. He also mentioned that now the government has laws to punish those who still indulge in this activity, although these laws are not implemented.

Currently most of the Bawm communities preserve some 20-25 acres of land surrounding their villages. They usually term this 'community forest'. No forest produce collected from the community forest is sold. Only the villagers have access to forest resources for their own consumption. Usually the *karbari*, and sometimes the village Headman if necessary, will consult with the villagers for all matters relating to NRM.

Usually 7-8 persons in a group will get involved to work in the *jum* fields. Old couples, women without partners, and children were exempted from this work. There was a system of 'exchange labor,' locally known in Bawm community as '*bala*' (which is still being practiced in other communities under different names) through which families who did not have able bodied labor could exchange other goods, usually food, for the labor of other people in the community. Daowlan mentioned another practice relating to *jum* cultivation: while a *jum* field is being cleared a firing line is prepared collectively and in one day the villagers would set and complete the firing of that field. He pointed out that besides *jum* they produce vegetables, chilies, and paddy, and their main purchased items were salt, matches, scissors and kerosene from the local market. The usual commodities that the communities would sell were mustard seeds and *karpas* cloth. Women in the communities wove their own cloths for use and for sale.

FGD conducted in Ujani Para, Bandarban District (15-12-05)

5.4 Resource Management by the Tripura

Nunchari village (Tholi Para) is close to the Khagrachari district headquarters and is inhabited by about 80 families, mainly Tripura. Among the major natural resources of the area are its hills, natural forests and water bodies, including the upstream lake locally known as *Matai Pukhiri* or 'a pond on the top of hills'. The lake is located at an altitude of 1,200 feet above sea level. Lake *Matai Pukhiri* contains stones brought down by the stream that flows into it.

The village's water supply is met by this flow from Matai Pukhiri. Villagers sell the stones to traders and earn a little additional income. However, the number of outsiders participating in stone collection is increasing. The removal of stone is leading to soil erosion and deforestation. Locals believe this will negatively affect the existence of what they believe is the lake god, and consequently, the people.

Lake Matai Pukhiri has been regarded as one of the most valuable natural resources of this area. The local belief is that a god resides in the lake and that improper use of this lake for bathing and other purposes can incur the wrath of the god. Due to belief in the gods residing in the area, and the god of the lake, the locals have been preserving the natural resources surrounding Matai Pukhiri Hill. The locals also believe that the waterfall at the base of the hill around Matai Pukhiri has a sacred value because it comes down from the pond of the god. They think this is a pure source of drinking water. They worship the god of Matai Pukhiri lake by performing rituals known as *Puja*. They try to keep the water clean and they avoid using the lake water for daily necessities.

Women of the locality usually contribute to household work by collecting vegetables, fuel wood and water from Matai Pukhiri's waterfall and surrounding woods. Male villagers collect wood, bamboo and straw and sell them in the market. The latter also participate in the collection and sale of stone to traders. In this way the joint work of both male and female members of this locality help to provide a livelihood for these people.

The locals pointed out that there has been little governmental restriction on the consumption of natural resources on a commercial scale, and further, that the area is very likely to be declared a Reserved Forest. This would mean that the area's management would be given over to the Department of Forest. This may have severe consequences for the livelihood security of the locals and may even lead to their relocation or undue restriction of their sustainable use of these resources. This would also sever their spiritual connection with Lake Matai and their local god.

6. Ethnicity, gender, class and natural resource management

In order to obtain an in-depth understanding of the role of indigenous peoples in natural resource management in the CHT, it is important to analyze its ethnic, class and gender dimensions.

6.1 Ethnicity & Indigenous Resource Management

Article 28 of the Constitution of Bangladesh outlaws discrimination based on ‘religion, race, caste, sex or place of birth’ and further requires the state to make ‘special provisions’ to protect ‘backward sections of citizens’. However, such a policy of equality and non-discrimination is not reflected in the government’s land and forest management policies. Such policies actually tend to be both ‘gender blind’ and ‘ethnicity blind’ (in a negative sense). On the contrary, the implementation of such a non-discrimination clause leads to refusal to recognize the customary resource rights of indigenous peoples, both in the plains regions, such as in the Madhupur ‘eco’ park, the Maulvibazar ‘national park’, and in the CHT, including through the denial of rights in the existing and new reserved forests areas.

In the special administrative system of the CHT (including the *karbaries*, headmen, chiefs, district and regional councils), indigenous people have a substantive level of participation in resource management in *mauza* circles or ‘USF’ areas, but indigenous representation in the aforesaid institutions is not uniform. Many of the smaller ethnic groups have complained of non-representation or inadequate representation in the CHT governance system although their actual and positive role in natural resource management is quite substantive. Given the structure of the CHT institutions, and the structure of the interim district councils (some ethnic groups excluded), such under-representation cannot be denied. Given the rich store of knowledge, innovations and practices that the smaller indigenous groups are custodians of, it is unjust and unwise to exclude the small groups from their due participation in policy decision-making processes. This goes for both the state system and the special regional institutions

6.2 Indigenous Resource Management & Class Dimensions

As in the case of smaller ethnic groups, the poorer sections of the CHT population are generally excluded from policy-making processes. However it is the poor, and particularly the rural poor, who not only suffer disproportionately from environmental degradation, but who are also the major custodians of the country’s natural forests and water bodies. They

need to be adequately represented in decision-making processes both on account of their direct experiences and knowledge, and the fact that poverty and deforestation and resource depletion are causally connected. Natural resource management, particularly in the case of the government-managed RFs and other common resources, has consistently been ineffectual and reductionist, not addressing the root causes of poverty, and there is no sign that this will change. Addressing the livelihood security of forest-adjacent communities, including by offering them a direct share of the income from the RFs and other common pool resources, may reduce tension between indigenous communities and the Forest Department and lead to better management and protection of the resources of the RFs.

6.3 Gender & Indigenous Resource Management

Natural resource management generally involves women more than men because women's primary responsibilities, such as cooking, fetching water and gathering firewood, are directly related to the use of natural resources. Women suffer numerous hardships when ecological degradation occurs in forests and other common pool resources. Researchers have pointed out that in developing countries it is women who are the most dependent upon forests for their sustenance (Shiva, 1989; Agarwal, 1989; Halim, 1999).

Promoting and strengthening equitable practices on gender and class (in the sense of socio-economic backgrounds) was regarded as a cross-cutting strategic issue as well as a specific goal of NRM by the workshop participants and other respondents. Increased participation of women in the affairs of NRM remains a continuing challenge for the indigenous communities. *The most glaringly negative feature that was perceived in the NRM workshop is the gender-blindness of the people who are concerned with forming committees having NRM functions.* The other troubling feature that was revealed in the workshops was the reluctance of forest-based and other communities to open up the group to new members.

In this context, the role of local NGOs like Taungya is perhaps even bigger than thought, and related challenges in the long term include how to bring changes in the perceptions of men to help them realize that women have as much capacity as men to make rational and intelligent decisions related to development, resource management and their family concerns. Members of Taungya staff working in remote areas have pointed out that management committees running local community forests (VCFs) have become more gender-sensitive than before. The number of general members of VCF committees has increased, and women have become full members

for the very first time. These instances of *positive impact of the project interventions might go beyond forest management to actually encouraging greater gender equity practices in CHT rural society in a general way*. This would of course depend upon the extent that VCF community practices are emulated by CHT communities outside of the small project area of Taungya (Halim and Roy, 2006). In this context, the impact of the gender equity components in ongoing development projects – including those funded by the Asian Development Bank and the Hill Tracts Facility managed by the UNDP – need to be studied.

6.3.1 Customary Land Rights: Gender Based Discrimination

The traditional division of labor in developing societies has allocated hazardous tasks as well as tasks requiring physical strength to men, and work that requires sustained effort and endurance to women. The division is strengthened by taboos and beliefs. Like Bengali women in the plains, the indigenous women of Bangladesh are also traditionally regarded as occupying a lower social standing than the men. Indigenous women's status is low in terms of the right to inheritance, legal and political rights, decision-making powers and other spheres. One of the most acute problems faced by indigenous women is the denial of their access to customary owned land. Land scarcity among indigenous communities generally affects women more adversely than indigenous men. The inheritance laws of most indigenous peoples, including the most numerous groups such as the Chakma and the Santal, tend to discriminate against women. The notable exceptions are in the case of the Khasi in greater Sylhet and the Mandi or Garo in the plains, and to a lesser extent, the Marma in the southern Chittagong Hill Tracts. Apart from the above exceptions, the common trend of the indigenous communities is that only sons inherit landed property.

Some Garo⁹ women respondents pointed to a new trend in their communities, whereby sons are allowed a share of the landed property. According to these women, this is largely on account of poverty and unemployment among their male youths. Another possible cause, which was not discussed formally, was the fear of land passing on to outsider Bengalis through the marriage of Bengali men with Garo women (the same also applied to Khasi women). Thus, this too shows an instance of discrimination due to gender, albeit in an indirect manner. A combination of patriarchal tendencies among both Mandi/Khasi and Bengali males marrying Mandi/Khasi women may have contributed to such phenomena and perceptions.

Although the Government of Bangladesh has ratified the ILO Convention on Indigenous and Tribal Populations (Convention No. 107, 1957), which recognizes the customary land

rights of indigenous/tribal population groups, it has done little or nothing to protect the land rights of the Mandi/Garo and other indigenous peoples. Although the Constitution of Bangladesh formally recognizes equality irrespective of sex, race, caste or place of birth, in practice such provisions do not seem to have led to equal opportunity and safety for women in formal and informal sectors of work. Mandi women working in beauty parlors are not entitled to similar rights as day laborers (since such parlors are considered as part of the 'informal' sector) and are thereby deprived of their legal rights (Gulrukh, 2004).

It has been reported by indigenous Garo women from other research areas, such as the greater Mymensingh, that they play a primary role in production, especially in subsistence-oriented agricultural communities. Despite their contribution to production, these women are not in a position to utilize loans - where they can access loans - to buy land. These women reported that sometimes they use their loans to recover mortgaged land, which in most cases is in the names of their male family members. These women also pointed out that if given the chance to buy land, they would do so, and have the same recorded jointly with their husbands. Further, some women respondents stated that they utilize part of the credit to start court cases to recover their alienated lands from Bengali land grabbers. Some even managed to obtain decrees in their favour. However, most were still unable to recover possession of dispossessed lands on account of financial and procedural difficulties.

Another important area of concern is personal law dealing with family matters. Family laws deal with five areas of family life, including issues relating to (i) marriage, (ii) dissolution of marriage, (iii) custody of children (iv) guardianship of children and the (v) conjugal rights, which are also considered part of citizens 'religious personal' lives. In all other areas such as inheritance or adoption, religious laws are applied, although indigenous and tribal peoples are excluded from such laws (both in the CHT and in other parts of the country). Only since 1995 have Family Courts been made available to non-Muslim citizens, applying non-Islamic laws, as a forum for adjudication (Halim, 2003a).

However, Family courts are not operating in CHT. In most cases the Headman and *karbari* of the village in CHT resolve disputes caused by a severed marriage, desertion by the husband, and other conjugal disturbances. If the Headman or *karbari's* decision is disputed by one of the parties, the cases usually come to the respective circle chief. Indigenous women in CHT, if required, seeks justice from their traditional courts administered by three circle chiefs in three respective districts. It is observed that despite indigenous women's marginal presence in the power structures, these customary structures may actually be more sympathetic

towards disadvantaged women than comparable *shalish*' in the plains. For instance, in the rural areas of the plains, Bengali women have no voice in the local *shalish*, except NGO modified *shalish*, and in most cases the verdict goes against them. On the contrary, in the traditional courts administered by Headmen and circle chiefs in CHT, it seems that the judicial officers or bodies do make strong efforts to ensure that indigenous women's rights are treated with respect. This is quite rare in the plains (Halim, *et al*, 2005b: 16-20; Halim, 2006).

Matters that concern family generally fall under the jurisdiction of the Family Court (again with the exception of the CHT). Mainstream women leaders are demanding the adoption of uniform family laws covering all aspects of family life, including in the CHT, a demand not hitherto prominent in the women's rights movement. Given the presence of negatively discriminatory provisions against women among most Bangladeshi peoples' inheritance laws, including those of the Muslims, Hindus and most of the indigenous or adivasi peoples (the Garo and the Khasi being notable exceptions), a gender-equitable Uniform Family Code that would apply to all peoples in all parts of the country may well be a desirable development. However, consideration ought to be given as to whether that would be the *only* way to bring forth a more gender-equitable system in the case of some, such as Garo or Khasi women, if not all of the indigenous or adivasi peoples of the country (Halim, 2003a).



Turmeric Farmers-Reingkyong Rerve, CHT

Photo: Devasish Roy

6.3.2 Indigenous Women and Development

Rather than addressing indigenous women's specific problems, many of the government policies on women aim at the atypical cases of discrimination faced by ethnic Bengali women in the plains. Women from the most underprivileged sections of society are most affected by the depletion of natural resources since they have little or no access to private lands and are therefore highly dependent upon forests for their livelihoods. However, rural women from the middle and higher income classes are also dependent to a large extent upon forest resources where the economy is at least partially subsistence-oriented and where wage labor is scarce both for economic, social and cultural reasons (hill people are traditionally averse to doing domestic labor for others). Thus the problems faced by rural women, both poor and higher income, and including indigenous women, are closely related to environmental problems.

The state-sponsored development programmes in the CHT region remain largely welfare-oriented, and sometimes implemented at the costs of basic rights. They seem to have done little to bring about any favourable changes in indigenous women's lives. These welfare programmes have generally ignored indigenous women's productive role in the economy. Indigenous women, through their traditional role as *de facto* managers of the rural household, have the most intricate knowledge about forest food items, their nutritional value and herbal medicinal plants. The degradation of natural forests results not only in the extinction of many plants, but also in loss of indigenous women's knowledge of their natural resources, along with the increased burden of having to fetch water and gather food items from places that are farther and farther removed from their homes. Thus the impact of deforestation on indigenous women is not only upon their knowledge systems, economic well-being and health, but on their status in society (Halim, 2002). Unfortunately, women's issues and natural resource issues are viewed as separate problems. From the environmental perspective sustainable development emphasizes the prevention of pollution and environmental degradation, with a concern to contain economic and environmental costs. From the gender point of view, making people and their well being the objective requires that women be both agents and beneficiaries of the development process and social change (Roy and Halim, 2001a: 29). Observation in the CHT reveals that women have a crucial role in natural resource management. However, it is rare for women to be considered full participants in natural resource regeneration and protection programmes, with some local NGOs such as Taungya providing the only exceptions to this.

The other important matter of concern is that the social and cultural contexts of the various indigenous communities are very different, and many of the laws and policies on

resource management and other related spheres are not adequate to prevent discrimination against indigenous women. It is usually non-indigenous women's organizations and other development organizations that take up development issues like health issues related to reproductive health, violence against women, educational programmes, natural resource management programmes and land rights. Non-indigenous organizations and policy makers incorporate all these issues without a specific approach to the issues confronting indigenous women, who often face triple discrimination as women, as indigenous and often as the poor as well.

For instance, CEDAW (the Convention on the Elimination of All Forms of Discrimination Against Women) is a powerful tool, but fails to mention the right of self-determination for indigenous women. While CEDAW identifies unequal access to education, discriminatory wages, health, violence, and human rights violations as among the key threats to women, it does not reflect the fact that national policies drawing upon the provisions of CEDAW (for instance SF programmes where women are only taken as beneficiaries) may on occasion perpetuate the discrimination against indigenous peoples. These policies are employed not only as a means of erasing their existence as indigenous peoples but also to dispossess them of their rich ancestral land – the basis of their culture and survival.

6.3.3 Denial of Political Voice

The denial of indigenous women's substantive participation in political spheres further reinforces their low status in society. They remain invisible in the eyes of the policy makers, who are generally not women, or do not function in de-gendered ways even if a few among them are indeed women (consider the case of the present and former women prime ministers of Bangladesh). Various roles played by indigenous women during the conflict in the CHT were neither nationally awarded, recognized, nor received any formal recognition from their own communities. The struggle of indigenous women for autonomy and peace has thus remained invisible next to the struggle of men, as in so many other spheres of women's lives and roles (Halim, 2003: 97; Halim *et al*, 2005b). Blind spots such as these have led some to refer to the CHT Accord of 1997 as a 'gendered' agreement (Mohsin, 2003: 53).

The Accord makes no reference to the human rights violations committed against women in the CHT. There are no provisions for providing compensation to the women affected by violence, and no any mention of rehabilitation, compensation or counseling for victims of sexual violence. This contravenes Bangladesh's responsibilities as a signatory

to the International Criminal Court (ICC) convention that considers rape as a crime against humanity.

Women from indigenous communities are facing many different types of human rights violations. The various forms of abuse by Bengali settlers are on the increase. This may be because the settlers, who were mostly confined in military-protected 'cluster villages' before, are now far more mobile because of the end of the guerilla war. Militarization, which still continues in the CHT in the name of keeping peace in the region, is resulting in much misery for innocent people, both men and women. Although the 1997 Accord provides for the dismantling of military camps (except for some specified large garrisons), this provision is still to be implemented in substance by the Government of Bangladesh (Halim, 2005a; Halim *et al.*, 2005b).

In both indigenous and state political structures, indigenous women are often excluded from roles of political leadership. In the CHT, under the largely hereditary traditional system of governance, it is almost always men who hold key positions, such as *mauza* headmen, and even more so in the case of village *karbaries*. Apart from two notable exceptions of acting or *de facto* female chiefs – in the case of in the Chakma Circle in the 19th century, and in the Mong Circle in the 1980s – the position of chiefs is also generally restricted to male heirs, to eldest sons of former chiefs in the case of the Chakma and Mong Circles, and to the fittest and eldest males of the royal family in the case of the Bohmong Circle. This patriarchal tendency is further reflected in the structure of interim regional and district councils in the CHT. In the case of the regional council, only 3 out of 22 members are women, and their voice in decision-making is yet to be heard or otherwise felt. In the case of the interim hill district councils, the situation is even worse, as none of the 6 members from each district council is a woman, excepting the chairperson of the Bandarban Council (Halim, 2002: 137-138).

The aforesaid shortcomings with regard to women's representation in the political and administrative institutions need to be addressed. The national forest, land and environment policies also need to be revised from a de-gendered perspective. Efforts of NGOs such as Taungya to enhance women's representation at village-level forest management need to be supported by government and developmental institutions, and mirrored at higher levels of natural resource management practices in particular, and in leadership structures in general.

7. The interface between indigenous and state processes of NRM

7.1 Indigenous Peoples and Policy-Making

It is generally seen that the state's natural resources policies, like its development policies, are yet to directly and substantively acknowledge indigenous peoples as legitimate rights-holders and stakeholders.¹¹ Historically, indigenous people have been systematically denied access to lands that were required by the empires, kingdoms or colonizers. The legacies of these past policies have continued in different forms up to the present day, particularly with regard to lands categorized as 'forests' or required for state forestry. A horticulture project for the dam-affected people of the 1960s, as mentioned in the box below, illustrates the point poignantly.

When the inhabitants of the middle Karnafuli valley – mostly Chakmas – were displaced by the Kaptai Dam in 1960, they were resettled in several places within the CHT. Some of them were resettled within Rangamati district and encouraged to create fruit plantations with direct government support under the auspices of the Jum Control Division of the Forest Department. This project continued until 1967 or so. The Deputy Commissioner was supposed to provide land settlement titles to these farmers but that happened only in a very limited number of cases. These same people are now threatened with eviction by the Forest Department as their lands were under process since the 1990s to be part of new reserved forests.¹²

While the fruit plantation project of the 1960s was solely funded and managed by government agencies (the Forest Department in particular), as was the trend of those days, policy formulation and project interventions on natural resource management in Bangladesh has in recent years been substantively influenced by priorities and perspectives of external donor and lending agencies. Sometimes the interests of these agencies are seen to enter into unhappy alliances with lobbies of vested interest groups within the country. One of the best examples of this dichotomy is the Forest (Amendment) Act of 2000. On the one hand, this Act formally introduces the concept of 'social forestry', while on the other hand, it strengthens policing powers and provides immunity to Forest Department officials from prosecution. It has been said that there is little of 'social' or 'forestry' dimensions in the model prescribed under this Act, as the major decision-making powers are retained by the Forest Department, and the proposed programmes

are oriented towards plantation programmes, rather than forestry (which would include natural regeneration and protection) (Halim, 1999; Roy & Halim, 2001a; Roy, 2002). There are two further points that are noteworthy with regard to ownership and use rights over lands to be taken up for the SF (Social Forestry) Programs. **First**, the definition of 'SF program' as provided in the new section 28A of 2000 Forest Act stipulates that the SF programme will be carried out on only two categories of lands, the first of which includes land 'assigned' to the government. **Secondly**, the 2000 Act authorizes the government to assign rights to others over land involved in the SF programmes, but the assigned rights are limited to user rights only. It seems that the possibility of assigning ownership rights over SF lands has not been considered. The 'social' element of the proposed forestry programmes were weakened by providing some responsibility to the proposed participants of social forestry programmes, while keeping the major decision-making powers in the hands of the Forest Department officials (Roy & Halim, 2001).

The National Poverty Strategy Paper (PRSP) published in October 2005 refers to inadequate representation of *adivasis*/ethnic minorities at various levels of government and policy process, limiting their opportunities to influence policy decisions that affect their lives. Among actions recommended by the PRSP are the full implementation of the CHT Accord, activation of the CHT Land Commission and the Task Force on Refugees, resolution of land and forest related problems in the plains (particularly the Eco park) (Roy, 2006).



Mru village

Photo: Chris Erni

7.2 Ownership versus User Regimes

As mentioned in 3.5 above, some of the customary resource rights of indigenous people of the CHT have been partially recognized in the CHT Regulation of 1900. The Forest Act of 1927, which applies both in the CHT and in the plains, contains provisions (in section 28) that allow assignment of the government's rights over reserved forests. In comparison, the ambit of the scope of assignment of the government's rights under section 28A, introduced by the 2000 Act, is decidedly narrower. Section 28 of the 1927 Act allows the government to '*assign to any village community the rights of Government to or over any land which has been constituted into reserved forest...*'. It is clear from the section 28A definition of SF as provided in the 2000 Act that government-led SF programmes will henceforth be confined to lands that are either under the ownership of the government or over which the government has been assigned rights by others. The question that arises here is why does ownership over SF lands needs to be vested in the government when existing trends of resource management worldwide are leaning towards such programmes as inclusive and participatory rather than centralized in the hands of government agencies? (Roy & Halim 2001a: 22-23).

Indigenous communities in Bangladesh have quite rightly pointed out that they do not have sufficient access to farmlands and even where they do have access to lands, their tenure security is absent due to administrative bottlenecks and conflicts between customary and local laws on the one hand and national laws on the other. Most farmers do not own their own farmlands, leading to under-investment in these lands in terms of capital, labor and other inputs to add value to the farm produce. The proposed state-centric SF programmes are not only contrary to the rights and needs of forest communities, particularly those of indigenous peoples, but are likely to fail due to continued denial of tenure security.

As mentioned earlier in section 3.5, the ADB has been a crucial actor in designing and supporting SF programmes all over Bangladesh, including in the so-called 'USFs' or *mauza* commons. Human rights activists in the CHT, with support from the civil society groups from the plains, have resisted the proposal of the FD because they pointed out that the model is unsuitable for the CHT as it would provide them with less rights than they can now exercise under existing CHT laws, customs and usages. The CHT Regional Council is also known to have disagreed with the proposed programme in the 'USFs' (Roy, 2002; ICIMOD). Similarly, findings from the plains show that where SF has been implemented, the programmes do not account for local people's rights to land title, including in the Attia Forest area¹³ within greater Tangail District (Halim, 1999).

There is also a conceptual problem with the notion of 'USFs' in CHT. What the Forest Department calls 'USF' is regarded as common property of the indigenous communities (Arnes, 1997), and a large part thereof is concurrently regarded as government '*khas*' land by the district land administration authorities under the Deputy Commissioner. Thus these three differing perspectives bring in three differing law and practice regimes – whatever their formal legal status may be – quite often conflicting with each other, especially between the indigenous communities on the one hand and the government on the other.

Another government programme that has brought the indigenous people of the CHT into conflict with the government is the expansion of the area of RFs by including privately titled and customarily owned lands of indigenous communities and some long-term Bengali residents of the CHT. This has drawn widespread protests from CHT communities, who have rallied around the previously mentioned mass movement, the *Forest and Land Rights Movement in the CHT* (Roy, 2002b; Roy, 2004). Although the government has avoided a conflict with the communities so far in the face of the mass protests and advocacy campaigns – including in the capital city, Dhaka – it is reported that ADB-funded SF programmes are being quietly re-introduced in some parts of the CHT.¹⁴

7.3 Re-Empowering the Status of Customary Resource Rights:

The Legal Status of Customary Resource Rights

The tension and potential conflict between customary law regimes and essentially 'statist' land and forest laws are yet to be resolved despite the promulgation of the Constitution of Bangladesh in 1972, which declares that the property of the Bangladeshi state belongs 'to the people'. This tension is particularly high where it concerns rights of 'ownership' over common resources. In comparison, the tension is far less in the case of user regimes, especially in the CHT. During the British period (1860-1947), and even up to the post-British period when British-born DCs were posted in the CHT (up to 1955), although full ownership rights over unsettled lands were always regarded as belonging to the state alone, 'use' or 'usufruct' rights based upon customary laws were acknowledged far more readily.¹⁵ Thus there are formalized laws that recognize the competence of headmen to provide settlements of rural homestead plots to hillpeople without the requirement of sanction from the Deputy Commissioner, and laws recognizing the right of hillpeople to use 'minor forest produce' from the *unclassed state forests*. In recent years, the clearest acknowledgement of customary resource rights was made in the CHT Accord of 1997 and the subsequent *CHT Land Disputes Resolution Commission Act of 2001*, that obliges

the CHT Land Disputes Resolution Commission to act ‘in accordance with the laws, usages and practices of the region’ in its decisions on land disputes in the CHT. How these customs, practices, etc, will be treated in practice by the commission, especially when they come into conflict with codified law, is, however, a matter that remains to be seen. Another recent law that recognizes customary resource rights is the *Chittagong Hill Tracts Regulation (Amendment) Act of 2003* (Act No. 38 of 2003), which, while declaring the extent of jurisdiction to be exercised by the soon-to-be appointed civil judges in the CHT, refers to the ‘existing laws, customs and usages of the district concerned’.¹⁶

In the plains region, the overall situation of customary resource rights of indigenous peoples is far worse. Indigenous peoples’ rights over the Madhupur forest, the Attiya forest, and over the Barind tract in the northwest, have been denied through declarations of the former commons as reserved forests, vested forests, acquired forests or private forests. Lands of Santal, Oraon and other Adivasi communities in the Barind tract within the Rajshahi administrative division have been taken over both in the name of government forests (reserved or vested forests) and private forests, and even for ‘social forestry’ in recent times. Likewise, both Bengali and adivasi communities have suffered due to the unilateral declarations and legislation vesting all rights over the Attia forest in the government alone, overriding all rights and claims of others (see further, section 7.2). The Madhupur forest – traditionally the home of Garo, Koch, Hajong and other indigenous groups – has seen a long conflict between the Forest Department and local residents, involving court cases, a controversial Asian Development Bank-funded project of the 1980s (Earth Touch, 2004) and the killing of an activist named Piren Snal in January 2004. A similar situation prevails in the Chittagong and Sylhet administrative divisions too, particularly in reserved forests. A singular exception where customary rights were acknowledged to an extent has been in the case of Khasi communities, who have entered into agreements with the Forest Department over parts of RFs inhabited by them, on the basis of section 28 of the Forest Act. However, this is the exception rather than the rule. The only other area where customary resource rights have been indirectly acknowledged is in the controversial Social Forestry Rules of 2004, in which ‘ethnic minorities’ have been included among the disadvantaged groups that will become ‘beneficiaries’ of the social forestry projects of the government.¹⁷

As the above discussion has shown, it is only *some* of the customary resource rights of the indigenous people that have been directly acknowledged by legislation. Moreover, the exact status of many of these laws has never been explored in detail, either through judicial pronouncements or legal commentaries or otherwise. Thus it is unclear how the matter would be decided either administratively or judicially – in cases of conflict between the aforesaid laws and other statutes. In comparison, the status of the personal and family

laws of the indigenous peoples – also based upon customs and usages – would seem to be somewhat higher, and less contested, particularly in the CHT. In the CHT, practices of marriage, divorce, maintenance, child custody, inheritance, etc, are generally regulated by the customary law of the people or community concerned, and this is acknowledged both by legislation and judicial pronouncements, although these rights are not defined by formal laws. In addition, the judicial and other authority of traditional institutions, including the headmen and chiefs, is formally recognized by statute law. In the plains, the indigenous peoples' personal and family laws are not expressly recognized by statutes, although they continue to be practiced. However, the judicial institutions of the plains *adivasis* are not formally recognized, and this makes the position of *adivasi* customary law far more precarious.

Quite apart from the fact that custom is a recognized source of law under the Bangladeshi legal system, the status of customary laws in the CHT is unique because of three important factors. **First**, many aspects of the CHT legal and administrative system – including in the CHT Regulation of 1900 itself – have been and still are regulated by customs, usages and longstanding practices: to deny the legal validity of such customs would leave a huge juridical vacuum in administrative law. **Secondly**, the CHT Regulation and many other



Chakma women selling firewood

Photo: Chris Erni

enactments did and still do recognize the presence of many customary practices regarding the use of land and other natural resources. **Thirdly**, even where enactments do not specifically acknowledge the existence of customary resource rights, these laws do not necessarily negate the validity of such customs because, according to the CHT Regulation (at section 4), all laws apply to the region only 'so far as they are not inconsistent with [the Regulation] or the Rules for the time being in force'. Therefore, it could be argued quite persuasively that the enactments applicable to the CHT are void to the extent of their inconsistency with these customary laws.¹⁸

Of course, even if the above contention is legally valid, it would still leave the question of the relative status of customary law and other laws unanswered, something that will have to be dealt with by the future CHT Commission on Land when it hears disputes presented before it. The absence of an unambiguous clarification of the status of these competing laws in the CHT Regulation has been explained:

*'[The CHT Regulation] was not intended to be a declaratory instrument that sought to identify, define and declare various customary rights and privileges but a regulatory law that sought to regulate already-existing rights... In the case of the special land rights of the indigenous peoples of the CHT, these rights are not theirs because the CHT Regulation] says so, but because [the indigenous people] have been exercising these rights uninterruptedly for so long. The [Regulation] merely contains the provisions relating to the control and regulation of already existing rights.'*¹⁹

There is, therefore, a strong case for arguing that the indigenous peoples' customary practices over land have full legal validity as rights, notwithstanding that the government purports to qualify the manner of the exercise of such practices.

In one of the rare instances when a dispute over a customary law matter from the CHT reached the Supreme Court of Bangladesh, the court upheld the concerned customary law and censured the government for acting contrary to the concerned custom.²⁰ This, however, was a case concerning succession to the chiefship of the Bohmong Circle in the CHT, and therefore, a matter of customary personal law rather than custom-based resource rights. Therefore, the more crucial question is whether the Bangladeshi juridical system, or for that matter, the country's political system, will provide as much space in the context of customary resource rights as it has in the case of indigenous customary law (Roy, 2003).

7.4 Settlement Policy of Landless Bengalis in CHT Bengali Re-Settlement & Its Impact on Natural Resource Management

An important development that affected resource management practices in the CHT and led to the violation of the indigenous peoples' rights was the population transfer programme of the 1980s that brought hundreds of thousands of Bengali people into the CHT under direct government sponsorship. This not only led to a dramatic change in the demographic pattern in the CHT, but also brought significant changes in the occupational patterns of the CHT communities, many of which affected existing resource management practices.²¹ Officially, low population density in the hills and over-population in the plains were used as the justification for the re-settlement. However, the underlying motive is believed to have been to outnumber the indigenous peoples and to 'pacify' their resistance movement and demands for autonomy, as stated by several CHT researchers (Roy, 1997b; Arens, 1997; Adnan, 2004; Mohsin, 2002; Halim & Roy, 2005).

Respondents at the various workshop meetings and in focus group discussions held in the presence of the researchers claimed that the re-settlement of Bengalis had led to illegal encroachment on indigenous peoples' land, sometimes through the use of false or fraudulent land documents. The then government had decided to allot a combination of hillside lands, plain and paddy lands, and gently slopping or 'bumpy lands' to the migrants. However, the Bengali migrants were not interested in hillside lands because they were not acquainted with hillside farming techniques, which are radically different from irrigation-oriented plough farming in the plains. However, CHT did not have much plain and bumpy land available; what little there is was already under the ownership and occupation of CHT residents, both indigenous and Bengali (Roy, 1997: 172). Thus what happened was that the settlers came to gradually re-settle themselves on plainlands and gently sloping lands that were already occupied by local hillpeople, and owned by them on the basis of formal private titles or customary law. In many instances, land-grabbing involved violence, in which state security forces have been directly implicated. Tens of thousands of indigenous peoples were forced to seek shelter in the remoter hill and forest areas, themselves causing pressure on existing inhabitants of those areas and depleting the available resources (Roy, 2002; Roy, 2004b). The settlers were given between 2.5 acres and 5 acres of land, and support in the forms of rations (Hume, 2003) which is still being continued today; while the internally displaced are provided with no such assistance. The settlers also gained priority over land with some forest areas in Rangamati being de-reserved for them. Mostly land belonging to indigenous peoples under customary law was taken and given to Bengali settlers (Hume, 2003). The overall impact of the trans-migration programme upon the ecology and natural resources of the region was

hugely destructive, leading to deforestation, over-cultivation, inadequate use of fertilizers, hill-cutting, landslides and soil erosion, and the contamination of rivers, lakes and other aquifers (Chakma & Hill, 1995).

7.5 Re-Empowering Customary Management Systems

Strengthening customary management systems is the best way to reduce tension between state and customary systems, create synergy, and facilitate sustainable management.

The huge depletion of natural resources in Bangladesh, especially in the reserved forests and other state-managed forests and other natural resources, has gone hand in hand with centralized decision-making and a visibly weakened role of indigenous peoples in resource management. Among the clearest manifestations of this is the 2000 amendment to the Forest Act of 1927 (Halim, 1999; Roy, 2002b; Roy, 2004). This is not a mere coincidence and the main reason is not difficult to find. Where the rights and interests of the local communities are denied, and where their livelihood security is precarious, they can hardly be blamed if they fail to take measures to protect something that no longer 'belongs' to them. Even where some of their members are party to unsustainable use, or 'sale' of produce of such forests, it is a response to the situation in which they have been placed.

The aforesaid difficulties and defects in centralized state forest and natural resource management are not unknown to central policy-making institutions in Bangladesh and elsewhere. In fact, a number of policy shifts have taken place at international and national levels to de-centralize natural resource management practices, particularly in forestry and related fields. The most important international developments in this regard include the Rio Earth Summit in 1992, the Convention on Biological Diversity (including the special Working Groups on Access and Benefit Sharing and on Genetic Resources) that followed the Rio process, and the work of the Intergovernmental Panel on Forests. At the national levels, some of these developments resulted in a more 'participatory' mode of forest and natural resource management, albeit with deep flaws. In South Asia, since the 1980s, we have seen the introduction of new models of forestry that were ostensibly far more participatory than before, including 'community forestry' (CF) programmes in Nepal, the 'Joint Forest Programmes' (JFM) in India, and 'participatory forestry' (PF) and 'social forestry' (SF) programmes in Bangladesh. The PF, and later, SF, programmes in Bangladesh did provide villagers, including a small number of indigenous people in the plains region, with a stake in the forests, but this did not alter the manner in which the government-owned forests – particularly the reserved forests – were managed. The latter

remained as state-centric as before, and despite some minor concessions to participatory modes of forest management that were acknowledged in policy documents – such as in the National Forest policies of 1979 and 1994 and in the Forestry Master Plan – they have largely failed to include indigenous people.

In many situations where indigenous communities were left in charge of managing their natural resources, including small forests, water bodies, grazing lands, etc – largely on account of the locations' remoteness or because the lands were not state-owned – the resources were seen to be far better managed than in the case of the state-managed lands and forests. Such successful examples include *mauza* forest commons or VCFs and small streams among Chakma villagers in Rangamati district (Halim & Roy, 2006) and bison grazing grounds among the Bawm, Khumi, Mro and Tripura in the highlands of the Bandarban-Rangamati border (Roy, 2004 & 2006). Such successful utilization of indigenous knowledge systems proves that acknowledgement of the 'traditional scientific knowledge' of indigenous communities in Agenda 21 (at Chapter 26) and in the Convention on Biological Diversity (particularly article 8j) has a continuing utility.



Chakma swidden landscape

Photo: Chris Erni

8. Conclusions and Recommendations

The regeneration of degraded forests and sustainable management of these and other forests and fragile ecological resources, is unlikely to be successful without the active involvement and cooperation of the indigenous peoples and other local communities. This will call for efforts to render existing NRM policies more inclusive, by providing adequate space to indigenous knowledge and practice systems, and by clearly acknowledging the rights of indigenous peoples and their communities, including the key right of secure tenure to customary lands. Possible ways and means to bring about such synergized state-indigenous management are discussed in more detail in subsection 8.1 below.

8.1 Acknowledgement of Customary Resource Rights

Indigenous peoples' resource rights need to be unequivocally acknowledged. In the CHT, one of the best ways to do this would be to provide stronger recognition to the customary resource rights of the indigenous peoples following the examples already contained in the CHT Regulation of 1900 and within the broad ambit of such recognition as provided in the CHT Land Disputes Resolution Commission Act of 2001 and in the CHT Regulation (Amendment) Act of 2003. Moreover, section 28 of the Forest Act of 1927 may be invoked to assign rights of government to RF-inhabiting communities, both in the CHT, and in some of the *adivasi*-inhabited parts of the plains regions (such as in the northwestern, north-central and northeastern Bangladesh). This provision is far more equitable towards indigenous communities, and far more likely to result in successfully promoting state-indigenous forestry, than the over-centralized and bureaucratized system currently practiced by the Forest Department.

Such acknowledgement of existing rights and active inclusion of indigenous peoples must be attuned to their development needs. These priorities may vary from people to people and may also depend upon such factors as education, location (rural/urban), economic situation (class) and sex, among others. Some of the most important issues would include those that were mentioned in the *Rangamati Declaration* of 1998²² that came out of the first people's conference on development in the CHT after the signing of the CHT Accord in 1997 (see Appendix II). Among these, the following are regarded as extremely crucial:

- Just resolution to land dispossession by non-indigenous settlers
 - Autonomy and self-government
 - Protection of land and resource rights
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- Health
- Human development (education for all, capacity-raising of NGOs)
- Protection of language and culture

8.2 Advocacy

In order to resolve land rights disputes in the CHT, it is important to develop effective strategies and tools for advocacy both at the national and international levels. National level advocacy programmes should focus on the implementation of the CHT Accord, and of the recommendations made in the PRSP and other relevant strategy documents. Strengthening the capacity of both informal (headman, *karbari* and other community level organizations) and formal institutions on customary laws and practices would enhance advocacy goals.

International advocacy should aim to make effective use of the international intergovernmental processes, including the mechanisms of the UN human rights treaty bodies, the Human Rights Council, and the offices of Special UN Rapporteurs. These should in particular refer to customary laws and practices, including the CHT Regulation of 1900, and crucial provisions of the CHT Accord and post-Accord laws, and international treaties ratified by Bangladesh, all of which are an *agreed* part of the Bangladeshi political and legal system.

Strengthening existing networks and creating further networks would further enhance progress in this regard. Given the situation of extreme political, social and economic disadvantage suffered by most indigenous peoples, this needs to be an integral strategy perspective over the long term.

8.3 Policy Reform & Implementation of Policies

There are differing perspectives on the need for policy reform and policy implementation. Indigenous peoples put high emphasis on recognition of customary laws and practices, especially upon those that remain wholly or partially unacknowledged. Land and forest officials, on the other hand, along with senior level political leaders and functionaries in Dhaka, have little or no understanding about natural resource management issues in areas outside those that are managed directly by the Department of Forest. Thus, their views on policy and policy implementation are largely *ad hoc*, and remain as an obstacle in this regard. This will have to be remedied by efforts to sensitize the district and national-

level land and forest administration departments, and political leaders. However, to what extent such support can be mobilized into action on policy reform will depend partly on the strength of the advocacy measures and partly upon the politics of the day.

Further, the implementation of policies in several areas may need to be complemented by detailed administrative guidelines, particularly on account of the absence of knowledge on indigenous culture, and the presence of discriminatory attitudes of non-indigenous officials in government positions. The following steps, among others, could be taken to help remedy this situation.

- Increasing indigenous representation in key decision-making bureaucratic positions
 - Dissemination of information to indigenous peoples regarding their rights
 - Providing educational institutions, training academics of government functionaries and NGOs with greater access to information on indigenous peoples, their language, culture, economic systems and cultivation patterns, etc
 - Supplementing existing policies with indigenous-focused administrative guidelines and express references to customary laws and practices
 - Accepting the plurality of indigenous peoples' situations. It is vital for the interest of indigenous peoples themselves that these differences are understood prior to major development interventions being designed and implemented
 - The principle of Free, Prior and Informed Consent (FPIC) must be applied prior to, and during, any major decision-making involving the rights and welfare of the indigenous peoples
 - Acknowledgement of indigenous technology and innovations as rational and scientific (such as practiced in agriculture, forestry, watershed management, etc), in line with Agenda 21 (Chapter 26) and the Convention on Biological Diversity and related processes that include indigenous peoples' representatives
 - Policies to redistribute state-appropriated common forest lands to indigenous communities, conditional on their sustainable use
 - To involve indigenous peoples and other forest-dependent communities in the joint management of state-managed forests and to share the resources of such forests in an equitable and parctiable manner (Roy & Halim, 2003: 46-47)
 - Effective measures taken for the practice of autonomy or self-government by indigenous peoples, especially in relation to development issues, policies and programmes
-

8.4 Removing Discriminatory Attitudes

Provision and understanding of correct information would go a long way towards adjusting the discriminatory attitudes that pervade much of the Bangladeshi state with regards to indigenous peoples. There must be acknowledgement of indigenous people's contributions towards the country's political, social, economic and cultural integrity and its development process, in the official versions of the national histories and in other national discourses and public information systems. Government functionaries with major responsibilities on policy areas impacting on indigenous peoples should be provided with exposure to the reality of indigenous culture, history, life style, etc.

State media should provide accurate information on indigenous peoples' social and economic contribution to the state, and information on indigenous knowledge in NRM. Private media should be encouraged to provide similar levels of accuracy.

8.5 Enhancing the Role of Indigenous Peoples

The role of indigenous peoples in the formal development process has been peripheral at best. This needs to be addressed through institutional reforms and capacity-raising initiatives. **First** is the representation of indigenous peoples (both men and women), in decision-making, policy reforms and in programme implementation. This could be encouraged and ensured through legal and institutional reforms. **Second** is an adaptive approach in participation that would account for the positive aspects of indigenous knowledge systems related to NRM.

8.5.1 Role of Traditional Leaders

The other major challenge is, at least in some cases, the pre-eminence of the traditional leaders (the *mauza* headman or the village *karbari*, as the case might be), which in some instances caused or contributed to conflicts of social class or interests. There were also contrary examples where the community voluntarily sought to involve the headman or the *karbari* because of kinship unity or his close links with or influence over the community and district and sub-district senior administrative bodies. Thus, the role of the traditional leaders was seen to have both positive and negative features.

The major challenge, which may be said to be an amalgam of the above problems, is the decision-making process that appears far less *participatory* than is needed, especially since discussions at most committee meetings tend to be dominated by a few individuals, particularly men. However, to what extent the non-participation of some in the verbal

deliberations of the NRM meetings can actually reflect their marginality or not, cannot be understood in-depth without further enquiry. The authors' impression of dominant or marginal participation in NRM affairs is based upon their notions of what is *participatory*. It cannot be ruled out, therefore, that on account of the limited field studies they have done, the present researchers' understanding of decision-making methods is of a rudimentary level (Roy & Halim, 2005: 39). A deeper understanding of the social, cultural and political contexts surrounding leadership and participation issues remains a daunting challenge for NRM actors and researchers on NRM in the CHT.

8.5.2 Role of Local NGOs

The other important challenge lies with the role of NGOs. Pro-people NGO interventions are especially pertinent to the CHT because of the disadvantaged situation of the region's population with regard to access to social extension services of the government. Organizations working to facilitate the spread of formal education, functional literacy, and vocational skill improvements, accelerating women's access to education and training opportunities are still very limited in the CHT. Strong local-level organizations like Taungya and others are important. Pro-people and grassroots-based NGOs can play a strong role in NRM as long as they maintain the requisite balance between inaction and overly active interventions that weaken local self-dependent efforts. Such efforts could act as a strong corollary to the communities' own efforts to bringing further strengthening and 'equitization' of the indigenous committees (Halim & Roy, 2004).



Mru swidden fallow

Photo: Chris Erni

8.5.3 Role of National NGOs

The role of national NGOs in the CHT is quite complex and generally have little or nothing to do with NRM. The orientation of several national NGOs, and micro-credit institutions (like IDF), around the disbursement and collection of micro-credit show visible concentration in urban and peri-urban settlements (particular in Bengali settlements) – with little relation to NRM activities – and absence or marginal presence in rural and remote areas. Given the lack of knowledge and experience of national NGOs regarding CHT culture and topography, perhaps this is a mixed blessing. As in the case of government agencies, national NGOs too need to be sensitized prior to starting operations in indigenous-inhabited areas. The NGO Bureau Guidelines of the Prime Minister's Office offer a basis for such guidance and direction.

8.6 Promoting Gender and Class Equity in NRM

Bringing about gender equity in NRM in the short term will be difficult without committed support from other actors, including political, social and community leaders, local NGOs and national NGOs due to longstanding gender-insensitive practices based on customary beliefs, religious and social conservatism, or otherwise, but it is a matter that requires consistent and urgent attention.

Many policies on indigenous women are aimed at the atypical cases of discrimination faced by ethnic Bengali women in the plains regions. Since the social, cultural and economic contexts in the hill areas and other regions inhabited by indigenous peoples is so different, many of these laws and policies are not appropriate for preventing discrimination against indigenous women. The inadequacies of these policies are however seldom recognised in the national discourses on women's rights, which are dominated by concerns for Bengali speaking and Muslim women, without accounting for the problems faced by minority and indigenous women (Halim, 2002).

Other important interventions should be made to address the human rights issues of *adivasi* women who are under-represented in political bodies and local and regional councils; and the lack of funds, necessary for mobilization drives. Awareness about the negatively discriminatory inheritance laws towards women belonging to the most of the ethnic groups in the CHT also need to be raised.

It could be finally noted that many actors – including human right workers, development planners, and social scientists – believe that it would be useful to have comprehensive

policy regarding the lands and other natural resources of the region to ensure equitable and environmentally sound resource use and practice. It calls for elements of participatory justice (Alston, 2001) as it has become clear that without the involvement indigenous peoples proper implementation of strategies would be useless. Therefore, any new policies that are framed will need to be carried out with the indigenous peoples, including farmers, women, community leaders, and government officials. In any such reforms, the importance of traditional natural resource management process need to be acknowledged as far they are appropriate to the socio-economic and cultural needs of CHT today. Policy reforms also need to be cautious to incorporate representation on the basis of ethnicity, class and gender.

Notes

- 1 For explanation of the differing estimates see Adnan (2004:49).
- 2 The most well known exceptions were the land grants to Bengali settlers during the population transfer programme of the 1980s, and commercial land leases to non-resident entrepreneurs and industrialists in the 1980s and 90s.
- 3 This finding is based on the interviews and FGDs with Anil Marand, Rabindra Shoren, (President & Secretary Jatiyo Adivasi Parishad & others) by the team leader, research associate and the adviser in Phulbari, August 2006.
- 4 Khyang is one of the indigenous community with a small population (2,343 BBS, 1991). The Khyang community, the smallest and most disadvantaged of the indigenous peoples' are on the verge of total eviction from their ancestral land (Skinner, 2005).
- 5 Unlike in the case of the 2003 Act, the Land Commission Act, 2001 has been put into effect. However, the Commission, although formed, is not fully functional until now because of complaints that the law itself is contrary to the relevant provisions of the 1997 Accord. See Adnan (2004:178), Roy (2002, 33-34), Roy, (2004: 47).
- 6 The 2003 Act has not been put into effect as of the date of this study.
- 7 Roy (1994:16) writes that “[the CHT Regulation] was not intended to be a declaratory instrument that sought to identify, define and declare various customary rights and privileges, but a regulatory law that sought to regulate already existing rights...”
- 8 The mauza is a unit of land and revenue administration for all parts of the country. In the CHT, however, it is also a unit for civil and judicial administration under the mauza headmen (predominantly male and largely from among the hillpeople), who number about 350.
- 9 This section is derived from the evaluation report of CARITAS where the team leader participated as a Gender Researcher and herself interviewed Garo women in greater Mymensingh, April 2006.
- 10 Shalish is an informal system of justice which has no legal form. It usually involves gathering of village elders, Union Parishad Chair and members and concerned parties, exclusively male for resolving disputes over marriage, dowry money, child custody & sexual assaults. For detail see Halim, S. . (2006). Access to Justice: Situation of Rural Women and Urban –Rural Migrant Workers in Bangladesh, in legal empowerment-a way out of poverty, Norwegian Ministry of Foreign Affairs, December 2006-issue2.
- 11 This section is mostly based on the comments provided by the representatives of various ethnic communities in a workshop which

was held as partial activity of this report in Rangamati, CHT, 19-02-06..

- 12 Based on the interviews done by Sudatta Bikash Tanchangya & Raja Devasish Roy with inhabitants of Barudgola, Ballalchara, Kutubdia, Kashkhali and Betbungia mauzas of Rangamati district several times between (2005-2006).
- 13 The area which is within Attia is 5 km from Tangail district where the team leader did her field work for the PhD dissertation in two villages .The study area was under Attia Zamindary rule. The Government of Bangladesh in 1982 announced the Attia Forest Ordinance for the sal forest area. This law was intended to bring Attia forests under FD management as reserve forest. (Halim, 1999)
- 14 Within Rangamati District in Rajsatali , 329 Kaptai mauza FD is implementing SF on USFs which is mostly used for jum by Khyang, Tripuras and Tanchangya communities.
- 15 See, e.g., the “Standing Order” of DC, CHT, dated 30.04.1954 as reproduced in Appendix 6, (Roy, 2002 b) which prohibits even the DC himself from issuing timber and related permits without the approval of the chief and headman concerned. See also CHT Forest Transit Rules, 1973.
- 16 This law has not been put into effect as yet through a formal gazette notification as is required by law.

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Appendix I

Spatial Distribution and Stock of Forest Resources in Bangladesh

Forest Type	Location	Area million Ha (% of land)+	Growing stock million m ³ (stocking m ³ /ha)++	Remarks
Mangrove (evergreen) Sundarban Coastline	Southwest coast of the Bay of Bengal	0.57 (4.0) 0.11 (0.76)	13.19 (23.1) 5.05 (45.9)	includes 0.17 million ha of water
Hill forest (tropical moist semi-evergreen)	Eastern Hill Tracts	0.67 (4.65)	28.32 (42.3) Negligible (Mainly treeless)	
Managed reserved Forest, Un-classed state Forests (scrub forest)	Eastern Hill Tracts	0.72 (5.00)		
Plain Land Forests (tropical moist deciduous)	Central and northwest	0.12 (0.83)	1.13 (0.94)	
Sub-total government forest		1.19 (15.2)		Excluding
Village Forest Groves (Mixed species)		0.27 (1.87)	54.68 (202.5)	
Total Forest		2.18 (17.1)		Excluding water bodies

Note: + rounding prevents figures from adding up exactly.
++ refers to wood volume, not total bio-mass.

Source: Davidson (2000: 62)

Appendix II***Rule 41 A CHT Regulation 1900***

- 41A. The Headmen is responsible for the conservation of the resources of his mauza. For this purpose any headmen may –
- (a) prohibit the removal of bamboos, timber and other forest produce by residents of his mauza other than for their domestic purpose or by non-residents of his mauza for any purposes;
 - (b) excluded any area or areas in his mauza from the jhuming area with a view to keeping such area or areas as a mauza reserve of bamboos, timber and other forest produce;
 - (c) prevent newcomers from cutting jhums in his mauza if in his opinion their doing so is likely to result in a scarcity of jhum for his own tenants in future years; and prevent any person from grazing cattle in his mauza when such granting is harmful to his jhuming area

Appendix III**Rangamati Declaration**

Rangamati, Chittagong Hill Tracts, 19 December, 1998

Adopted at a Conference on 'Development in the Chittagong Hill Tracts Convened by
The Forum for Environment and Sustainable Development in the Chittagong Hill Tracts

Welcoming the signing of the Chittagong Hill Tracts Accord of 1997 between the Government of Bangladesh and the Parbatya Chattagram Jana Samhati Samiti and congratulating the parties to the accord,

Concerned at the slow pace of implementation of the Chittagong Hill Tracts Accord,

Bearing in mind the Rio Conference on Environment and Development,

Reiterating our support to the aims and objectives of Agenda 21,

Recalling that the right to development is a basic human right,

Recognising that human rights, peace, sustainable development and the protection of the environment are interdependent and indivisible,

Recognising that the protection of land and resource rights is closely related to the achievement to sustainable development,

Recognising that the forests of the Chittagong Hill Tracts are the natural habitats of humans as well as animals, plants and other life forms,

Encouraged that rural communities in the Chittagong Hill Tracts have continued to play an important role in the development of the region without governmental and external assistance,

We, the representatives of different peoples, communities and organisations meeting in Rangamati

at the Conference on *Development in the Chittagong Hill Tracts* on 18 and 19 December, 1998, proclaim this declaration, to be called the Rangamati Declaration, and recommend that:

The Chittagong Hill Tracts Accord of 1997

1. Measures be undertaken to achieve speedy implementation of the Chittagong Hill Tracts Accord of 1997;

Development Institutions, Policies and Processes

2. All development programmes for the Chittagong Hill Tracts be implemented in consultation with the future Chittagong Hill Tracts Regional Council;

3. The development budgets for the Chittagong Hill Tracts be formulated in consultation with the Chittagong Hill Tracts Regional Council;

4. No development programmes be undertaken in the region without assessing the likely social, cultural and environmental impacts in the region or if it is contrary to the provisions of the Chittagong Hill Tracts Accord of 1997;

5. No development programmes be undertaken in the region except on the basis of proposals by, or with the full, prior and informed consent of, the people of the area concerned;

6. All development programmes, projects and processes be transparent and open to public scrutiny;

7. A development trust fund be established and placed under the control of the Chittagong Hill Tracts Regional Council;

8. The agreed transfer of subjects to the hill district councils be effected expeditiously;

9. The agreed transfer of authority to the hill district councils on the subjects already transferred, and to be transferred, to these councils, be effected expeditiously;

10. The Chittagong Hill Tracts Development Board Ordinance of 1976 be amended to make the structure and process of the Board more democratic and transparent and the Board directly responsible to the Chittagong Hill Tracts Regional Council;

Land

11. No development projects related to land-use on disputed lands be undertaken before the disputes are resolved by the future commission on land;

12. The leases on lands to non-resident individuals and companies that have been illegally left un-utilised be cancelled and vested in the concerned hill district council;

Rehabilitation

13. Those of the returned international refugees who have not already been properly rehabilitated, and all the internally displaced indigenous people, be returned their lands and otherwise properly rehabilitated;

Water Bodies, Their Natural Resources and Biodiversity

14. No Water bodies, including the Karnaphuli reservoir (Kaptai Lake), be leased out or settled in the name of private individuals and companies without the prior consent of, and consultations with, the concerned hill district council and the people of the area concerned;
15. In the event that any part of water bodies, including the Karnaphuli reservoir (Kaptai Lake), is leased out, priority be given to the permanent residents of the area concerned;
16. The water level of the Karnaphuli reservoir (Kaptai Lake) be regulated in consultation with the Rangamati Hill District Council for the interest of the 'fringe-land' farmers. The periodical water level chart so agreed upon (the 'rule curve') be followed and the concerned farmers be provided due information about it;
17. The control and management of all water bodies and their natural resources, including the Karnaphuli reservoir (Kaptai Lake) and its resources, be vested in the concerned hill district council;
18. The introduction of non-local species of fish and other marine life that is harmful to the local environment or biodiversity be prevented;

Forests, Forestry and Biodiversity

19. The Forest Act of 1927, in its application to the CHT, be amended in consultation with the regional and hill district councils, the circle chiefs and the headmen;
 20. Logging in the natural forests and their conversion into agricultural lands or plantations be totally prohibited. Similarly, the killing of, and trading in, endangered species of wildlife be totally prohibited;
 21. The inhabitants of the areas living in the reserved forests be allowed a just share of the income from the utilisation of the resources of these forests;
 22. The hill district councils be involved in the management and administration of the reserved forests;
 23. The local residents be involved in the protection and management of the government-owned forests and plantations;
 24. The procedures on the extraction and transit of the produce of privately-owned forests and plantations outside of the reserved forests be excluded from the system of extraction and export permits;
 25. The village forests ('service' or 'mouza reserved' forests) situated outside the reserved forests be recorded as the common and collective property of the village community concerned;
 26. No parts of the reserved forests be de-categorised as reserved forests without the consent of the regional council and the concerned hill district council;
 27. The gazetted notifications of the 1980s and 1990s concerning the creation of new reserved
-

forests be revoked and other measures be undertaken in consultation with the hill district councils to undertake community forestry and participatory forestry programmes;

28. The raising of industry-oriented plantations under the ownership and management of permanent residents of the region be assisted with soft-term credit on a long-term basis and no lands be compulsorily acquired for the raising of industry-oriented plantations;

29. The introduction of species of non-local trees and plants that are harmful to the local environment and biodiversity be prevented;

30. The customary rights and privileges of indigenous peoples and their communities over lands and territories in the forest areas be recognised in accordance with the ILO Convention on Indigenous and Tribal Populations (Convention 107) of 1957 and the Convention on Biological Diversity;

Horticulture

31. A horticulture development project in the manner of horticulture projects undertaken previously by the Bangladesh Agriculture Development Corporation (BADC) be started and the local farmers be provided with land grants, soft-term credit and technical and other assistance;

Mineral Resources

32. Mining activities be carried out only in consultation with the concerned hill district council and the Chittagong Hill Tracts Regional Council and in such a manner that they are not harmful to the natural environment or otherwise detrimental to the physical and material well being of the residents of the areas concerned;

33. All CHT residents being adversely affected by mining activities be adequately compensated with land grants and monetary compensation and otherwise rehabilitated in the event that they have to be relocated;

34. The terms and conditions of the compensation agreements between the concerned mining company and the affected people be determined in consultation with the Chittagong Hill Tracts Regional Council;

35. Priority be given to local residents in employing people in connection with the survey and extraction work of mining companies;

Environment

36. Logging, farming, tourism and other activities that are or are likely to be harmful to the environment be stopped and prohibited;

37. Urgent measures be undertaken in the Chittagong Hill Tracts to prevent deforestation and soil erosion in the lands and forests of the region;

38. Urgent measures be taken to protect the environment of the rivers, lakes, streams and other water bodies of the Chittagong Hill Tracts;

Human Development & Capacity Building

39. Special measures be undertaken for human development in the Chittagong Hill Tracts;
40. Special measures be undertaken to enhance the administrative and technical capacities of the local voluntary organisations (NGOs), traditional institutions, local government bodies and the regional and district councils;

Disabled People and Destitute Women

41. Priority be given for the education and employment of disable people;
42. Special measures be taken for providing employment to and in rehabilitating destitute women;

Women

43. All forms of social, cultural, economic and political discrimination against women be prevented;
44. Inheritance laws discriminating against women be amended with the consent of the people/ community concerned;
45. Educational curriculums include subjects regarding the rights of women;

Health

46. Programmes of the control and eradication of malaria be re-introduced in the Chittagong Hill Tracts;
47. All hospitals and other medical centres in the Chittagong Hill Tracts be provided with the requisite personnel and equipment;
48. All medical practitioners who are permanent residents of the Chittagong Hill Tracts and are now serving outside the Chittagong Hill Tracts in government institutions be transferred to the Chittagong Hill Tracts;
49. Indigenous students who qualify for entry into the medical colleges in the general entrance examinations be not included within the 'tribal' quota system;
50. Medical colleges be established in the Chittagong Hill Tracts with a quota for indigenous peoples and other permanent residents of the of the region;
51. At least one trained para-medic and at least one trained midwife be appointed in each mouza for the welfare of mothers and infant children;
52. Indigenous and other herbal medical systems be recognised;

Education

53. Primary education be imparted in the mother tongue of the indigenous peoples of the Chittagong Hill Tracts;
-

54. Teachers of primary schools be employed from among the local people who speak the same language as the majority of the students of the area on a priority basis by relaxing the necessary qualifications and pre-requisites;
 55. A Board of Secondary and Primary Education for the Chittagong Hill Tracts be established under the supervision of the Chittagong Hill Tracts regional Council;
 56. Free education be provided to all students up to class X;
 57. Schools be established on a priority basis in areas inhabited by the more disadvantaged indigenous peoples;
 58. Preference be given to the members of the more disadvantaged indigenous peoples in gaining admission into institutions of higher learning;
 59. Adequate funds and other assistance be provided to non-formal schools run by village communities;
 60. The chairpersons of registered non-government colleges and registered non-government secondary schools be nominated by the regional and district councils, respectively;
 61. Women be appointed as teachers on a priority basis;
 62. Colleges offering Bachelor of Education (BEd.) courses be established in the Chittagong Hill Tracts
 63. Honours and Master's course be fully introduced in the Rangamati Government University College and university colleges be established in the district headquarters of Bandarban and Khagrachari;
 64. The involvement of the military in connection with the admission of indigenous students through the reserved quota basis in the medical colleges, engineering colleges and the Agricultural University be stopped so that these institutions may carry out their admission procedures in an independent manner;
 65. The existing quota of reserved seats for indigenous students in the institutions of higher education including those for medicine, engineering and agriculture be increased and a special quota of reserved seats be maintained for the ethnic Bengali permanent residents of the Chittagong Hill Tracts;
 66. The residential hostels for indigenous students that were previously running in the district headquarters of the Chittagong Hill Tracts be revived and new hostels for indigenous men and women be established as required;
 67. Training institutes for primary teachers (P.T.I.) be established in the district headquarters of Bandarban and Khagrachari;
-

Culture and Languages

68. The educational curriculum in the Chittagong Hill Tracts include courses on the languages and cultures of the indigenous peoples of the Chittagong Hill Tracts;
69. The languages of the indigenous peoples of the Chittagong Hill Tracts be included as a subject of study in the secondary schools of the region;
70. The existing inaccurate and disrespectful references to the languages and cultures of the indigenous peoples of the Chittagong Hill Tracts in the national educational curriculums be corrected in consultation with the leaders and representatives of the peoples concerned;

Data and Information

71. Measures be undertaken so that the general public have free and easy access to relevant information about the programmes and activities of the government, semi-government institutions and non-governmental organizations in the Chittagong Hill Tracts. Similarly, measures be also undertaken to ensure that relevant information about the social, cultural, economic and environmental conditions of the less developed areas are available to the government, semi-government and non-governmental organizations and institutions operating in the Chittagong Hill Tracts;

Sports

72. The administration and management of the district sports associations in the Chittagong Hill Tracts be handed over to the concerned hill district councils;
73. A regional sports association be established to manage the district sports associations of the Chittagong Hill Tracts and placed under the control and supervision of the Chittagong Hill Tracts regional Council;

NGOs

74. All NGO activities in the Chittagong Hill Tracts be supervised and coordinated by the Chittagong Hill Tracts Regional Council;
75. Credit programmes by NGOs be conducted in the Chittagong Hill Tracts only in consultation with the Chittagong Hill Tracts Regional Council;
76. NGOs operating in the Chittagong Hill Tracts be prohibited from charging interest and service charges in excess of the rates allowed by the laws applicable in the region;
77. No programmes of NGOs that are contrary to the culture and traditions of the peoples of the Chittagong Hill Tracts be allowed;
78. Local NGOs be given preference in the formulation and implementation of development programmes in the Chittagong Hill Tracts;
79. Permanent residents of the Chittagong Hill Tracts be given preference in employment by NGOs operating in the Chittagong Hill Tracts.
-



Photo: Chris Eml

Cambodia

New Laws for a New Approach in the
Northeast Provinces

Jannie Lasimbang
Chingya Luithui

Asia Indigenous Peoples Pact Foundation



Cambodia

New Laws for a New Approach in the Northeast Provinces

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Cambodia

New Laws for a New Approach in the Northeast Provinces



Kreung rice harvest, Kralah village, Ratanakiri Province, 1998

Photo: Chris Erni

1. Indigenous Peoples of Cambodia

There is no special provision in the Constitution of the Kingdom of Cambodia for indigenous peoples.¹ However, indigenous peoples argue that they should not be discriminated as all citizens have equal rights according to Article 31.2 of the Constitution, which states that:

Khmer citizens shall be equal before the laws and shall enjoy the same rights, freedom and duties, regardless of their race, color, sex, language, beliefs, religions, political tendencies, birth origin, social status, resources and any position.

There is also no official definition of “indigenous peoples” in Cambodia. However this does not indicate the absence of the concept. There are laws and policies which use different terms such as “indigenous communities”, “indigenous ethnic minorities”, “highland peoples”, etc, whose intent clearly refers to indigenous peoples.

For instance, Article 23 of the Land Law 2001 refers to “indigenous community” as “a group of people that resides in the territory of the Kingdom of Cambodia whose members manifest ethnic, social, cultural and economic unity and who practice a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use”.²

Other laws such as the Forestry Law of 2002 refer to “local communities”.³ The Sub-decree on the Community Forestry Management (2003) under the Forestry Law defines “Local Community” as a “minority ethnic community or a group of local residents with original settlement in one or more villages...”.⁴ Further, the draft Protected Area Law in its lexicon defines “indigenous ethnic minorities” as “people living in mountainous areas, most of whom make their living by practicing shifting agriculture and other additional livelihoods, such as hunting, fishing, and collection of forest products/by-products.”

From this it is very clear that, as the Asian Development Bank Study on Indigenous Peoples, Ethnic Minorities and Poverty Reduction (2001) states, “Cambodia has a reasonably clear definition of the vulnerable groups considered to be indigenous for practical development purposes”.⁵

The 1998 Population Census⁶ estimated that about 0.9 percent or 101,284 people of Cambodia’s total population of 11.4 million belong to indigenous groups,⁷ with almost 64 percent living in Ratanakiri Province (ADB, 2002).⁸

Indigenous groups are defined by the World Bank’s Indigenous Peoples’ Policy guidelines (World Bank, 1991) as groups with:

- (a) a close attachment to ancestral territories and to the natural resources in these areas;
- (b) self-identification and identification by others as members of a distinct cultural group;
- (c) an indigenous language, often different from the national language;
- (d) presence of customary social and political institutions; and
- (e) primarily subsistence-oriented production.

Article 24 of the Land Law 2001 also allows for self-identification, stating: “an individual who meets the ethnic, cultural and social criteria of an indigenous community, is recognized as a group member by the majority of such group, and who accepts the unity and subordination leading to acceptance into the community shall be considered to be a member of the indigenous community”.

At a National Indigenous Forum in Kompong Speu in September 2004, the participants defined self-identification to include the following:

- having a lineage of indigenous blood (parents and grandparents were indigenous)
 - living permanently within the community
 - managing and using lands and forests communally
-

- practicing rotational agriculture
- having ceremonies related to agricultural practices
- having burial forests
- respecting spirits (*neak ta*) and holding ceremonies for the village *neak ta* every year
- calling/praying for help and having thanksgiving ceremonies when spirits help
- having their own languages
- individual self-identification as indigenous

The Forum also recommended that the “process to verify eligibility of an indigenous community should be simple and streamlined while preventing potential manipulation by a non-indigenous person or group attempting to gain rights to traditional lands. The State should defer authority to communities, following their own traditional customs, to allow them to claim their indigenous ethnic identity”.

2. Indigenous Natural Resource Management System

2.1 Concepts and Principles of Indigenous Natural Resource Management

Indigenous peoples of Cambodia have their own traditional concepts and principles of natural resource management, which are still practiced today. Some communities have adapted their system to the changes brought about by statutory laws and policies, as well as to the growing changes within their societies.

Indigenous communities still maintain clear territorial boundaries between community lands, and community members do not allow strangers to use community land, although any individual may hunt on the territory of other villages. For example, people from highland villages in Ratanakiri do not allow other villages to establish rotational agricultural farms within their territory. Indigenous peoples in Mondolkiri Province, as well as a number of other provinces, do however allow other villagers to use their land for rotational agriculture and to collect products from their community forest, but anyone using neighboring land in this manner need to get prior permission from the traditional village leader. In most cases, however, families have enough resources from their own land or around their own village. If inter-marriage occurs, and the couple has no land, they can approach the village elders or their relatives to request their own plot. The couple are normally allowed to collect non-timber resources for their own use without getting permission from the village elder.

Box 1: Indigenous Resource Management

Traditionally, the land is owned by the community but each family has access to resources and to their own plot of land. This arrangement is governed by a group of elders. Each community has clear boundaries associated with a stream, mountain, rock or big tree. Farm lands are divided and demarcated and encroachment on other peoples' farms is not allowed. Traditionally, people from different villages are not allowed to draw water from a given pool if one village has been granted rights over that pool. Communities also used to relocate their settlement and farming when they were confronted with diseases or disasters or when the population became too big.

Pat Chan Seng, *Tampoun* from
Patang commune, Lumpath District

Communally-owned lands are further sub-divided into several individually managed plots. Each family within the community decides on the type of crops and varieties depending on the soil to ensure they adequately meet diverse food needs and to manage the farm work throughout the year. The family also uses their plots for different needs. For example, plots for long-term crops are also used to graze livestock. Cultural, spiritual and social systems are also integrated into natural resource management, and as such festivals and ceremonies are tied into agricultural cycles. Social support among family members in terms of sharing labor is also taken into consideration when opening up land and the planting and harvesting cycles.

2.2 Framework and Institution of Indigenous Natural Resource Management

A number of studies on indigenous natural resource management systems show a highly organized system that is closely linked to culture and adapted to the local environment. Institutional structures and mechanisms exist, such as traditional land laws, to govern such a system. The example below shows how land use is governed by traditional customs and institutions of the *Brao*, *Kavet*, *Kreung* and *Lun* peoples, a system similar to that of other indigenous peoples in Cambodia.

Box 2: Concepts and Institutions of Land Management of *Brao* People

Land use is governed by a *Brao* custom called “*tang gup*”. The concept of *tang gup* is an important spatial taboo for the *Brao*, *Kavet*, *Kreung* and *Lun*, and it is fundamental for understanding their land use patterns. It explains the cultural significance of traditional boundaries, and the way they are delineated. It also explains why *Brao* villages tend to move in one direction up one side of a stream, and then move back down the other. It is important not only on a village-to-village basis, but also within communities. The concept of *tang gup* prevents someone from one village practicing swidden farming in the territory of another village. The concept also governs how swidden agriculture plots are distributed within the village area, as a person cannot have one active swidden plot on one side of a recent fallow area, and another active plot on its other side. This would be considered *tang gup* and could lead to poor harvests, a cut foot or even being bitten by a poisonous snake when crossing the fallow. It is also considered to be *tang gup* if someone has to pass through another person’s active swidden to reach the stream where they regularly bath, reach wood resin trees that they regularly tap, or even to dig wild potatoes in the forest. *Tang gup* also applies for a family who eat rice from the same pot to have one active swidden on one side of a stream, and another on the other side.

A sophisticated body of traditional law, which governs all aspects of *Brao* society, backs up these traditional beliefs. For example, every village has at least one traditional judge, called *Ya Weu*. These individuals are elders who are considered by their communities to be fair-minded, good talkers, and with a good understanding of legal precedent. There are also senior judges that may be called in to deal with particularly difficult cases which standard *Ya Weu* cannot deal with, and may be called in to make decisions on cases in other villages when the judge for that particular village agrees. A brief description of how this traditional legal system operates illustrates how organized it is: The *Brao* recognize plaintiffs, called *Me Drenij*, and defendants, called *Me bij kadee*. When a *Ya Weu* makes a decision regarding a case, they are expected to base it on oral precedent, from the different eras of government, such as the *Thai*, *French*, *Japanese*, *Sihanouk*, *Khmer Rouge*, *State of Cambodia* and the present. This legal code is part of an oral tradition that is passed from generation to generation and from *Ya Weu* to *Ya Weu*. Therefore, *Ya Weu* will have a younger assistant who attends cases with the practicing *Ya Weu* so that they can learn from the senior judge, and eventually take over the job when the senior elder either dies or is too old to continue practicing.

Ironside and Baird, 2003

Judicial matters on indigenous resource management are often the responsibility of traditional village leaders. Traditional village leaders often work with other elders in the community to ensure community members abide by customary laws on the collection of medicines, land use, hunting and respect traditional rules prohibiting wrong actions such as killing someone, couples living together before marriage and other wrong actions. Although such traditional structures still exist and are very much respected in most indigenous communities in Cambodia, there is often confusion when the government appoints Commune Councils regarding the relationship between these two institutions that now exist at the same time in communities. In the eyes of the community, there is now a hierarchy between the traditional village leaders and commune councils. A number of traditional village leaders within the commune are under the administrative control of the commune council – but even though the commune councils are elected, they are perceived to be promoting the interests of the government.

Customary laws on natural resource management may differ from community to community, with well-defined penalties for wrong-doers. There is a strong belief that social misbehavior affects resources by causing rivers and lakes to dry-out, as well as bad harvests and general degradation of the environment. Therefore communities place great importance on inter-generational education to ensure everyone understands and adheres to customary practices and rules.



Weaving traditional Tampuen cloth, Ratanakiri Province

Photo: Pleurt

Box 3: Brao Traditional Penalties

Penalties for particular offenses are well defined, based on the fines levied for transgression, often in the number of buffaloes. For example, a human life is considered to be worth 12 buffaloes, and if someone were to make a large wildlife trap in the forest nearby, without telling other villagers, and then a person got caught in the trap and was killed, the owner of the trap would be required to pay half the value of a person, or six buffaloes, to the family of the dead person. However, if the trap owner had informed the community about the trap in advance, he would have to pay one third of the value of a human life, or four buffaloes. Cold-blooded murder requires a penalty of three times the value of a human life, or the equivalent of 36 buffaloes. If an unmarried young woman becomes pregnant, the family of the man who impregnated her would have to supply a pig and a jar of rice wine for the spirits. If the man did not agree to marry her, he would have to pay six buffaloes or six sets of traditional musical gongs. If someone became guilty of *tang gup*, they would have to pay for the cost of sacrifices required in case somebody was injured or became ill as a result of the mistake.

Ironside and Baird, 2003

2.3 Indigenous Practices in Natural Resource Management

2.3.1 Agricultural Land Management

Indigenous community members recognize the need to minimize the impact and allow sufficient time for forest regeneration by rotating farm plots and maintaining evenly dispersed populations rather than concentrating settlements in one area. Swidden plots are farmed for three to five years and then left fallow for eight to 10 years, re-opening the original fields only after the forest and soil have sufficiently regenerated. Different crop varieties are planted in different plots depending on their age, soil type, etc. This allows for longer harvest times, shorter hunger gaps, more effective exploitation of plant variety, spreading risk of seasonal variations, etc. Longer term crops are also cultivated in the fallows and they are used as grazing areas.

Box 4: Indigenous Agricultural Management

Indigenous agricultural systems consist of short rotation of swidden agriculture along the edges of mountains, streams and rivers. Generally, people did not cut swiddens far from the stream, as doing so makes it difficult to access water. Depending on the area, people would spend five to 10 years moving up one side of a stream, and then they would change sides and start working their way back down, or they would change stream valleys and start working their way down the new valley. When the village centre became too far away from the swidden plots, it would be moved in front of current swidden areas. It took about 10-20 years to return to the same location. Bamboo re-growth is preferred for swidden agriculture, because soil fertility is restored in six years or less and a large amount of ash is produced after burning. Local people therefore have benefited from the “humanized ecosystems” that they have created.

Ironside and Baird, 2003

2.3.2 Wildlife Management

The diverse activities and land-use of indigenous peoples in Cambodia supports the mosaic of habitat types that is important for maintaining wildlife. The fallow fields are popular with deer, as they provide young shoots, and farmers purposely plant a variety of food crops that attract these animals. Forests are also not only maintained as a source of timber and other products, but also as a source of wildlife. Some communities also clearly demarcate hunting areas. Certain breeding areas are not disturbed and are in fact strictly maintained by communities.

Hunting is only done by the community during dry seasons and mostly carried out in groups, although individuals and family members may hunt in areas close to the village. There is a limit on the number of animals allowed to be killed during a group hunt, while only one animal is allowed during individual or family hunting trips. Animals are divided among community members, thus discouraging over-hunting. It is considered a taboo to mix more than one animal species when cooking. Every family and even a whole village prohibit a certain animal to be killed or hunted, as these animals are considered their *kanchang* or “helper”. Taboos and rituals are a very important part of indigenous hunting traditions and can be seen as wildlife management. Omens and other beliefs are grounds for controlling over-hunting since the hunter is not allowed to proceed with his hunting trips if he observes anything unusual.

Box 5: Practices and Beliefs in Wildlife Management

Many families and often whole *Tampuon* villages do not hunt bears. There is a story that bears fought tigers to protect our villages. It is also believed that in the old days, bears brought food to villagers and even taught them how to start a fire. Even now, according to my father, you can still coach a bear to get honey from very tall trees.

Wanai Lieng, *Tampuon*

2.3.3 Biodiversity Management

The use of medicinal plants is still practiced as part of indigenous health systems in Cambodia, and both young and old people believe that only the use of traditional herbs can cure certain ailments. Medicinal plants are mainly collected from forest areas that are conserved by communities for such purposes. Forest spirits are believed to be protectors of these areas and only old or knowledgeable herbalists, mostly women, are allowed to collect medicinal plants. Families who are in need of medicines from the protected forest area must first ask the elders who will then advise them on how much they may collect and how to collect these medicinal plants. Communities still believe that they should not sell these medicines, nor should they give them to outsiders - those found doing so can be punished.

An intricate system of seed sharing and exchange still exists. For example, if a person desires to get some seeds from another person, a knife, a chicken or a pig must be given in exchange. However, if the owner of seeds can no longer maintain the seeds but considers them precious, the seeds may be given to a person who has “good hands” (i.e. a successful seed breeder) without expecting anything in exchange. Most families consider the best way of ensuring continual seed supply is by simply maintaining a small garden plot or patches.

Many plants species are also protected through a similar belief system to that which governs actions impacting on wild animals. For example, there is a belief that bamboo protects communities during wars by magically encircling whole villages, thus hiding it from enemies. Some communities do not allow any cutting of bamboo, and if a person passes such a community with cut bamboo, they can be fined. Certain tree species are also prohibited from being used as building materials based on stories of natural disasters that once happened when such species were used. These stories and beliefs are significant with respect to management of biodiversity.

2.3.4 Water and Aquatic Life Management

It is common among indigenous communities in Cambodia to protect forests immediately surrounding springs and water sources. For lakes and rivers, community members are only allowed to use fishing methods that do not deplete fish resources, such as hooks and lines. Outsiders are not allowed to fish in lakes or rivers that are within the boundaries of a community. To ensure a constant supply of fish, communities prohibit the cutting down of fruit trees that are known to be a good source of food for aquatic life.

2.4 Intergenerational Transfer of Knowledge

Most of Cambodia's indigenous communities still live in a traditional setting, placing importance on elders and kinship systems. Natural resource management is part of the daily life of people, with transfer of knowledge a daily occurrence. Each night, young people will gather in the house of elders or a knowledgeable person, bringing tobacco as gifts, in exchange for stories and anecdotes. Young people and even children are free to ask questions. Daily, children and youth "learn by doing" through the examples of the elders and family members. One way in which such learning takes place is through the numerous ceremonies and rituals (for example those observed prior to harvesting) that youth take part in, thus performing the physical work needed for the elders.

Box 6: Learning by Doing

Community leaders and families pass traditional knowledge to their kin during ceremonies and rituals. Use of certain plants, vegetables and animals that are restricted by taboo are taught to children from a young age. Weavers, blacksmiths and farmers also pass their skills and knowledge to anyone in the community who wishes to learn by joining in the work and through practice. Pieces of land along streams, water catchments areas and mountain areas with big rocks and big trees are considered to be governed by spirits and so opening of farming areas in such places is prohibited. I am told that we should be very vigilant to ensure fire does not start or if it does, it does not spread resulting in the destruction of the land.

Pat Chan Seng, *Tampuon* from
Patang village, Patang commune, Lumpath District

The settling of disputes, such as land and resource conflicts, is usually conducted in community halls or in the houses of the elders in the community. Again young people are allowed to listen and to ask questions. Transfer of knowledge is not limited to the village chiefs and elders but also those who hold knowledge and are good at presenting messages and information to other members of the community. Parents and grandparents, as well as siblings, are responsible for providing guidance and advice on natural resource management.

3. Legal and Policy Framework on Natural Resource Management

3.1 Natural Resource Management Laws and Policies in Cambodia

Article 59 of the Constitution of Cambodia states, “The State shall protect the environment and balance of abundant natural resources and establish *a precise plan of management* of land, water, air, wind, geology, ecological systems, mines, energy, petrol and gas, rocks and sand, gems, forests and forestial (sic) products, wildlife, fish and aquatic resources” (italics added).

The framework of laws in Cambodia is hierarchical in structure, each deriving its authority from the law placed above it. The Constitution as the supreme law in Cambodia is the backbone of all other laws, which must conform with it (Article 131). Next down the hierarchy come laws passed by the National Assembly and Senate called ***Chhbab***. Below these are the Royal Decrees or ***Reach-Kret*** followed by the Sub-Decrees or ***Anu-Kret***. Pursuant to the Constitution, a Royal Decree is signed by the King (or Head of State as the case may be) for a list of very specific tasks after being proposed by the Council of Ministers. The Sub-Decrees are drafted by a single ministry or in collaboration with other ministries over competent subject matters, to implement and clarify the ***Chhbab*** further,



Aerial view of Ratanakiri Province

Photo: Graeme Brown

and is signed by the Prime Minister and the Minister(s) in charge of implementation, upon approval of the Sub-Decree by the Council of Ministers. Further down the hierarchy are the *Prakas*, which also clarify and set out implementation guidelines for laws. Like the Sub-Decrees they are drafted by the Ministry responsible for the subject matter but with a much more limited scope. However, in the case of the *Prakas*, they can be signed into effect by the Minister(s) in charge of the ministry having competence over the subject matter without having to go to the Council of Ministers. In that sense, they are much easier to bring into effect than Sub-Decrees. The next in line is the Circular or *Sarachor* which are issued by the Prime Minister or relevant minister to instruct, clarify and further explain legal or regulatory provisions. Finally comes the *Deika*, which are orders given by the provincial governors or commune councils, effective only within the geographical region under their authority.

While there are many laws and policies governing natural resource management in Cambodia, most appear to be ambiguous, contradictory and sometimes difficult to access. They are certainly not the realization of the vision recorded in Article 59 of the Constitution. It is also the case that some subjects have a number of laws and policies enacted and formulated (sometimes in contradiction with each other) while some do not have any. For instance, land as an area of policy and law-making seems to attract a lot of attention. Besides the Land Law of 2001, there are a few sub-decrees already issued under it, yet other important subject matters for natural resource management, such as wildlife conservation, are discussed only in four articles in the Forest Law of 2002.⁹

The Land Law of 2001, the Forest Law of 2002, and the law on Commune/*Sangkat* Administrative Management of 2001 are some of the laws that have significance for indigenous peoples and natural resource management (including Royal Decrees and Sub-Decrees). Above all of these is the Constitution which is important to include in the analysis as the expression of the country's overall intentions for the management of the natural resources found in the country.

3.1.1 The Constitution of the Kingdom of Cambodia

According to Article 44 of the Constitution, "All persons, individually or collectively, shall have the right to ownership. Only Khmer legal entities and citizens of Khmer nationality shall have the right to own land. Legal private ownership shall be protected by law. The right to confiscate possessions from any person shall be exercised only in the public interest as provided for under law and shall require fair and just compensation in advance". The

Constitution makes it clear that private citizens and legal entities enjoy the right to own property, notably land. Although it is implied, it is not clear whether indigenous groups as a collective can claim this right. (See also Section 1: Indigenous Peoples of Cambodia).

The Constitution goes further on state land than it does on private (individual and collective) ownership. In a catch-all provision in Article 58 the Constitution provides that, “State property *notably* comprises land, mineral resources, mountains, sea, underwater, continental shelf, coastline, airspace, islands, rivers, canals, streams, lakes, forests, natural resources, economic and cultural centers, bases for national defense and other facilities determined as State property. The control, use and management of State properties shall be determined by law” (italics added).¹ The italicized words, on a plain reading of the provision, indicate that the types of property listed are not exhaustive and if the State so wants, it has the power to include other natural resources within the definition of or to define the scope of state property. This they have done through legislation such as the Land Law of 2001.

The next provision, Article 59, requires the state to protect the environment and natural resources by establishing a precise plan of action.

3.1.2 Law on Environmental Protection and Natural Resource Management

The first Law on Environmental Protection and Natural Resources Management was prepared by the Ministry of Environment (MoE) between 1993 and 1995 and was passed by the National Assembly on 24 December 1996. In the legal hierarchy, this law is the



Preparing for transplanting paddy seedlings, Ratanakiri Province

Photo: Nang Noy

supreme legal instrument governing environmental protection and natural resources management.¹¹ However, the law is very general and does not provide the specific guidance needed, setting out only a basic overall framework based on sustainable and natural resources management.

Amongst other things, the law provides for the formulation of a National and Regional Environmental Plan (Article 2) for environmental protection and sustainable natural resource management (Article 3). The law requires Environmental Impact Assessments to be conducted for any project, for which the procedure is determined by a sub-decree promulgated in 1999 (Article 6). Echoing Article 58 of the Constitution, the law defines natural resources of the Kingdom of Cambodia as including land, water, airspace, air, geology, ecological systems, mines, energy, petroleum and gas, rocks and sand, precious stones, forests and forest products, wildlife, fish, and aquatic resources, which it states “shall be conserved, developed, and managed and used in a *rational and sustainable* manner” (italics added).¹² Activities related to the conservation, development, management or use of natural resources must be sustainable (Article 10), and if it is found that such activities are not sustainable, then the MoE shall inform the concerned ministries undertaking the activities (Article 11).

The law also has a provision regarding participation of the public in protecting and managing natural resources (Article 16). However, the wording of the provision is not strong enough to require participation from the public, providing only recommendations that it should be done. Besides this, the law also contains a few penal provisions as well as the creation of an environment endowment fund for environmental protection and natural resource conservation.

3.1.3 Land Law 2001 and Land Policies

Before the Land Law of 2001 came into being, the Land Law of 1992 was in force. This law, based on the culture and land-use practices of lowland Cambodians, did not reflect the concept of communal land ownership of indigenous peoples. In response to increasing concerns by indigenous peoples and donor pressure, a series of consultations and negotiations were held between 1995 and 1999. After an intensive period of study and public debate, a draft law was developed with funding from the Asian Development Bank (ADB). This draft Land Law was approved by the National Assembly and the Senate and signed by the King on August 30, 2001.¹³

The Land Law of 2001 has 268 articles divided into 19 chapters. Of these, Articles 23

to 28 in Part II, Chapter 3, entitled “Communal Ownership or Communal Property”, have direct and important significance for indigenous peoples as they set out the basis for land ownership by indigenous communities in Cambodia. The chapter starts by defining “indigenous community” in Article 23.¹⁴ Article 24 seeks to further define membership in an indigenous community.¹⁵

Article 25, seeking to identify indigenous communities’ lands, provides that they are “lands where the said communities have established their residences and where they carry out traditional agriculture” and includes “not only lands actually cultivated but also includes reserves necessary for the shifting of cultivation” as per their traditional agricultural practice. In many cases where land is owned by the community and where traditional shifting cultivation is practiced, land may be left fallow for a number of years. Because of the non-recognition of such land use patterns and the inclination towards a concept of individual property ownership and use superseding the collective concept, conflicts often arise. As such, this Article is particularly significant for its recognition of community lands to include lands for shifting cultivation in addition to residential and other agricultural lands. However the qualification in the provision that such lands should be those “recognized by the administrative authorities” weakens the provision immensely as it gives the administrative authorities the final say over demarcating land as belonging to a community or not.



Brau crossing river with bamboo raft, Kok Lak Commune, Ratanakiri Province 1998

Photo: Chris Erni

The third paragraph of the same Article gives indigenous communities the right to assert their own claim for land and register for collective title based on negotiations with neighboring villages and authorities “according to the factual situation as asserted by the communities”. Communities can exercise their rights under this provision collectively or through their traditional authorities. Once boundaries are agreed upon the Cadastral Department¹⁶ shall coordinate with other authorities to verify a community’s claim and determine what lands to register for title.¹⁷

Article 26 then goes on to provide for communal ownership, to have “all the rights and protections of ownership as are enjoyed by private owners” except the right to “dispose off any communal ownership that is State public property to any person or group”. Article 26 goes on to emphasize and recognize the role of traditional authorities, mechanisms and customs in decision making and exercising the ownership rights of immovable property of the community.

In the event that an individual wants to leave the community, an adequate share has to be provided to them (Article 27). However a share that is allotted to such person cannot be from lands that fall under state public property.¹⁸ Read together with Article 26, communal title may be claimed even over state public property. Article 28 reiterates the absolute right of indigenous highland peoples to immovable property stating that “No authority outside the community may acquire any rights to immovable properties belonging to an indigenous community”. Besides these provisions dealing specifically with lands belonging to indigenous communities, there are other general provisions in the Land Law of 2001 which are of importance.

Article 2 classifies immovable property into three types: (i) immovable property by nature; (ii) immovable property by purpose; and (iii) immovable property by law. Of these, immovable property by nature refers to all natural grounds such as forest land, cleared land, land that is cultivated, fallow or uncultivated, land submerged by stagnant or running waters and constructions or improvements firmly affixed to a specific place created by man and not likely to be moved. Article 8 recognizes only natural persons or legal entities of Khmer nationality as having the right to the ownership of land. Such legal entities include public territorial collectives, Cambodian communities or associations.

Article 11, concerning exceptions to the Land Law of 2001, provides that “the legal regime for ownership of immovable property varies in accordance with the requirements of the Cambodian society, such as agricultural land, forests, waterways, lakes, reservoirs or expanses of water, seashores, riverbanks, urban immovable property, and land for

construction of industrial development zones”. It further goes on to provide that “specific laws shall supplement the provisions of this law or shall derogate this law in order to meet socio-economic, land management and urban planning exigencies.”

Article 14 envisages two types of property: (i) public property of public legal entities or state public property; and (ii) private property of public legal entities or state private property. Article 15 of the law establishes seven categories of State public property.¹⁹ All other forms of property not classified as State public property is state private property.²⁰ In effect, this means that State private land is all land that is, (a) not State public land, and (b) not privately owned. The basic distinction between the two is that while state private property can be the subject of sale, exchange, distribution or transfer of rights, state public property is inalienable and ownership of such property is not subject to prescription and also cannot be acquired by the special acquisition provisions of the Land Law of 2001.²¹

The distinction of land as state public and private property becomes significant because it affects the rights and duties of indigenous communities to their lands – before, during and after the titling process.²² As a result of this classification and the resulting difference in rights and limitations imposed, a number of questions arise. Chief among them is whether state public property, because of its “inalienability”, can be part of the community title as envisaged in the land law? It appears from the overall intent of the law and the wordings used in Chapter 3, and reading other laws such as the forestry law with it, that state public property can indeed be part of indigenous community property. This position has been argued by experts on the land issue in Cambodia, but remains in dispute.²³



Kreung rice harvest, Kralah village, Ratanakiri Province, 1998

Photo: Chris Erni

Another significant feature of the Land Law of 2001 is its recognition of the impact of the “period of crisis from 1975 – 1979” on reconstituting ownership over land and therefore providing for a right *in rem* over “immovable property which was recognized since 1989” that “may lead to the acquisition of ownership by the holder of the property” in accordance with the conditions set by the land law.²⁴

The condition for transforming possession into ownership is set out in Article 38, which provides that “in order to transform into ownership of immovable property, the possession shall be unambiguous, non-violent, and notorious to the public, continuous and in good faith”. The law is unclear however whether land left fallow as part of the traditional cultivation system constitutes an obstacle to a claim of ownership.

In the case of a dispute over immovable property, Article 47 also provides that “such dispute[s] shall be submitted for investigation and resolution... The results of the investigation shall be submitted to the Cadastral Commission ... (who) shall make a decision on the dispute”. If there is disagreement or dis-satisfaction with the decision made by the Cadastral Commission, the disputants can file complaint to the courts. The organization and functioning of the Cadastral Commission is determined by a relevant sub-decree that was promulgated in 2002.

Article 69 provides that the transfer of ownership shall be considered valid only upon the registration of the contract of sale with the Cadastral Registry Unit. This provision has given rise to some concerns vis-à-vis the draft Civil Code wherein it is stated in draft Article 133 that in relation to land, the creation, transfer and alteration of a real right shall take effect in accordance with those agreed upon between the parties. In other words, land can be legally transferred through a contract between the buyer and the seller without the requirement of registration to complete the transaction.

The Land Law of 2001 sets out important provisions on communal ownership of property, specifically land, by indigenous communities. The law suggests the recognition of prior rights and claims of indigenous peoples over land and its resources. Another positive thing about the law is its recognition of traditional indigenous authorities and their customary law as a valid legal process in the determination of land claims. Its inclusion of some form of conflict resolution mechanisms is also encouraging. However it “does not specifically spell out any mechanisms for land use planning and management that would link to community based natural resource management activities”.²⁵ What it does is provide an opportunity for indigenous communities to claim title over land which could lead to stronger control over their resources. It is also true that the Land Law of 2001 is, at times, in conflict with other laws in Cambodia, such as the Forest Law (to be discussed below) and such conflicts have yet to be resolved.

3.1.4 The Forest Law 2002

Cambodia has the largest intact deciduous forests in Southeast Asia and retains a large proportion of its natural forest cover. There are varying estimates on the amount of forest cover remaining, ranging from 30 percent to over 60 percent. Extensive deforestation has taken place since 1992-3, reflecting the lack of effective forest management plans and ongoing security problems.²⁶

Ever since the early 1990s when concerns were raised about forest cover, the forest sector has seen many changes and transformations. The Independent Forest Sector Review summed up these changes and transformations:

For international donors, forestry became the emblem of the governance problems facing the Cambodian state... (with) sustained attempts over nearly a decade to reform the sector and put in place a policy and legal framework that clearly defines the parameters of the sector. However, the sector has been marked by acute polarization around the problematic issue of concession allocation; abuse of the resource has been serious with evidence of over-logging and corruption. Despite a series of critical reviews, the concession system was accepted by major donors as the most effective form of institutional arrangement for resource management in Cambodia. This acceptance has cast long shadows over the policy debate and management of the sector. In effect, it has meant that forest policy has become equivalent to the management of forest concessions rather than starting from a broad



Tampuen children, Ratanakiri Province

Photo: New Savin

societal viewpoint of agreement around what forest resources there are, how they are to be managed and for whose benefit.²⁷

Some progress has been seen over the last few years. The Forestry Law came into force in August 2002, seeking to define “the framework for management, harvesting, use, development and reservation of the forests ... (and) to ensure the sustainable management of forests for their social, economic and environmental benefits, including conservation of biological diversity and cultural heritage.”²⁸ The Forestry Law came on the heels of the Statement of the Royal Government on National Forest Policy, an important policy document issued in 2002 which outlines the government’s commitment to conservation and sustainable management goals. The Policy designated Cambodia’s remaining forest resources as Permanent Forest Estates to be maintained in perpetuity.²⁹

It has been stated that this Policy is “one of the most important existing pieces of legislation that links to CBNRM [community-based natural resource management] issues. This law contains important provisions on traditional use and access rights to forest resources, though these do not include management rights. More important are the provisions that allow for the creation and management of community forests, whereby communities are granted an area of the Permanent Forest Reserve to manage and derive benefits from”.³⁰

Article 2 ensures traditional user rights of timber products and Non Timber Forest Products for local communities. Article 4 is remarkable in its recognition of “*full public participation* in all government decisions that have the potential to impact on concerned communities, livelihoods of local communities and forest resources” (italics added).³¹ Forest management is under the jurisdiction of the Ministry of Agriculture, Forestry and Fisheries (MAFF,³² under which the Forest Administration (FA) is the government institution for implementing the management of forest and forest resources.³³ One of the duties of the FA is to “assess boundaries, classify and demarcate forests in order to establish a land use map of the Permanent Forest Estate in coordination with MLMUPC, local authorities *and communities*” (italics added).³⁴ This provision is significant for its mandating of coordination between the two governmental agencies, as it should reduce competing interest between them, a problem which has plagued forest management in the past. Similar mandates can be found in other provisions in the same law, and in this it is an improvement over the Land Law, where such cooperation is not specifically mentioned. The FA is also required under the law to “prepare a National Forest Management Plan with broad public participation of all authorities and communities concerned”.³⁵

Under the law, Permanent Forest Estate is categorized into Permanent Forest Reserve and Private Forest. The first is again further sub-categorized into: (i) Production Forest;³⁶

(ii) Protection Forest;³⁷ and (iii) Conversion Forest.³⁸ The Permanent Forest Estate, to be managed according to the principle of sustainable forest management, should be classified, registered and demarcated by the MAFF who coordinates with concerned local communities, authorities and the Ministry of Land Management, Urban Planning and Construction (MLMUPC) to assist in the registration of land of indigenous communities and preparation of the national land use map.³⁹

It is important to look at the whole land use system of indigenous communities to ensure there is a coherent approach taken to the support of their livelihoods. For example, community forestry and communal land titling should go together to ensure that the intrinsic links between swidden agriculture and forest use are maintained with integrity.⁴⁰ Article 15 and 16 also seem to support the contention that indigenous community title can be given over forest lands demarcated as state public property, by providing that activities of a concessionaire should not interfere with the customary user rights taking place on the land of indigenous communities and the customary access and user rights practiced by communities residing within, or adjacent to, concessions.

Another indication of continuing title can be found within Article 37, which provides that local communities that traditionally practice shifting cultivation may conduct such practices on the lands of indigenous communities registered with the State. At the same time, Article 37 restricts recognition of swidden agriculture where it demands a sub-decree to delineate forest areas in which swidden agriculture can occur. An independent review of the forestry sector in Cambodia observed, “this appears to imply that the prior allocation of land under the Land Law under communal title is an important step prior to any demarcation of forest land under the Permanent Forest Reserve (PFR). If the PFR



Tampuen village, Yeak Lom Commune, Ratanakiri Province, 1998

Photo: Chris Erni

demarcation precedes the Land Law communal titling, it is likely that indigenous peoples will have their access to future lands for swidden agriculture confined by the PFR".⁴¹

3.1.5 Protected Areas

In 1993, a Royal Decree established a national system comprising 23 protected areas classified under four major categories: National Parks, Wildlife Sanctuaries, Protected Landscapes, and Multiple Use Areas. The Department of Nature Conservation and Protection under the Ministry of Environment is responsible for overseeing these 23 protected areas and an additional three Ramsar sites, two of which are contained within the 23 protected areas. All combined, these areas cover 32,289 sq km. In addition to these areas, the Ministry of Agriculture, Forestry and Fisheries has set aside a number of areas for biodiversity conservation, forest protection, genetic conservation, and wildlife habitat protection. Together, these areas represent an additional 14,860 sq km under intentional protection. The country's entire system of protected areas covers 47,845 sq km, or about 26.3 percent of Cambodia's land territory.⁴² A 2003 review of protected areas found that more personnel are needed for managing the protected areas.⁴³

The draft law seeking to define the framework for management, conservation and sustainable development of protected areas set out its objectives, amongst other things, as: the management, conservation, and sustainable use of natural resources in protected areas; to determine standards and procedures for managing protected areas; to determine the responsibilities and participation of local communities, indigenous ethnic minorities, and the public; and to implement regional and international conventions, protocols and agreements on the protection of biodiversity and ecosystem of protected areas.⁴⁴ This draft law would also govern the management of State public property in protected areas.⁴⁵ The Ministry of Environment is responsible for implementing the law, and developing a National Strategic Plan for Protected Area Management.

Under the new draft law there are nine categories of protected areas: (i) National Park; (ii) Wildlife Sanctuary; (iii) Protected Landscape; (iv) Multiple Use Area; (v) Ramsar site; (vi) Biosphere Reserve; (vii) Natural Heritage site; (viii) Marine Park; and (ix) provincial/municipal protected area.⁴⁶ These protected areas are to be managed by the Ministry of Environment under a new secretariat called the "Natural Protection and Conservation Administration" which the law requires to be created.⁴⁷ Amongst other things, this Natural Protection and Conservation Administration shall perform its duties *to guarantee the rights of local communities, indigenous ethnic minorities and the public to participate in the decision-making on the sustainable management and conservation of biodiversity.*⁴⁸

These categories of protected areas are further divided into four zones:⁴⁹ (i) Core zone;⁵⁰ (ii) Conservation zone;⁵¹ (iii) Sustainable Development zone;⁵² and (iv) Local Community zone.⁵³ The procedure for identification of protected areas and their classification into different categories are also set out in the law. The classifying criteria have to be based on clear scientific information and pursuant to the policies and strategies of the government.⁵⁴

The first three categories are prohibited from any procurement or ownership, with the first two specifically to be used for public interest and can not be sold, exchanged, rented, mortgaged, transferred or donated.⁵⁵ This is potentially problematic, especially if the demarcation of protected areas is made without the active participation of indigenous communities, and if the law on protected areas is interpreted to exclude indigenous collective title. However the law provides for use rights of the sustainable development and conservation zones for traditional, customary, belief and religious purposes for local communities and indigenous ethnic minorities.⁵⁶ At the same time it provides that collection of forest products, by-products and natural resources shall be allowed only in the sustainable development zone.⁵⁷ It also recognizes the practice of traditional shifting agriculture, but only on lands that have been registered for such a purpose with the state.⁵⁸

The draft law provides for “modifying the boundaries of each divided zone”,⁵⁹ and the “modification of any protected areas”.⁶⁰ Although not expressly stated, there is a strong indication that this could mean the power to alter the status of protected areas, including the power to declassify them.

The law recognizes the importance of local communities, indigenous ethnic minorities, and the public and civil society’s participation. However the language of the draft law



Brau swidden field, Kok Lak Commune, Ratanakiri Province 1998

Photo: Chris Erni

confines this participation only to “giving and receiving information related to protected area management”.⁶¹ Community resource management is also recognized in the law through the formation of the Protected Area Community, who could enter into an agreement with the Natural Protection and Conservation Administration to manage part of the protected area set out in their agreement.⁶²

3.1.6 Environment Protection

The law on Environmental Protection and Natural Resource Management has a chapter consisting of two articles (article 12 and 13) dealing with environmental protection. It provides that the MoE, in collaboration with other ministries, shall develop an inventory that indicates the sources, types, and quantities of pollutants and waste, toxic and hazardous substances being imported, generated, transported, recycled, treated, stored, disposed, or released into the airspace, water, land, or on land; the sources, types, and extent of noise and vibration disturbances.

3.1.7 Inland Fisheries and Aquaculture

Cambodia’s freshwater fisheries produce over 400,000 tonnes per year and is the fourth largest national fisheries catch in the world after China, India and Bangladesh. The estimate of 400,000 tonnes is additionally considered to be an under-estimate.⁶³ Fisheries in Cambodia are interlinked with annual floods of the Tonle Sap (Great Lake) and the Mekong-Bassac Delta around and downstream from Phnom Penh. About 14,000 sq km are flooded annually and fish migration, as part of their breeding cycles, coincides with these floods. It is reported that more than 100 species are regularly caught in the Tonle Sap, although up to 200 species have been recorded in the Tonle Sap itself and over 500 in the freshwaters of Cambodia.⁶⁴ About 90 percent of the total inland production is from capture fisheries and the rest from aquaculture.⁶⁵ Concerns have been raised about over-fishing, particularly of larger and less fertile species.

The Fisheries and Administration Law (Fiat-Law No. 33 Kro chor of 1987), which is the principle fisheries legislation, does not provide for co-management arrangements or mechanisms. It does allow for subsistence fishing year round. The law identifies a fishery resource as “live animal and vegetable” found in the “fishery domain” which could be either inland⁶⁶ or marine⁶⁷. The Department of Fisheries under the Ministry of Agriculture is responsible for implementing the law. In June 2005, the Sub-Decree on Community Fisheries Management, designed to promote co-management of fisheries resources, was adopted. It provides the rules and procedures for establishing and managing community

fisheries throughout Cambodia. Each community fishery is to be led by a Community Fisheries Committee (CFC). No community fishery is allowed to manage fisheries in a designated area unless it has entered into an agreement, referred to as a community fisheries area agreement, with the Government of Cambodia through the Department of Fisheries (DOF). This agreement defines the extent of the designated area (a plan must be attached), provides the list of community fisheries and CFC members, local fisheries regulations and a statement setting forth management objectives. Community fisheries areas remain state public property, but community use rights are granted for a renewable three-year period.⁶⁸

3.1.8 Water Resources

The Overseas Development Agency (ODA) in 1993 proposed the creation of a Cambodian Water Management Authority to coordinate all government agencies involved in water use and management. However, the government requested that this agency should be under the authority of the Department of Agricultural Hydraulics and Hydro-Meteorology of the MoA. That request was not accepted by the ODA and there are now at least six different ministries involved in water management in Cambodia.

Cambodia has the second highest hydropower generating capacity in the Lower Mekong Basin, amounting to 8,000 MW. However, present electricity generation is entirely by thermal power plants using imported fuel and per capita power generation is the lowest in the region at 0.007 kW (Mekong Secretariat April 1995, pg 55).



Making a rice granary, Ratanakiri Province

Photo: Lam Suet

Despite the numerous ministries charged with water management in the country, not a single authority has looked at watershed management. Such attention is critical as communities rely on water supply from gravity feed. Most communities have also been looking after community catchment areas and the destruction of such areas would not only affect the communities but wildlife within a particular habitat.

3.1.9 Commune Administration Law 2001

The Commune Administration Law (2001)⁶⁹ provides for the establishment of Commune Councils to manage small groups of villages (communes) through local elections, government funding for their work, and a local development planning process. The Commune which governs the local affairs is based on the Constitution,⁷⁰ with legislative and executive authority vested in the Commune. While the recognition of the Commune Council is important and would provide indigenous communities the opportunity to have a say in local affairs, in practice the system has been shown to be subject to abuse. Most land sales and registration apparently involve Commune Chiefs without the consent of the affected communities. As such, the tendency to address this is to limit the scope of Commune Councils to avoid abuse of power and ensure that any dealings with respect to indigenous lands should be consistent with the Sub-decree on Registration of Indigenous Land Rights.

There is a growing awareness of the need to recognize that the traditional authority provided for in the Land Law 2001 need not be assumed to be the Commune Council. Thus the role of the Commune Council may be seen more for the physical development of communities, such as infrastructure, education and participation in local government, while the traditional leaders can take the role of maintaining the cultural and territorial integrity of the community.

3.1.10 Management and Exploitation of Mineral Resources⁷¹

Under this law,⁷¹ the term “land owner” refers to general land owners, which may include indigenous communities. Under Article 5, “legal owners or possessors of private land can use gravel, sand, stones and clay without requiring license, but they are not permitted to transport beyond the boundary of that land for business purposes”.

The law does not provide a mechanism for obtaining free, prior informed consent. Neither does it mention the right of land owners to reject exploitation of resources in their lands. However, it does provide for compensation under Article 26.⁷²

3.2 Policy for Highland Peoples' Development

The Cambodian Government established an Inter-Ministerial Committee (IMC) in 1994 to develop a policy on indigenous and ethnic minority peoples, as part of the government's plans to improve the quality of life of indigenous peoples living in highland and mountainous areas. The Inter-Ministerial Committee (IMC) is composed of a wide range of Ministries, including the Ministry of Rural Development (MRD), the Ministry of Agriculture, Forestry and Fisheries; the Ministry of Education, Youth and Sport; the Ministry of Health; the Ministry of Public Works and Transport; the Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation; the Ministry of Women's and Veterans' Affairs; the Ministry of Environment; and the Cambodian Mines Action Centre.

At present, IMC is the main body that represents the government in coordinating activities with national and international institutions working in the northeastern provinces of Cambodia, where the majority of indigenous peoples are living. From 1994 till 1999, IMC conducted several meetings and workshop in order to develop the draft of the indigenous policy. The IMC officially ended its mandate at the end of 1999. From 2000 through to June 2001, there was no real work done and the policy remained in draft form. In June 2001 the Government created the Department of Ethnic Minorities Development (DEMD) within the Ministry of Rural Development (MRD), whose role is to prepare short-, medium-, and long-term development plans for indigenous peoples, to conduct research on identity, culture and traditions of indigenous peoples and to provide training for development workers in cooperation with different local and international development agencies. In addition the Department was given the mandate to prepare and revise the policy on indigenous peoples to submit to the government for approval.



Stieng community, Chingkon, Kratie Province, 2007

Photo: Colin Nicholas

The DEMD is playing an important role in finalizing the Policy for Highland Peoples' Development (now called National Policy for Development of Indigenous Peoples after the national consultation in August 2005). The drafting of the policy for indigenous peoples demonstrates the Government's intention to accommodate and preserve indigenous groups, give them some group-specific citizenship rights and promote a multicultural society. Strongly influenced by ILO Convention No. 169, this document details a number of objectives, intentions, and measures to accommodate the country's indigenous communities. The policy consists of three chapters: General Provisions, Guidelines, and Action Plan. The main difference in the current draft to the original document is that the previous references to "*indigenous minority people*" have now been replaced with "*indigenous peoples*".

The General Provisions highlight the need for indigenous peoples to be consulted in development processes and to be part of the decision-making process, and for indigenous peoples to have the same rights and duties as other Cambodian citizens. It also affirms that indigenous peoples have the right to manage their natural resources. Among the gaps in the present policy draft is the need to respect indigenous land rights, culture and indigenous knowledge per se and not judged based on what is appropriate.

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Kreung traditional bachelor and young girls houses, Ratanakiri Province

gaps in the present draft policy is the need to respect indigenous land rights, culture and indigenous knowledge *per se*, not judged based on what is appropriate.

In Chapter 2, the guidelines to implement the policy address issues on environment, land, agriculture, education, health, culture, access to justice for indigenous peoples and infrastructure. Under environment, one gap identified is the lack of recognition of the role that indigenous peoples play in the management of their natural environment and natural resources as an important contribution to the preservation of national natural resources. The language on consent is weak and needs to be strengthened in line with emerging principles of Free, Prior and Informed Consent. On land, the proposed monitoring of the effectiveness of land use and the development of measures to ensure the sustainable use of natural resources by the Village-Commune Natural Resource Management Committee (VCNRMC) may not align with the interests of indigenous communities. There is a need to first explore the possibility of allowing village elders within traditional authorities and members of the community to take on this role. There are some major gaps under the Guidelines for the Agriculture Sector. The existing statement in the Khmer version talks about research and extension and the increase of tree planting. This should be changed to emphasize improving existing agricultural methods by working jointly with farmers and making use of their local knowledge. There should be a clear statement of Government support for traditional and rotational forms of swidden agriculture. Emphasis to “*promote the investment in agricultural sector and organize an integrated agricultural production in order to increase agricultural production*” (Article 3.1) may not be the best option for indigenous communities.

The guideline’s discussion on education is progressive, including an article calling for the establishment of community learning centers and the training of indigenous teachers who would then teach in their own community. However, the policy could further include the use, practice and development of indigenous languages to be guaranteed by the State, the strengthening of, and respect for indigenous forms of education and transmission of knowledge, and the establishment of formal and informal, bilingual intercultural educative and literacy programmes in consultation and with participation of indigenous peoples. Likewise, the guidelines for implementation under the Health Sector could look into the establishment of traditional health centers. The suggested policy guidelines under the Culture Sector appear to be comprehensive. On infrastructure, the main issue is the lack of a mechanism to obtain Free, Prior and Informed Consent of communities prior to any development taking place.

Chapter 3 of the Policy on the priority action plan outlines six points: (i) human resource development, particularly for women; (ii) poverty reduction; (iii) improving the information system for indigenous peoples; (iv) strengthening indigenous communities, especially for

traditional elders, women and children; (v) ensuring community participation; and (vi) training of government staff and NGOs working with indigenous peoples.

This policy was first submitted to the Council of Ministers in 1997 and discussed in two sessions, but was not approved. After several rounds of revisions through wide consultations, the Policy was again presented to the Council of Ministers in February 2006, but it was again rejected.

4. Interface between Indigenous and Statutory Systems on Natural Resource Management

This Chapter is devoted to assessing the interface between indigenous and State systems and laws on natural resources management, with a view to identifying gaps and challenges for further action. It will also look at current efforts to harness indigenous natural resource management systems with other systems to illustrate the need to further develop such initiatives, as well as examine and illustrate the roles of government, NGOs, community organizations and donors. Recognizing the need for indigenous peoples' involvement in natural resource management, section 3.4 highlights mechanisms and issues for effective participation.

4.1 Indigenous Peoples and State Legal and Policy Framework

4.1.1 Implementation of Laws and Policies

It may appear that several laws and policies exist that protect indigenous rights. However, implementation of these laws and policies is far from adequate. For example, implementation of Land Law 2001 is hindered by lack of efforts to resolve land tenure issues



Weeding upland rice fields, Ratanakiri Province

Photo: New Savin

with respect to affected communities who were included in national parks. As a result, the recognition of indigenous knowledge on forest resources, and community participation in park protection and management, takes a back seat. Conflicting information, such as prohibition from living and conducting swidden agriculture within certain zones inside the park, are confusing for indigenous peoples and must be clarified. Although there is some progress in the titling of communal lands, many issues and questions remain.

Box 7: Pilot Project on Community Title

Three areas were selected as pilot sites for the communal titling of land - two in Ratanakiri and one in Mondolkiri Province.

Lessons learned/issues raised

1. Where there are strong support groups, the project appears to have gone well. One of the pilot sites in Ratanakiri which lacks such support groups is proving to be difficult.
2. Except the MoE, other Ministries are not actively involved in the project.
3. Too many issues and agencies are involved, making the process confusing.
4. No person or body works on the project consistently, either from NGOs or from other advisory bodies.
5. Indigenous organizations and communities are not empowered to pursue communal land titling.
6. There are doubts on whether the community is really interested in communal titles, even after the communities have clearly shown their preference for communal title. A series of information workshops were held to explain the difference between communal and individual titles. However, the process was over-simplified, for example the provincial governor once came and asked the people to put up their hands to choose and they all chose to opt for communal titles.
7. Many see the community consultations as a time-consuming and unnecessary exercise.
8. Although many discussions were held about traditional authority, there are still doubts as to what this actually refers to.
9. "Communal Title" used in the land law has some negative connotations.
10. A number of donors are willing to support the titling of land and there are plans to expand the project to another area.

Interview with Key Informants

Although indigenous rights are now legally recognized in Cambodia under the Forest Law and the Community Forestry Sub-Decree to complement community management of forest that has been a traditional form of forest management in Cambodia, these legal instruments have yet to be developed and implemented.

4.1.2 Implementing Ownership Rights Framework

In Cambodia, indigenous peoples have traditionally managed natural resources communally under the guidance of community leaders. Currently they have come to accept ownership of land through communal titling of areas based on territories traditionally occupied by a particular community. Communal titles are perceived as providing security and ensuring communities are in control and are better able to manage natural resources in traditional territories. This compliments the government's clear policy on the importance of the social function of land for sustainable economic and social development, poverty reduction, decentralized administration, good governance, equitable land distribution to assist the poorest of the poor, and tenure security to prevent or resolve conflicts. It also recognizes the importance of preventing illegal land acquisition and land concentration. However, titling on areas where indigenous communities are most vulnerable to being dispossessed has not been given priority.

Box 8: Indigenous Land Titling

At a planning meeting in 2002 for the National Poverty Reduction Strategy (NPRS), some of the reasons why communal land titling is beneficial for indigenous communities were identified, and recommendations made:

1. Ensures traditional access of established local communities to common property resources (land, forest and waterways) is not usurped by new groups.
2. Improves limited/insecure access of the poor to common resources.
3. Ensures tenure security for rural people by correcting weaknesses in existing land practices and laws.
4. Need to examine gender bias in land policy and registration systems to ensure that women and girls have access to land titles and natural resources.
5. Need to improve farmers', rural poor and other vulnerable groups' access to land, water and other productive inputs for sustainable livelihoods, food security and overall socio-economic development.

NPRS 2002

4.1.3 Implementing Use Rights Framework

Cambodia's law on recognition of customary use rights is among the most progressive in the region. The Forest Law (Article 15) and the Sub-Decree on Forest Concession Management (Article 2) both provide for the rights of indigenous peoples living within or adjacent to a forest concession, by ensuring that they do not interfere with the customary user rights of indigenous communities, and protect their access rights to forest resources that are of economic, subsistence and spiritual value to them. Recognizing that indigenous peoples are not immune to the possibility of overexploiting forest resources does not necessarily mean that their rights to use natural resources should be curtailed. Rather, a check and balance for ensuring sustainable management should be put in place. Root causes for local overexploitation also need to be ascertained, and if necessary, relevant assistance provided.

4.1.4 Recognition of Customary Law

Recognition of traditional authorities such as indigenous governance over natural resource management by the Land Law 2001 is very progressive. Customary laws on natural resource management is still highly respected by Cambodia's indigenous communities, and are being implemented as part of peoples' way of life. However, with the introduction of the commune councils and the Commune Council Law, coupled with the tendency of most governments to look up to leaders who are literate or to put in place regulations that are more in line with state laws and policies, it can be very easy to replace the traditional authorities and customary laws. If this happens, it would pave the way for illegal land acquisition and land concentration and over-exploitation of resources that could seriously result in conflicts within the community and among authorities. In the long run, this could contribute towards the lack of confidence among community members themselves.



Fences starting to appear as a result of land alienation, Ratanakiri Province

Photo: New Savin

Section 2.2 above illustrates a highly evolved and time-tested system that remains very applicable to the everyday lives of *Brao* people. It suggests that indigenous natural resource management strategies can be much more effective, at least at the local level, if they are integrated into *Brao* law. For example, established *Ya Weu* could be asked to act as judges in cases when community natural resource management regulations are broken by outsiders or members of the community.

Thus far, other laws on natural resource management have not attempted to incorporate customary practices and laws into statutory laws as seen in many countries in the region. The recognition of customary law and traditional authorities is a step in the right direction. A programme to train traditional leaders to engage and communicate effectively with government departments, and vice-versa, would be more appropriate than introducing other forms of governance within indigenous communities. It is also important to clarify the roles of both commune councils and traditional authorities in every community. A new project by UNDP Cambodia is working with communities to clarify roles of traditional authorities and build from these existing institutions instead of promoting new ones that are alien to indigenous peoples.

4.1.5 Conflict in Perceptions

Debate over natural resource management continues to be dominated by contrasting perceptions between locals and outsiders on wilderness and cultural landscapes. Conservation thinking has tended to opt for preservation of “wilderness” areas and therefore the automatic rejection of any human influence. However, this focus on the steady state of “wilderness” has hindered a realistic appraisal of the role of disturbance processes and change in maintaining ecosystems (Ironsides and Baird, 2003).

Often the “balance between protection of indigenous culture and becoming developed” is equated with giving up certain rights. While culture is dynamic, it does not necessarily mean accepting modern lifestyles, but rather embracing aspects of both. Being able to attend school is used as a measure of development, even though indigenous peoples insist that school curricula must respect indigenous cultures as it has resulted in the alienation of indigenous youths from their own community.

These are but a few of the conflicting perceptions of indigenous peoples and natural resources conservation and management held by communities and by outsiders. These conflicting perceptions tend to complicate the issues and result in indigenous peoples being

treated as subjects for studies, rather than owners of the process of their own development and little effort is placed in trying to gain an understanding of indigenous peoples' own perceptions of their path of development.

4.1.6 Recognition of Indigenous Natural Resource Management System

Indigenous knowledge on natural resource management needs to be recognized; recognition that does exist in Cambodia is partial and even then only on paper. Many of the recommendations for natural resource management still tend to rely on western concepts, rather than promoting indigenous customary practices. In the process of enhancing the capacity of indigenous peoples to promote natural resource management, there is a need to look at these issues to ensure that the process will promote traditional systems of natural resource management. A management plan that outlines benefits and responsibilities for both government and indigenous peoples would ensure that indigenous culture is protected, sustainable incomes from the forests are assured, and wildlife and biodiversity is conserved.

Box 9: Yeak Loam Lake Ecotourism Project

Tampoun community around the Yeak Loam Lake harnessed their traditional knowledge in managing the habitat in and around the lake to provide an income through an ecotourism project. The community also established a museum and traditional structures to provide information about *Tampoun* cultures to visitors. Though the income is modest, the community is proud of their efforts, which has at the same time enabled them to conserve the natural beauty of the lake and surrounding forest.

Wanai Lieng, *Tampoun* from Yeak Loam

4.1.7 Land Demarcation

Land, as a vital part of indigenous peoples' lives, must be clearly demarcated. Numerous issues remain to be addressed, particularly the interface between indigenous peoples' and the State's concept of land. Failure to recognize this would render much of the effort on natural resource management useless and may only end up fuelling further conflicts.

Box 10: Considerations on Land Demarcation

There are some serious issues of sequencing and policy processes to be considered.

1. There needs to be definition, identification and agreement of what constitutes 'state public property' – this requires a set of subsidiary processes to clarify what can sit within this overall category.
2. There needs to be agreement on the definition and identification of the lands of indigenous communities.
3. There needs to be definition and identification of those core areas of forests that should be retained under a protected area system and areas of high environmental service function (e.g. watersheds).
4. There needs to be definition and identification on the ground of those areas of forest that could be managed under some form of production (the actual institutional arrangements to be determined – e.g. groups (communities, communes), small-scale 'industrial' forests, concessions, direct management by the public sector).
5. There needs to be definition and identification on the ground of those areas that are available for agriculture (the actual institutional arrangements to be determined – family farms, small scale 'industrial' farms, large-scale concession agriculture).

Without this clarity and agreement about the broad process and criteria for allocation of lands, insecurity will continue and permit the continued and escalating alienation of land by those who have the most power and political connections. In terms of sequencing, although logically the Land Law should take precedence, there is no mechanism to ensure that it does. Cambodia does not have a hierarchy of laws, although in terms of precedence set by when a law was passed, the Forestry Law should be applied subsequent to the application of the terms of the Land Law. Under Forestry Law the Administration is empowered to determine the Permanent Forest Estate, even though logically steps 1 and 2 above should happen prior to the definition of the Estate. In both cases the process followed for definition and demarcation must be a local participatory process for clear mechanisms to address grievances over land allocation decisions.

Mary Hobley - Forest

4.1.8 Developing Partnerships and Mutual Learnings

Mistrust between government authorities and indigenous communities still hinders openness and sharing of responsibilities. Consultation and information-sharing that could build partnerships and mutual learning are not built into mechanisms on natural resource management. For example, villagers believe that since the local people withdrew from the Virachey National Park, outside hunters and NTFP collectors have had more opportunities to exploit resources. It is not possible for park rangers to effectively control this influx, due to the park's size. The destruction of the rattan and eaglewood resources over the recent past can be partly attributed to the fact that there are no longer communities living in these areas. If partnership between park authorities and the people exist, villagers can assist in monitoring the park, as has been successfully demonstrated in other countries in the region. Indigenous peoples believe that if they were allowed to live in the park, they could help to control illegal hunting and NTFP exploitation. Some communities have already established committees for this purpose (Ironsides and Baird, 2003).

The policy to move indigenous peoples' communities and to change their cultures, thinking and way of life has only served to perpetuate mistrusts and suspicions, instead of harnessing the knowledge and skills on other livelihood strategies, particularly on swidden agriculture.

Box 11: Historical disharmony

Challenges for developing partnerships and mutual learning are enormous as this goes against the history of relationships between indigenous peoples and outsiders. For indigenous groups, particularly in Northeast Cambodia, the slave trade, which continued over such a long period and with such intensity, was cultural rape. The disharmony continued with the relocation of Brao and Kavet people to lowland villages adjacent to the Sekong and Se San Rivers in the early 1960s in order to "educate" and "Khmerise" them; then continuing with the draconian policies of the Khmer Rouge to make wet rice paddy rice cultivators out of swidden agriculture farmers, and finally with the policies of the State of Cambodia government to keep the people in the lowlands.

Ironsides and Baird, 2003

4.1.9 Strengthening Links Between Government and Indigenous Communities

The Inter-Ministerial Committee (IMC) for Highland Peoples Development was formed by the Royal Government of Cambodia in 1994, and is composed of the Ministry of Rural Development (MRD), the Ministry of Agriculture, Forestry and Fisheries, the Ministry of Education, Youth and Sport, the Ministry of Health, the Ministry of Public Works and Transport, the Ministry of Social Affairs, Labors, Vocational Training and Youth Rehabilitation, the Ministry of Women's and Veterans Affairs, the Ministry of Environment, and the Cambodian Mines Action Centre. Having a committee at such a high political level to look specifically at indigenous issues is an important step in ensuring a broader understanding of indigenous peoples' situation and is critical in the establishment of more equitable laws and policies. It is unfortunate, therefore, that the IMC was apparently dissolved after the creation of the Department of Ethnic Minorities Development (DEMD).

Nevertheless, the DEMD has played an important role in finalizing the Policy for Highland Peoples' Development and has a potential role to act as an important link between government departments and indigenous peoples. There is a need to raise the profile and capacity of the DEMD as it appears to be at a low rank in the hierarchy of the government.



Forest, Mondul Kiri Province

Photo: Mane Yun

An obstacle for strengthening links between the government and indigenous communities is the weakness on the side of government staff in their understanding of the cultures and histories of indigenous peoples, in linking biodiversity conservation and indigenous resource management systems, ecological agriculture, forest management and regeneration processes, and understanding the significance of swidden agriculture and forest collection activities for peoples' livelihoods. There is also an obvious lack of skills in communicating effectively with local people. Such a lack of understanding and ability to communicate is a crucial issue that must be addressed before effective relationships between the government and indigenous communities can be established and strengthened.

4.1.10 Research and Information Dissemination

Several good examples exist in Cambodia of research work with indigenous communities in the field of natural resource management. There are also many institutions that involve government, local and international NGOs and UN agencies that have developed tools and models of participatory action research. However, the inaccessibility and remoteness of most villages hampers information dissemination. Producing information that is easily understood also poses a challenge. Many indigenous peoples did not, and still do not, have access to formal schooling, making it difficult to promote written materials. More popular forms such as radio programmes and audio-visuals have been found to be most effective.

Box 12: Community Documentation Project

The Ratanakiri Natural Resource Management Network (RNRMN) started a video project to document the situation faced by indigenous communities. In this project, indigenous representatives are given basic training in handling video cameras and editing, and subsequently assigned to take footage of interviews and scenes in their own villages. Video productions are done in Khmer or indigenous languages and translated into English for wider distribution. This activity has proven to be of immense support to communities facing various problems and an important awareness-raising and alliance-building tool.

Wanai Lieng, RNRMN

Box 13: Sharing of Information

The Community-Based Natural Resources Management (CBNRM) Learning Initiative in Cambodia has been considering plans to scale up its efforts in promoting CBNRM in the country and in the region towards the formation of a “CBNRM Learning Institute”. Initiated in June 2001, the CBNRM Learning Initiative has been actively working with local communities in the areas of capability-building, learning, networking, and policy support. The learning initiative is being co-sponsored by the World Wide Fund for Nature (WWF), Oxfam America (OA), and the International Development Research Centre (IDRC), and is being supported by the Regional Community Forestry Training Centre (RECOFTC), the CBCRM Learning and Research Network (LeaRN), and the Mekong Learning Initiative (MLI). A major activity of the CBNRM Learning Initiative has been the holding of case study writing workshops that aim to synthesize insights from CBNRM efforts by local communities, enhance people’s research and analytical skills, and develop and extend the network of organizations and institutions in CBNRM. These case study writing workshops have not only served as a venue for the sharing of experiences among CBNRM practitioners in Cambodia and Southeast Asia, but have also contributed to promoting CBNRM as a viable and important aspect of socio-economic development efforts, particularly in the case of the Royal Government of Cambodia. The workshop outputs have likewise served as basis for the development of relevant policy and legal frameworks in CBNRM.

Regional Newsletter on CBCRM

4.2 Harnessing Indigenous Natural Resource Management

Indigenous peoples’ detailed knowledge can be used in community mapping to identify important cultural sites, terrestrial habitats and place names in their traditional territories. Traditional resource management systems and the traditional legal systems of indigenous peoples can also be integrated with other resource management systems. In remote areas, this traditional legal system could continue to be used to resolve their conflicts.

Although the contribution of traditional knowledge on resource management such as the above has often been quoted, there is still a tendency for these statements to be mere lip service. The ground reality requires not only political will but active engagement, especially from communities themselves. Nevertheless, there are already ongoing efforts, particularly mapping of community protected areas.

4.3 Impact of Natural Resources Development on Women

Box 14: Women and Development

Indigenous women play a major role in agriculture and collection of forest products. While men mostly do the hunting and fishing, and undertake more physical agricultural work, women have to be more knowledgeable and hardworking than men as their work involves the maintenance and supervision of the field crops, and regular harvesting visits to the forest areas. Women also have to collect firewood and water, take care of the children and farm animals, and manage all the traditional activities. Women have good knowledge of resources available in the forest and around their fields.

As more lands are taken for orchards, cash crops, oil palm and rubber plantations, women are severely affected as they lose control of an important part of the surrounding village area which they currently use to gather, collect and cultivate food resources. While collective rights traditionally include women, sometimes even as primary managers, private ownership that has been introduced through the land law could exclude women from ownership and control of natural resources.

In an impact assessment of the Yali Falls dam on the Se San River in Ratanakari Province, indigenous women complained about the loss of their livelihoods. Activities by women such as fishing using scoop baskets and nets to catch small fish and shrimps along the river, collecting of wild vegetables and bird eggs from the riverbanks during the dry season has been severely affected. The dam has also disrupted gold panning and dry-season gardens and women feel they have lost their independence, having to rely on men to supply fish and some other food sources.

4.4 Institutional Structures

For many years, NGOs promoted food security programs including providing seeds of a variety of fruit trees, and promoting livestock rearing and agricultural technologies. Many NGOs and government departments are also working on natural resource management, which have established forest committees. These organizations are: Ratanakiri Network Support Project (RNSP); Highlander Association (HA); Non-Timber Forest Project (NTFP); CIDSE (now called Development and Partnership); ICC; Seila; and CEDAC. At the same, many NGOs are also involved with improving infrastructure, including schools, health centers, and rural roads.

Indigenous organizations in Cambodia are still unable to effectively engage with governments, local and international NGOs and UN agencies. The next four sub-sections will look at the institutions involved in natural resource management and the mechanisms for engagement.

4.4.1 Government

Cambodia's current institutional approach on natural resource management is to assign responsibility for state resource management to sectoral ministries at the national level, who subsequently assign it through the provincial departments. Provincial governors also exercise control over state resources, particularly in areas where ministries do not have active management control. There is a lack of active and sustained mechanisms to coordinate among these ministries and governors, which are very dependent on financial resources from international donors. As seen in Chapter 2, each ministry would be guided by the laws and decrees.



Brau land use planning workshop, Kok Lak Commune, Ratanakiri Province 1998

Photo: Chris Erni

4.4.2 Community Organisations

The growing capacities of a number of indigenous networks such as the Indigenous Forum and associations have played an important role in raising the awareness of communities, especially in remote areas. Of particular importance are the roles in organizing activities to enable communities to understand the provisions in the land law, forest law and in international human rights instruments on indigenous peoples' rights as well as the ongoing processes such as the policy on indigenous peoples' development and the draft protected area law. Indigenous networks and associations could also play a role in encouraging collaboration with local and international NGOs and donors to enhance the capacity of community representatives and organizers to improve knowledge and skill to dialogue with the government, investors and donors as well as assist community representatives in attending relevant workshops and conferences at the national and international levels.

Community organizations at the village level have an important role in promoting traditional natural resource management systems and strengthening traditional authorities and mechanisms for decision-making by the community. This implies the active promotion and inter-generational transfer of knowledge on indigenous culture and identity. Village-level community organizations also need to coordinate their engagement and to participate effectively in various processes to voice their perspectives on community development to guarantee the rights and interests of indigenous peoples.

Box 15: Highlander Association

The Highlander Association (HA), set up as a network, is governed by committees at the village and commune level to strengthen solidarity and traditional practices such as reciprocity within communities, be it exchange of food or labor. It has conducted studies of indigenous peoples' livelihoods, history and traditional culture. It also conducts workshops and other educational activities to discuss land tenure and natural resource management issues. Where requested, it also promotes income generating activities such as cashew nut marketing, animal husbandry and credit project as well as the collection and marketing of forest products. Members of the HA are actively involved in the process of registering communal land titles and in urging the government to implement laws and develop legal mechanisms to protect natural resources and indigenous peoples' rights.

Dam Chanty, Highlander Association

Box 16: Roles of Traditional Leaders

Traditional leaders govern the communities, including natural resources, using customary law. Traditional leaders mobilize labor and other resources to support community members during harvest, planting and ceremonies. They also play a role in supporting weak community members. Particularly, when conflicts arise, they have to bring the offenders and offended together in order to find mutually agreed settlements. The elders and women healers, who are also considered traditional leaders, conduct spiritual ceremonies, communicate with spirits and pray for the good health of community members. Leaders are also responsible for transferring traditional knowledge to young people. For many years now, traditional leaders have increasingly smaller roles and authority in governing communities, with the government claiming more and more power. It is the government who created and gave authority to the local administrative structure which is now key in the management of local areas.

Pat Chan Seng, *Tampuon*

4.4.3 Local, National and International NGO's

Many NGOs have been active in promoting the land law, forest law and indigenous peoples' rights, focusing their efforts on the right to utilize, own and control land and natural resources. NGOs that have good relations with government have also facilitated engagement between communities and relevant departments. NGOs and the government SEILA program established community forests and also strengthened the capacity of natural resource management (NRM) committees. These NRM committees play an important role in facilitating the community in establishing rules and regulations for the community forest. The NRM committee also developed the participatory land use plan (PLUP), assisted in demarcating community boundaries, provided classification of several types of land use and protection areas. However, the committees largely failed in these activities due to lack of support from local authorities (commune councils) and community members.

A number of communities have also expressed the need for NGOs to engage in a more sustained campaign for the recognition of indigenous peoples' rights to natural resources, and to pressure the government to enforce laws have been adopted and which are supposed to protect their interests.

Box 17: NGO Forum

The NGO Forum is made up of local and international non-governmental organizations grounded in their experience of humanitarian and development assistance to Cambodia. The NGO Forum exists for information sharing, debate and advocacy on priority issues affecting Cambodia's development. The NGO Forum has an important role to highlight the impact of development processes and economic, social and political changes on Cambodians. Under the Land and Livelihood Programme of NGO Forum there is a project on indigenous peoples and a project on forest livelihoods. The former is aimed at cooperating with various organizations to ensure that the capacity of indigenous peoples to advocate for their own rights is strengthened and that their concerns are heard and acted upon by the government, donors and the wider community, particularly in relation to their rights to land and natural resources. The forest livelihood project strives to enable local communities living in and near forest areas to gain secure tenure over the forest resources that they have traditionally relied upon for their social, economic, and cultural development.

www.ngoforum.org.kh

4.4.4 Donors and UN Agencies

Donors and UN agencies played a very important role in shaping the laws and policies on natural resource management in Cambodia. Further technical and financial support to clarify these laws and policies to ensure their feasibility for implementation on the ground, particularly with and for indigenous peoples, has been significant. Nevertheless, it is important to recognize that gaps in understanding indigenous systems, which also exist for donors and UN agencies, need to be addressed so as to avoid imposing western ideas on local institutions and customary laws and practices. The concerns that donors and UN agencies themselves have identified, such as having effective consultations, providing continuity and avoiding financial dependence, need to be seriously addressed in order to ensure that continued support is effective.

5. Challenges and Drawbacks

This Chapter focuses on cases that illustrate challenges and drawbacks in the implementation of laws and policies on natural resource management.

5.1 Illegal Land Sales and Land Grabbing

The foremost challenge in relation to indigenous peoples and NRM today is the illegal sale and acquisition of land - "land grabbing". Communities, concerned government officials, international agencies and NGOs concur that if this land grabbing continues, indigenous peoples are at risk of being displaced and all past efforts on legal and policy change and poverty-reduction strategies will be rendered useless. Many indigenous communities are being deceived daily into losing their lands, although there is a growing awareness within indigenous communities of the danger of illegal land acquisition, as expressed by the statement by a gathering of indigenous peoples in 2004



Tampuen field hut, Yeak Lom Commune, Ratanakiri Province, 1998

Photo: Chris Erni

Box 18: Indigenous Peoples' Statement on Land Sales

Numerous illegal land sales and land grabbing have been identified in Ratanakiri and Mondolkiri as confirmed by indigenous peoples at the Indigenous Forum in 2004. A statement by the NGO Forum to draw the attention of the government and developers in October 2004 stressed that this contradicts the intention of the 2001 Land Law and the policy priorities identified by the Poverty Reduction Strategy of the government. To illustrate the nature of the problem, the statement mentioned examples such as the issuance of 70,000 ha of land concession over the land of the Suy indigenous people in Kompong Speu; 1,400 ha and 2,000 ha of gem mining concession over indigenous peoples' land in Lumphat district and Borkeo district respectively in Ratanakiri Province, and 200,000 ha concession proposed for Mondolkiri Province.

The statement said that the traditional management systems of indigenous communities are being destroyed by individual land sales of community land mainly to powerful businessmen. Land sales were approved by individuals within the community but in an environment of insufficient information, disinformation, and sometimes threats and intimidation. In other cases, the local authorities (commune councils) arbitrarily sell land without informing the people living on the land, while in other cases land is forcibly occupied by powerful indigenous and non-indigenous individuals with strong connections with powerful individuals. Indigenous communities are demanding a moratorium on land sales and on granting land concessions that affects traditional lands until the adoption of the sub-decree on both indigenous collective titles and economic concessions.

Indigenous communities also want the forests and water resources traditionally used by them to be recognised as part of the traditional management and ownership of indigenous communities. Respect for traditional structures is also urged to ensure community solidarity and cultures are kept strong, and for new governance structures to respect and consult traditional systems.

www.NGOForum.org.kh

5.2 Developing Partnerships and Mutual Learning

Information dissemination, as an important mechanism for building partnerships and mutual learning, is a major challenge, due largely to language and cultural barriers. Most indigenous peoples lack access to formal education and Khmer literacy levels are low. In strengthening links between government and indigenous communities, a major challenge includes encouraging government staff to spend more time in villages, to learn from local people and increase interactions with elders in the communities.

Meanwhile, the formulation of policies for the development of indigenous peoples faces major challenges from the lack of detailed resource use plans to guide State resource management decisions, and lack of capacity for monitoring resource use and revenue availability. A report on the latest National Consultation Report states that “the indigenous representatives seemed to get lost in the midst of these intellectual debates on the meanings of words and phrases. Some of them seemed to have difficulty to read the documents, hence clearly limiting their participation. All these are just observations without real discussion due to limited timeframe”. This indicates that there was a lack of information on the policy paper despite the length of time it has been in circulation. In circulating documents, local languages should be used and promoted as much as possible through appropriate media such as community radio and audio-visual materials discussed earlier.

Another drawback is misunderstandings about indigenous land use practices:

Misunderstandings abound regarding land use practices of indigenous peoples. Outsiders and government officials assume that the local people are nomadic, and that their farming systems are environmentally destructive, with low agricultural productivity. Even though humans have lived in and helped shape large areas of Virachey National Park, for example, within the wilderness paradigm it is heretical to suggest that swidden systems might have had, and could have, a role in conserving overall landscape biodiversity. The real question about the future role of swidden is: can swidden be used to stimulate the ecological processes that can best achieve the most productive food webs and the most biodiversity habitats both for community use and wildlife? (Ironsides and Baird, 2003)

More recently in Cambodia, efforts on collaborative management in protected areas have received a large amount of interest among government, international NGOs and funding agencies. However, the collaborative management initiatives in protected areas where indigenous peoples have been residing are facing major challenges, as the case in Virachey National Park illustrates.

Box 19: Collaborative Management, Indigenous Peoples and Protected Areas

Community members say collaboration so far has only been shallow and that a lot of what the Park staff say is empty because there has been a lot of discussion but little implementation. People feel the Park staff do not allow them to understand too much (access sufficient information) and that the staff work very far from the people. Kok Lak people compare the NTFP's regular partnership with the community with the partnership efforts of the Park staff in Virachey NP. Meetings are only once every two to three (up to six) months. Sometimes meetings are short: one to two hours. People say that if they have long meetings, the Park staff and rangers are afraid people will ask a lot about illegal activities in the Park. People suspect Park staff of being involved in illegal activities. Before the staff did not have anything, now they have motorcycles and houses.

Community representatives say there is no justice or equality in the management of the Park. Examples used to illustrate these feelings included the fact that no Kok Lak people are employed, only Lao and Khmer people; that the community committees have been chosen to assist with Park activities but there have been no meetings with them for nearly a year; that a signed agreement was made about the boundary for a CPA but now they are told that people do not have any right to manage that area and must get a permit to enter anywhere in the Park; and that there is still no assistance with agriculture and with buffaloes for lowland rice growing despite promises by the Park staff prior to the establishment of the Park.

Now, since the recent logging, villagers are starting to say that rangers want to stop people from going into the Park because they can make partnerships with local businessmen/companies (made up of Police, Military Police, Chinese traders) to exploit the resources of the Park. At present, small scale loggers are cutting Granugn wood in the forests to the south of the Park and people are worried that in the future this activity will encroach into the Park. Park Rangers are telling people not to hunt animals, and will even be stopped if they fish. People, however, see the rangers going on patrol and then they hear mines and guns going off in the forest. People also say they have seen the remains of sambar deer, gibbon and monkey in the forest that have been eaten by the rangers. Local villagers have also followed up on a pangolin that was confiscated from a villager. When they asked the rangers they were told that the pangolin was freed but some villagers saw the animal in a local Chinese wildlife traders' house. Such observations and discrepancies serve to increase the mistrust with which communities view the establishment and management of National Parks.

Ironside and Bunma 2004

5.3 Coordination between Government Departments

Another major challenge is the lack of coordination between departments dealing with natural resource management. One example is the pilot project to title communal land in three areas in Ratanakiri and Mondulakiri. The departments involved are the Ministry of Environment (MoE), Ministry of Agriculture, Forestry and Fisheries (MAFF) and Ministry of Land Management Urban Planning and Construction (MLMUPC). However, only the MLMUPC was actively coordinating with NGOs and the community to implement the project. To ensure success of the project and extension to other communities, it is imperative to have all three departments involved. Resources would need to be set aside for such inter-departmental coordination.

5.4 Land Alienation for Logging and Plantations

As mentioned, the most serious problem that indigenous peoples face is land alienation. Large scale land alienation occurred during the last two to three years after the roads were built to Ratanakiri and Mondulakiri provinces, when newcomers moved in and land prices increased. Alienation of land stemmed especially from the government planning development through land concessions. As a consequence of the land alienation, indigenous communities are deprived of their lands, threatening their very existence as peoples. Associated with indigenous land alienation and the expansion of cash cropping agriculture, deforestation is becoming a serious environmental problem.

Many communities continue to be cheated by others - be they politicians or business people - to sell their land. More recently, communities from Ratanakiri and Mondulakiri have organised peaceful protest actions to draw the attention of the government to their plight. While such actions received consideration from local government officials, the central government still tend to use police action against the communities.



Kreung spirit forest, Kralah village, Ratanakiri Province, 1998

Photo: Chris Erni

Box 20: Monitoring Land Alienation

The agency responsible for overseeing the implementation of the Forestry Law and the Sub-Decree is the Ministry of Agriculture, Forestry and Fisheries (particularly its Department of Forestry and Wildlife). In this respect, there are concerns that the Ministry's overt pro-exploitation policies conflict directly with its responsibility to implement the community management goals of the 2003 Sub-Decree. Despite the passage of the new Forestry Law and a moratorium against logging announced in January 2002, the acute problem of forest mismanagement persists. For one thing, the government continues to grant timber concessions outside the revised legal framework and has also failed to terminate many non-performing concessionaire contracts. The few contracts which were in fact terminated in recent times appeared to involve companies which were either bankrupt or not aligned with the 'right' political groupings.

Overall, illegal logging by companies backed by political clout persists, and provisions of the Forestry Law are flagrantly breached. While the Forestry Law requires concessionaires to produce Strategic Forest Management Plans and Environmental and Social Impact Assessments, the government has reportedly been willing to accept assessments of extremely low quality. In some instances, assessments had simply been copied from previous reports. In this regard, the World Bank itself has been severely criticized for releasing loans to the government in breach of its own forest-reform conditions. The Forestry Law itself contains inherent weaknesses – one unsatisfactory feature is the failure to distinguish between “natural” and “planted” forests. Thus, logging companies can simply claim to be engaging in reforestation and disguise the reality, that is, the destruction of villagers' community forests, grazing land, commons and fallows, to be replaced by even-aged stands of species of fast-growing (but often alien) trees. The influence of vested interests over the forestry sector is also illustrated by the government's decision in April 2003 to terminate the representation of an independent NGO monitor in the Forest Crimes Monitoring Office. This Office had been established to monitor illegal logging activities and comprised officials from the Department of Forestry and Wildlife and the Ministry of Environment, together with Global Witness - as an independent observer. Subsequently, Global Witness was fired following conflicts with the government over the documentation of several cases of connivance by government officials in illegal logging.

5.5 Large-scale Development Projects

Another major challenge with respect to indigenous peoples and natural resource management is the implementation of large-scale development projects such as dams without obtaining the consent of affected communities. In some cases, the appeals and suggestions of indigenous peoples are disregarded. Problems of lack of consent and redress are compounded in projects that are trans-boundary, involving neighboring countries.

Box 21: Indigenous Voices Falling on Deaf Ears in Dam Construction

Extreme problems have been reported since mid 1996 with the impact of hydropower dams located on the Sesan River in Vietnam, which flows through Ratanakiri and Stung Treng provinces in the northeast of Cambodia. The dams have resulted in deaths from flooding, erratic river levels, degraded water quality, increased health problems, a severe decline in fisheries and riverine biodiversity, and these effects continue to threaten the livelihoods and lives of the people who depend on the river. While these problems continue, they are likely to be exacerbated by more dams that have already been commenced or are being planned in Vietnam and Lao PDR, on the Sesan River, Srepok River, Sekong River and Mekong River.

These dams are being planned or built without adequate assessment of past impacts, without rectification of the problems of existing dams, and without first conducting comprehensive future environmental and social impact assessments. International donor agencies and multi-lateral banks continue to support and validate their construction without funding the construction directly by supporting associated projects such as power line construction and funding feasibility studies. In this way, large international institutions such as the Swedish International Development Agency, the World Bank, the Japanese Bank for International Cooperation and the Vietnamese and Lao governments, along with funding from the Russian and Ukrainian governments, effectively undermine the lives of indigenous peoples in northeast Cambodia. In addition, it has been announced during the past year that the Cambodian and Vietnamese governments have signed agreements for the construction of two hydropower dam projects, which will be built on the Sesan and Srepok Rivers inside Cambodia. There are very strong local concerns that industrial power generation and the model of industrial development that it supports have profound and long-term negative impacts on the lives of indigenous peoples.

All of these dams are being built despite the demands of the communities who live along these rivers. The demands of the villagers include the restoration of the natural flow (of the river); compensation for past harm; no more dams until agreement is made with the villagers; improvement of the notification system; benefit sharing and economic development; insurance if the dam breaks; and greater participation in environmental governance.

In addition to dams affecting the northeast, a survey by the Cambodian Ministry of Industry, Mines, and Energy has proposed hydro-power dam projects in numerous areas throughout Cambodia. If constructed, these dams will affect indigenous peoples in at least eight provinces.

Graeme Brown, CPAC

5.6 Enhancing Capacity of Indigenous Communities

In cases of indigenous land alienation, it is very clear that indigenous communities do not know that the Land Law grants them rights to collective property under the responsibility of their traditional authorities and their mechanisms for decision making. If they were aware of this they would not be so vulnerable to the threats of brokers. It is also clear that they do not know that the Land Law prohibits indigenous common property alienation, so a contract to sell indigenous land has no legal effect, because the subject matter of the contract is illegal.

Indigenous peoples have expressed as a problem the loss of their culture, languages, customs, and traditional authorities. It seems that many groups of indigenous peoples are not aware of the legal statutes in force that protect their rights. Further, they are not familiar with the institutional channels to pursue their demand for the enforcement of those rights. A handful of indigenous students at the local universities and colleges and indigenous community leaders have therefore found it extremely important to gain exposure to relevant laws, international instruments, as well as learn from the experience of other indigenous communities outside of Cambodia..

5.7 Harnessing Indigenous Livelihood Strategies

If poverty reduction is to be effective, indigenous peoples' customary use of natural resources in their territories needs to be harnessed in partnership with conservation strategies. The challenge is to use a combination of effective joint management strategies and recognition of the rights of communities over their resources.

Box 22: Access Rights to Non-Timber Forest Products (NTFP)

There should be recognition of local community rights to control the use of several NTFPs in National Parks. In the recent past, exploitation of NTFP in National Parks has been anarchic and destructive. Part of the reason for this has been the inability of local communities to control access to important resources, and, therefore, to implement their own form of sustainable management. The recent effort by the park and communities to control the destructive harvesting of malva nuts is a good example of the kinds of joint management approaches that can be successfully implemented. However the park needs to go further in granting local communities management rights, so that they have an incentive to sustainably manage natural resources, knowing that they will be able to benefit from them in the future if they are to manage them properly now. People wish to protect for their own future use, and more specifically, to protect from unsustainable exploitation and destruction by outside interests. Due to the historical records of communities collecting and trading these forest resources for considerable periods of time, several of these NTFPs could be considered to be the "cultural inheritance" of the *Brao*, *Lun*, *Kavet* and *Kreung* people.

Ironside and Baird, 2003

5.8 Use of Criminal Laws and Police in Land Conflicts

Although there are specific laws regulating the use of various natural resources, these laws are often not used when conflicts arise. Instead, the police are brought in and criminal laws exercised, which are often more expedient in dealing with indigenous peoples who are struggling for their rights to their land.

Box 23: Unjust Treatment of Indigenous Peoples

There is a considerable number of indigenous people in prison. Several prisoners stated that they had been tortured during the period of detention in police custody. The President of the Court and the prosecutor told us of the lack of lawyers in the province to defend the accused persons during the trial. Even though the law states that a defendant is entitled to legal representation, indigenous minorities have faced trials without lawyers or translators. Prisoners complained that they did not have resources to pay for lawyers or the other fees that they were asked to pay. An indigenous prisoner told us that his wife had to sell all the family property (two buffalos and lands) to pay for all the costs related to his case. He has eight children, and now he has no property to support his family.

Pathways to Justice, p103

5.9 National Implementation of International Instruments

The presence of several UN agencies and international NGOs in Cambodia has provided the necessary financial and technical support to indigenous organizations and provided an avenue to share international legal instruments such as the United Nations Draft Declaration on the Rights of Indigenous Peoples. The World Bank (WB) and the Asian Development Bank (ADB) have also adopted policies to recognize and respect indigenous peoples' rights, and have determined that their policies apply to indigenous peoples in Cambodia. However, the major challenge is to ensure that projects supported by such agencies and bodies to implement human rights standards are not met with mere lip service by local and national government officials. One observed drawback is the implementation of pilot projects that are money-driven and which have not seen long-term commitments or benefits.

The International Labor Organization (ILO) established an office in Cambodia to promote ILO Convention 169. It has been a major challenge to get government departments to support the activities of this office, even the promotion of the UN-declared International World Indigenous Peoples' Day on August 9 each year. The ILO office and the Department of Ethnic Minorities Development, which organized an event to celebrate the international day in 2005, were disappointed when several indigenous representatives traveling from several provinces to Phnom Penh were not allowed access by the local authority and stopped by police, just one instance of a regularly observed tendency on behalf of some parts of the police to obstruct and hinder indigenous peoples' organizations and associations.

Notes

1. In this report, government (particularly the Department of Ethnic Minorities Development), NGO and indigenous peoples representatives agreed to the use of the term “indigenous peoples”. Some documents still use the term “ethnic minorities” and are left as it is when the document is quoted. “Ethnic minorities” is not otherwise used as it is often confusing when used in the context of Ratanakiri and Mondulakiri where they represent the majority (67% and 71%).
2. Article 23, Land Law of 2001, Cambodia.
3. Article 11, para (ii) and Article 37, para (i).
4. Article 5, Sub-decree on the Community Forestry Management (2003).
5. Quoted from Suzie Brown, et al.
6. Institute of Statistics, Cambodia, 1998.
7. The definition of “indigenous” does not include Chinese, Vietnamese or Cham people.
8. This figure is likely to underestimate the numbers of indigenous minorities in Cambodia, as the data were only inferred from a question about the mother tongue of the respondent. In some areas of the country people may not have felt comfortable with admitting they were an ethnic minority (Helmert and Wallgren, 2002).
9. Articles 48 to 51 of Chapter 10 of the Forest Law of 2002.
10. Article 58, Constitution of Cambodia.
11. Environment: ETAP Reference Guide Book, p. 491.
12. Article 8, Constitution of Cambodia.
13. ADB, Indigenous peoples/Ethnic Minorities and Poverty Reduction: Cambodia, p.13.
14. “An indigenous community is a group of people that resides in the territory of the Kingdom of Cambodia whose members manifest ethnic, social, cultural and economic unity and who practice a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use.”
15. “An individual, who meets the ethnic, cultural and social criteria of an indigenous community, is recognized as a group member by the majority of such group, and who accepts the unity and subordination leading to acceptance into the community shall be considered to be a member of the indigenous community.”
16. The Cadastral Department was brought to function under the direct control of the Council of Ministers in 1990 from the Ministry of Agriculture.
17. Suzie Brown, et al, Legal Issues Related to Registration of Lands of Indigenous Communities in Cambodia, p 31.
18. Article 27 states: “For the purposes of facilitating the cultural, economic and social evolution of members of indigenous communities and in order to allow such members to freely leave the group or to be relieved from its constraints, the right of individual ownership of an adequate share of land used by the community may be transferred to them. Immovable property that is subject to such private individual ownership cannot fall under the general definition of public properties of the State public property category.”
19. (i) Any property that has a natural origin, such as forests, courses of navigable or floatable water, natural lakes, banks of navigable and floatable rivers and seashores; (ii) Any property that is specially developed for general use, such as quays of harbors, railways, railway stations and airports; (iii) Any property that is made available, either in its natural state or after development, for public use, such as roads, tracks, oxcart ways, pathways, gardens and public parks, and reserved land; (iv) Any property that is allocated to render a public service, such as public schools or educational institutions, administrative buildings and all public hospitals; (v) Any property that constitutes a natural reserve protected by the law; (vi) Archeological, cultural and historical patrimonies; (vii) Immovable properties being royal properties that are not the private properties of the royal family. The reigning King manages royal immovable properties.
20. See Article 14.

21. See Articles 16 and 17.
22. Suzie Brown, et al.
23. Katrin Seidel, et al.
24. Article 29.
25. The development of CBNRM in Cambodia, p. 68.
26. Country and Regional Perspective on Resource Management.
27. Independent Forest Sector Review, p. 42.
28. Article 1, Forest Law.
29. Singapore Yearbook of International Law (SYBIL) [2004] Vol. VIII, pp. 177-192 Alan Khee-Jin Tan
30. The development of CBNRM in Cambodia, p. 70.
31. Article 4 Forest Law.
32. Article 3.
33. Article 5.
34. Article 7 (3).
35. Article 8.
36. Production Forest to be maintained in a manner to allow for the sustainable production of timber products and, NTFPs, and protection as a secondary priority may consist of the following: Forest Concession; production forest not under concession; Rehabilitation Forest; forestland for reforestation or tree plantation; reserved forestland for regeneration; and degraded forestland (Article 10).
37. Protection Forest shall be maintained primarily for protection of the forest ecosystem and natural resources therein. However exceptions are made for local communities who have traditional user rights to collect timber products and NTFPs within the Protection Forest. It may consist of: reserved forest for special ecosystems; research forest; forest for regulating water sources and forest for watershed protection; recreation forest; botanical gardens; and religious forest (Article 10).
38. Conversion forest is idle land, comprised mainly of secondary vegetation, not yet designated to any sector, that shall be temporarily classified as Permanent Forest Reserve until the RGC designates the land for a specific use and purpose.
39. Article 11.
40. Mary Hobley – Forest.
41. Mary Hobley - Forest
42. Biodiversity and Protected Areas Management Project. “Cambodia’s Protected Areas.”
43. ICEM, Cambodia National Report on Protected Areas and Development.
44. Draft Article 1
45. Article 2
46. Article 7
47. Article 4
48. Article 4
49. Article 13
50. A zone for conservation of rare, endangered, vulnerable and threatened animal and plant species and a delicate ecosystem. Except for authorized officials and scientific researchers with permission, entry into this area is prohibited. Article 13 (1).
51. The zone adjacent to the core zone, valued for conservation of natural resources, ecosystem, slope and landscape. Entry is permitted after obtaining advance permission as also the use of forest products, under close monitoring, for livelihood by local communities and indigenous ethnic minorities which do not have strong impacts on the biodiversity. Article 13 (2).
52. A zone of high economic value contributing to national economic development, to the management and conservation of the protected area itself, and to promoting the living conditions of local community people and indigenous ethnic minorities. It also includes conservation of national culture and heritage; Ecotourism; Wildlife conservation and recreational services; Restoration of biodiversity resources; Protected area community; Botanical garden; Geology; Infrastructure development, including irrigation, reservoir, hydroelectricity, electrical network; Environment-friendly resin exploitation in the protected area and surroundings. Article 13 (3).
53. A zone for socio-economic development of the local communities and indigenous minorities with existing houses, rice fields and vegetable gardens.

54. Article 14
55. Article 15.
56. Article 25.
57. Article 26.
58. Article 27
59. Article 14
60. Article 9
61. Article 24
62. Article 28
63. N.P. van Zalinge
64. N.P. van Zalinge
65. Country and Regional Perspective on Resource Management
66. Rivers, tributaries of rivers, lakes, streams, small rivers, canals, inundated forest areas or water channels, natural ponds, holes in ground, which having the water source from the river, tributaries of the rivers, lakes, streams, small river.
67. It extends from the coastline to the outer borderline of the economic zone of Cambodia.
68. Macfadyen, G., Cacaud, P., Kuemlangan, B. (2005).
69. Passed January 12, 2001, and promulgated March 19, 2001
70. Article 5
71. Passed on 30 May 2001, and promulgated July 13, 2001
72. If there are people living in licensed operating areas for mining resources before an operating license is issued, the mining licensed concessionaire must pay just and equitable compensation to owners in case of impact upon land ownership. This compensation must arise from the agreement between owners and the concessionaire.

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Photo: PACOS Trust

Malaysia

The Changing Status of Indigenous and
Statutory Systems on Natural Resource
Management

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Centre for Orang Asli Concerns



Malaysia

The Changing Status of Indigenous and Statutory Systems on Natural Resource Management

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Bridging The Gap

Malaysia

The Changing Status of Indigenous and Statutory Systems on Natural Resource Management



Semai women carrying rattan across a bamboo bridge, Ulu Woh, Perak

Photo: Colin Nicholas

1. Indigenous Peoples of Malaysia

1.1 Indigenous Peoples of Sabah

Based on the 2000 census, an estimated 39 indigenous groups make up about 60 percent of the estimated 2.6 million total population of Sabah. They speak more than 50 languages and 80 dialects, with the Dusunic, Murutic and Paitanic groups the largest among them.

In 1970, the term '*bumiputera*', literally meaning 'sons of the soil' was created primarily to facilitate the implementation of Malaysia's New Economic Policy (NEP).¹ The special position and privileges as *bumiputera* accorded to the Malays in Peninsular Malaysia were extended to all native groups in Sabah and Sarawak in the early 1970s but the term is objectionable to many indigenous peoples of Sabah since they are non-Muslims and non-ethnic Malays. The Indigenous Peoples Network of Malaysia and other indigenous organizations now use the Malay term '*Orang Asali*' or 'indigenous/original people' as

¹ The NEP was introduced to strengthen unity through (1) reducing and ultimately eradicating poverty by increasing the level of income-expanding opportunities for employment and (2) restructuring society in order to correct the economic imbalance between the different ethnic groups.

a collective term to refer to themselves. This term is accepted and used by the Malaysian Human Rights Commission, but there is still debate among some government agencies.

However, indigenous peoples in Sabah often interchange the term ‘indigenous/*orang asali*’ and ‘native/*anak negeri*’, and thereby accept the use of the latter in many legal documents. The Sabah Native Ordinance 1952 outlines who is a ‘native’. The definition of ‘native’ is wide and includes, *inter alia*, any person whose parents, or at least one parent, is indigenous to Sabah and has been living as a member of a native community. It also includes indigenous peoples of Sarawak, Brunei, Indonesia, Singapore and the Sulu group of islands in the Philippines Archipelago who have settled in Sabah before 1963 and have been members of a native community in Sabah for three to five years consecutively preceding the claim to be a native of Sabah.

Basic Information about Sabah

Covering an area of 73,619 square kilometers (73.7 million ha), Sabah is the second largest of the 13 states in the Federation of Malaysia. Sabah occupies the northern part of the island of Borneo and borders Sarawak in the west and Indonesia in the south. Together with Sarawak, Sabah makes up East Malaysia, which is separated from Peninsular Malaysia by the South China Sea. The climate of Sabah is hot and humid throughout the year and is not affected much by severe storms and typhoons. The landscape is highly dissected and steep and about 60 percent of Sabah’s area is mountainous. Most of the lowlands are confined to the coastal region. Both the coastal belt and mountainous slopes are heavily forested, and tropical rainforest of one type or another characterizes most of the state. Sabah has been called ‘the land of biodiversity’ in reference to the State’s rich natural resource endowment contributing to one of the highest species-biodiversity in the world.

Archaeologists estimate that Sabah was populated at least 30,000 years ago when the early inhabitants frequented the Madai limestone caves for shelter and food. Hunting and gathering were probably their main economic activities with little or no agriculture. Subsequent documentation of communities living in the coastal plains of Sabah indicates that they were largely self-reliant, producing food and other necessities for themselves. Forest and land were the main resources, which everyone had rights to use, cultivate or occupy. A communal way of life was practised and decision-making was more by consensus than enforced authority.

Increasing piracy, invasions, slave-raiding and oppression from the Brunei and Sulu Sultans, who considered themselves the owners of the land and the people, forced communities to move inland. As trade developed, combined with feudalism, people had to produce not

just for subsistence and for barter, but also to pay poll taxes and custom dues that were imposed by the Sultans, Datus and their functionaries. Very often people responded to these oppressive acts by getting together and fighting back, though not always successfully.

From the 17th until the early 20th century, slavery was a thriving trade, while piracy was rife from the 18th century onwards. The commercial potential of Sabah's natural resources has been a decisive factor in shaping the State's history. Until 1877 Sabah was part of the Brunei Empire, but that year the sultans of Brunei sold the northern part of Borneo (Sabah) to a British trading company. The British government granted the trading company a Royal Charter and the North Borneo Chartered Company was established. In 1888, control was consolidated when North Borneo became a British Protectorate. As any other company, the main objective of the Chartered Company was to secure a profit. The expanding market for tobacco and later rubber stimulated European interest in setting up plantations in Sabah. The Chartered Company realised that to achieve this, it was necessary to clarify legally the boundaries between the land used by the natives and the land available for such plantations. Thus, as part of the aim to develop agricultural production and to gain access to resources, a system of codification and land titling started under British rule. After the Japanese Occupation during World War II, Sabah became a British Crown Colony in 1946 and the exploitation and control of Sabah's natural resources, especially timber and farmland, continued. In August 1963, Sabah became independent, but joined the Federation of Malaysia on September 16 in the same year.

Table 1. Sabah's Indigenous Communities

Borneon Group	Sub-Groups
DUSUN	Dusun, Coastal Kadazan, Kimaragang, Eastern/Labuk Kadazan, Suang Lotud, Kujiau, Tatana, Dusun Sungai, Tangara, Bisaya, Rungus, Dumpas and Sonsogon
PAITAN	Tambonuo, Upper Kinabatangan, Sinabu, Lobuu, Rumanau, Abai Sungai and Lingkabau
MURUT	Kolod/Okolod, Gana, Kalabakan, Sabangkung, Serudung, Tagal, Sumambu, Baukan, Nabai, Timugon, Paluan and Lundayeh
DAYAK	Iban
Non-Borneon	Sub-Groups
Originally from the Philippines	Bonggi (Palawan), Illanun (Lanao, Mindanao), Suluk (Jolo), Tausug, Bajau (Southern Philippines)
Originally from Indonesia	Bugis (Sulawesi), Idaa'an, Tidung, Cocos (Cocos Islands, Australia) and Kedayan

1.2 The Orang Asli of Peninsular Malaysia

The Orang Asli (literally Original or First Peoples) are the descendants of the inhabitants who occupied the Malay Peninsula before the establishment of the Malay kingdoms. Comprising 19 ethno-linguistic groups and grouped under Negrito, Senoi or Proto-Malay, today they number 147,312 or 0.5 percent of the national population. While the majority live on the forested slopes of the Main Range, Orang Asli communities also live in the alluvial plains, along the coasts and within urban areas. Once an autonomous people, their history has been one marked by the designs of others to covet their natural resources, labour, knowledge or territory.

Archaeological evidence links most of the Orang Asli to the Hoabinhians who lived between 8,000 and 1,000 BC during the Middle Stone Age. The largely nomadic foraging Negritos are direct descendants of these early people. The Mongoloid Senoi are descendants of both the Hoabinhians and the Neolithic cultivators who entered the Malay Peninsula from the north around 2,000 BC. To this day, the Negrito and Senoi peoples speak Austroasiatic languages of the Mon-Khmer sub-group, manifesting their ancient connection with mainland Southeast Asia.

Between 2,000 and 3,000 years ago, the southerly groups came in contact with the seafaring peoples from Borneo and the Indonesian islands. Some of these Orang Asli who traded with the Austronesian-speakers assimilated with them, hence the term proto-, or early-, Malays. The exception perhaps is the Orang Kuala group who are said to have migrated from Sumatra about 600 years ago.

The ancestors of today's Orang Asli never lived in isolation nor were they removed from the political situation of the day. As early as the 5th Century AD, for instance, the Orang Asli played a significant role in the Malay Peninsula's economic history as collectors and traders of primary products. Being the only ones who had the needed knowledge and skills to locate and extract these commodities, the Orang Asli were sought by traders from India, China and the Mon civilisations in southern Thailand. Forest products such as resin, camphor, ivory, rattan and even gold were bartered for salt, cloth, beads and iron tools. Sea products – such as the rare black branching coral known to the Malays as *akar bahar* and the famed *tripang* or sea slug used as an ingredient in Chinese soups and medicinal preparations – were also traded by the coastal Orang Asli.

Some of the Orang Asli groups also played very dominant roles in the administration and defence of earlier political systems in the Malay Peninsula. Thus when Parameswara with his following appeared in Malacca from Tumasek (as Singapore was called) and later

established one of the first Malay kingdoms, there was already a small fishing village at the site, whose population included the Orang Laut. In fact, Hang Tuah, the most famous Laksamana in Malay folklore, was himself of Orang Laut background. For centuries to follow, the Orang Laut devotion to the Malay rulers of Malacca, aided via judicious marriages into the royal family itself, was a crucial factor in the kingdom's preservation and prosperity. Marriages between Malay rulers and Orang Asli brides were also not uncommon. Aspiring heirs in Negri Sembilan, for example, had to resort to claiming Orang Asli (matrilineal) ancestry in order to be eligible for hereditary positions.

Table 2: Orang Asli Population, 1999

Sub-Group	Population
<i>Negrito</i>	
Kensiu	245
Kintak	1570
Jahai	1,244
Lanoh	173
Mendriq	167
Batek	1,519
	3,507
<i>Senoi</i>	
Semai	34,248
Temiar	17,706
Jah Hut	2,594
Chewong	234
Mah Meri	3,503
Semaq Beri	2,348
	60,633
<i>Aboriginal Malay</i>	
Temuan	18,560
Semelai	5,026
Jakun	21,484
Orang Kanaq	73
Orang Kuala	3,221
Orang Seletar	1,037
	49,401
	113,541

However, the rise of the Malay sultanates coincided with a trade in Orang Asli slaves that prompted many Orang Asli groups to retreat further inland and to avoid contact with outsiders. For the most part, from this time the Orang Asli lived in remote communities, each within a specific geographical space (such as a river valley) and isolated from the others. They identified themselves by their specific ecological niche, which they called their customary or *adat* land, and developed a close affinity with it. Much of the basis of their culture and religion is derived from this close association with their particular environment. Their basic economic activities – hunting, gathering, foraging, swiddening and some trade – remained unchanged for a long time. Some Orang Asli still practise these activities with little modification.

Colonial Impact/The Emergency

For the most part, prior to the early 1900s, the Orang Asli were regarded as pagans and *kafirs* (unbelievers) and were called various names such as the much-despised *sakai* (slave or dependent) and *orang liar* (wild men). Except as excellent material for anthropological research or as ripe subjects for the zeal of missionaries, the Orang Asli were of no particular importance to the successive colonial rulers and were generally ignored administratively.

One positive effect of British colonial rule on the Orang Asli was the abolition of slavery and debt-bondage. On the other hand, the British colonialists were also of the view that Orang Asli were defenceless creatures with limited intelligence, and consequently declared that the Orang Asli should remain in isolation from the rest of the Malaysian population and be given protection. This was the onset of a long-term attitude of paternalism towards the Orang Asli.

In the period leading up to the Japanese Occupation (1942-1945), the British administrator's contact with the Orang Asli was largely confined to the creation of aboriginal reserves and preventing the forest dwellers from felling trees or hunting protected animals. This attitude changed substantially only with the Emergency of 1948-1960 during which the Orang Asli were known to provide food, labour and intelligence to the communist insurgents, or had even joined their ranks. In an attempt to stop this relationship, the colonial authorities uprooted whole Orang Asli villages and moved the inhabitants to hastily-prepared resettlement camps. A few hundred Orang Asli died in these crowded and sun-baked camps, mainly due to mental depression rather than diseases. This caused Orang Asli resentment and anger towards the government and provoked a few of them to increase their support for the insurgents.

The Colonial Government was then forced to devise ways to win over the Orang Asli to their side. The Department of Aborigines was established and the post of Adviser on Aborigines created. The Aboriginal Peoples Act, which had both protection and control measures over the Orang Asli, was enacted in 1954. The dreaded resettlement camps were replaced by 'patterned settlements' (later to be called 'regroupment schemes') established close to, though not always within, their traditional homelands, and where a small shop and medical facilities were available within the watchful sight of the security forces. The strategy nevertheless proved successful and Orang Asli support for the insurgents eventually waned. When the Emergency was declared officially over in 1960 a period of much more active and direct involvement by the state in the affairs and lives of the Orang Asli begun.

Modernisation and Integration with the Mainstream

In 1961, a year after the end of the Emergency, the government resolved that it should 'adopt suitable measures designed for their [Orang Asli] protection and advancement with a view to their ultimate integration with the Malay section of the community'. This policy of integration into the Malay mainstream was to be achieved by promoting economic development projects among the Orang Asli, delivered mainly through the agency of the Department of Orang Asli Affairs (JHEOA). However, the onset of the Second Emergency (1968-1978) that saw the communist insurgents operating once again from the forest homelands of the Orang Asli, forced the authorities to give priority, yet again, to security. As a result, more Orang Asli settlements, especially along the forested spine of the peninsula, were removed from their traditional environment and relocated into large new regroupment schemes, not unlike the FELDA schemes for landless settlers.

Even after the communist insurgency formally ended in 1989, the policy of regroupment remained with the rationale that the perceived nomadism of the Orang Asli made it difficult and uneconomic for the government to bring development to them. Nevertheless, while the expressed goals of the government remain largely unchanged – viz. to improve the wellbeing and to integrate the Orang Asli with the national society – there were significant changes in the way these were to be achieved. Changes included the introduction of privatisation as a tool for the development of Orang Asli areas, their participation in tourism, and the development of an entrepreneurial class of Orang Asli youth. The strategy also involved efforts at introducing a value system based on Islam for the integration of the Orang Asli with the wider society in general and the Malays in particular.

The rapid pace of modernisation in and around their traditional territories has affected the way of life of many Orang Asli communities. Developments in social services have also improved their condition, especially in regards to access to health and educational facilities. Nevertheless, as a community, the Orang Asli still lags far behind other Malaysians in all indicators of wellbeing. This is likely to change for the better, as greater self-awareness and self-confidence have resulted in more Orang Asli becoming increasingly vocal and pro-active in seeking their rightful dues and in improving their situation. Despite the vast changes occurring around them, the Orang Asli remain a distinct and proud people.

2. Indigenous Natural Resource Management System in Sabah

Sabah's natural resources, comprising various landforms, soil, climates and vegetation provide a diverse agro-ecosystem for the many indigenous communities. The majority of indigenous communities are subsistence farmers practising diversified agriculture, including cultivation of wet and hill rice, vegetables and fruit trees. Rural indigenous farmers often pursue a wide range of livelihood strategies where parts of the production system serve as subsistence and others as income generation. Rotational agriculture (or swiddening) however is becoming increasingly rare, while permanent agriculture practices (both annual and perennial crops) as well as off-farm activities are becoming economically more important. Apart from farming, many of the land-based indigenous communities rely on the diverse forest resources for their food, medicine, fuel, building materials and other household needs. Along the coastline and river mouths, there are many fishing communities that derive their cash incomes both from agriculture as well as fish sold at the market.

2.1 Concepts and Principles of Indigenous Natural Resource Management

Natural resources to indigenous peoples in Sabah include land, forest, agricultural areas, and rivers and coastal areas, in which land is central and often understood to encompass all these natural resources collectively. Traditional communities have a close relationship to land and resources and see themselves as part of the whole ecosystem. Natural resources are significant not only as a means of production but also as part of indigenous peoples' spiritual and cultural traditions, giving them their identity as peoples. Indigenous knowledge, innovations and practices on natural resource management is a little understood yet highly complex system, one that is closely interlinked with other indigenous systems. It incorporates a keen awareness of the environment, an appreciation for conservation and continuity, encourages sustainable innovation, and places the well-being of the community as the focus of all activities.

2.2 Framework and Institution of Indigenous Natural Resource Management

The goals of indigenous natural resource management are economic self-sufficiency and environmental sustainability. The indigenous natural resource management system is closely linked with other indigenous systems, such as social, cultural, spiritual, economic, governance, juridical, health, technological and learning systems. Management of natural resources through the *adat* has been established for generations and unwritten laws are transmitted by parents and elders in the community. *Adat* management of resources is also an integral part of community institutional control over lands and resources. Traditionally the Council of Elders governs the management of natural resources through customary laws and socialization of the whole community. The Council of Elders is composed of the village head, elders and the *bobohizan* (priests/priestesses).

Natural resource management involves both physical and spiritual realms and its practices are manifested by every indigenous person in their daily activities such that it has become a way of life for the community. The balance between the spiritual and physical realms will determine the condition of the universe and the immediate environment of communities, including the circumstances and conditions of the people.

In spiritual terms, the ‘hot’ (*ahasu*) condition symbolizes tragedy resulting in sickness, death or bad luck. It is believed that this condition comes about when members of the community go against set rules – be they socio-cultural, spiritual or those that relate to the environment. When the condition is *ahasu*, traditional communities believe that only the *bobohizan* can restore the balance through ceremonies.



Division of the *tagal* catch among all the villagers, Kampung Pongobonon, Penampang

Photo: PACOS Trust

For the physical realm, the village head and elders instruct and enforce the *adat* to ensure that the whole community not only manages resources in a responsible manner but also passes on the knowledge to the next generation. In the past, the *ketua kampong* and elders were selected based on their wisdom and expertise. They would make decisions on a consensus basis, taking the interest of the community as whole into consideration. A big part of their role was to manage the natural resources of the community to ensure sustainability and fairness.

The institution of the Council of Elders has now disappeared, having been replaced by the *JKKK* or Village Development and Security Committee. Members of this committee used to be elected by the community, but in recent years their appointment has been based on allegiance to the political party in power. Although the Council of Elders no longer exists in most indigenous communities, the *bobohizan* and knowledgeable elders are still called upon to perform the ceremonies. Today, the government recognizes only the village head (*ketua kampong*) as the traditional authority, in charge of the administration of the customary juridical system. However, as they are also in the employ of the government, their (most of the village heads are men, with a just a handful of women *ketua kampong*) power is gradually being taken away. Their role as instructors and enforcers of the *adat* has diminished, and many are relegated to routine settling of family disputes and some inter-village conflicts. The management of natural resources is very often neglected.

PACOS Trust, a leading indigenous organization, and many indigenous communities in Sabah have to come to accept the setting up of committees to manage natural resources as an approach in community organizing. Resources Management Committees are formed through community meetings. They often have women, youth and elders as members, and are functioning well with various activities. However, there is also growing realization and reflection on the importance of strengthening traditional institutions, to ensure that indigenous natural resource management systems once again become vibrant and relevant systems, with customary laws and the *adat* put in place to guide community members in education (knowledge transmission) and monitoring within indigenous territories.

2.3 Indigenous Natural Resource Management Practices

The indigenous concept and principles on the use and ownership of natural resources are realized though a variety of practices that embody spiritual beliefs and respect for the natural resources. Box 1 illustrates some examples of these practices that are still used today.

Box 1: Examples of Indigenous Resource Management Practices

Lands and Forest

Traditional ownership of a plot of land is based on mutual agreement within the community. Land ownership can be confirmed by a headman and is identified by the presence of certain signs such as fruit trees or the burial grounds of ancestors. Boundaries are marked by certain trees, a large rock/megalith, and the rolok bush or by reference to rivers or streams. To ensure that forest resources are not taken without permission of the owner, certain signs – understood by most indigenous communities – are placed strategically around the lands.

To ensure that forests are healthy and productive, unnecessary cleaning and cutting of trees is prohibited. The opening of farmland is usually on a small scale and restricted to areas of secondary forest growth. When fertility of the land for hill paddy cultivation is reduced, a fallow period is observed to give the land a rest and to restore its fertility.

Wildlife – Seeds, Plants (including Medicinal Plants) and Animals

To ensure that wildlife continues to thrive, selective hunting is practiced whereby only mature animals and game are hunted. In the same way, knowledge on seed selection and storage, maintained in particular by women, are important management strategies at the household and community level. A practice of leaving the last fruits to ensure continuity of plant varieties is still maintained by many communities. Indigenous peoples believe that medicinal plants have spirits and that respect is necessary before taking any plants. The concept of ‘use and protect’ ensures plants and animals with medicinal properties are not over-harvested and practices such as taking only what is needed still prevail among indigenous communities.

River, Water and Aquatic Life

When the number of fish is on the decline in rivers and inland waters, a communal understanding can be proclaimed through the practice of managal, the marking of a stretch of river as a ‘no fishing’ zone for a certain period of time (six months to a year). The proclamation is performed through a ceremony called the monogit, where the community slaughters a pig and eat it together to mark the period of abstinence.

Natural Resource Management and Indigenous Spirituality

Indigenous concepts of natural resource management are based on the world-view that all matter has a spirit (*moinat*) and therefore ought to be treated with respect. As such, the arbitrary taking of life is prohibited – whether plants, animals or birds – and arbitrary destruction of the environment through logging, clearing of land and other activities, which disrupt harmony and cause conflict between the spiritual and physical realm, is likewise banned. Indigenous spirituality is thus the expression of respect for spiritual being, social relations and the environment in which they manifest.

2.4 Inter-Generational Transfer of Knowledge

The village head, or *ketua kampung*, presides over community meetings and hearings and plays a major role in ensuring adherence to traditional land boundaries, and the exclusive ownership of certain natural resources according to customary laws.

The maintenance and transfer of knowledge is a responsibility of every individual in the community, although parents and elders play a particularly strong role. Such knowledge is learned orally through constant reference/repetition, by encouraging children to observe and to put them into practice in their daily life. Herbalists, carpenters and priests/priestesses acquire and pass their knowledge through apprenticeship. They learn not only their trade but also study the natural resources important to their work, and the traditional knowledge concerning the management of those resources.

Communities are aware that the traditional knowledge on natural resource management is eroding gradually due to several political, economic and socio-cultural factors that are impacting on the lives of indigenous communities. This includes consumerism, cultural borrowing and exposure to other influences brought on by the arrival of roads, western education models, a cash economy and mass media. All these have changed indigenous peoples' perceptions on natural resource management. The separation of the younger generation from their immediate environment and the compartmentalized way of thinking also means that they are no longer accustomed to the holistic approach inherent in the indigenous concept of natural resource management. This leads to a lack of reflection on the concepts and principles of community-based resource management.

3. Legal and Policy Framework on Natural Resource Management

This chapter reviews and analyzes current laws and policies regarding natural resource management, land tenure and resource access, with a view to identifying gaps with respect to the recognition of indigenous peoples' rights.

3.1 State and Federal Constitution

The indigenous peoples, or 'natives', of Sabah are accorded special rights and privileges under article 153 of the Federal Constitution. Further, article 161A(5) provides that state law in Sabah and Sarawak may provide for the reservation of land for natives or for giving preferential treatment in the appropriation of land by the state.

The Federal Constitution specifies the division of powers between the state and federal governments. The Constitution's Ninth Schedule divides the various responsibilities, privileges, and jurisdictions into three lists: List 1, the Federal List; List 2, the State List; and List 3, the Concurrent List. Article 73(b) of the Federal Constitution also empower the states of Sabah and Sarawak to enact their own laws through their State Legislative Assemblies.

3.2 Natural Resource Management Laws in Sabah

In Sabah, there is no single law or policy that governs natural resource management. Resources are compartmentalized (e.g. according to land, fisheries, forests, parks, wildlife, water, plantations and biodiversity). Any given law and its accompanying 'rules' govern the management of a particular resource under a specific department created to administer the law. Many laws on natural resource management also overlap in their jurisdiction and this requires inter-departmental and inter-ministerial coordination.

3.2.1 Land Ordinance, 1930

A whole section of the Land Ordinance is dedicated to Native Lands (Part IV, sections 64 to 86), with some other relevant sections also found in the main body of the law. The law also covers various sections on sub-surface and surface resources, as well as sea and coastal areas.

Section 15, on Native Customary Rights (NCR), is also provided in the Land Ordinance. NCR to land include:

- Land possessed by customary tenure;
- Land planted with 20 or more fruit trees per acre;
- Fruit trees, sago, rattan and other plants of economic value that are planted, upkeep and regularly enjoyed as personal property;
- Grazing land stocked with cattle or horses;
- Land that has been cultivated or built on within 3 years;
- Burial grounds and shrines; and
- Rights of way for people and animals.

Customary tenure is defined as the lawful possession of land by natives by occupation or cultivation *continuously* for three or more consecutive years or by title deed. However, in practice land titles are seen to be an indefeasible right of ownership. All land is considered to be state-owned and claims to non-state ownership have to be registered and approved by the state. Section 15 was an attempt to incorporate indigenous peoples' customary law on land ownership into the land law. However, due to the lack understanding of indigenous peoples' concept of land and natural resource management and the misrepresentation of customary law, this has resulted in inconsistencies and gaps within the process of land delineation. Section 15 clearly outlines the criteria for NCR, but practical experiences



Batu sumpah or swearing stone to commemorate the *tagal*, Kampung Bundu Apin-Apin Keningau

Photo: PACOS Trust

in the titling of indigenous peoples' land have shown that many problems remain which hinder access to these rights, one key one being the failure to take into consideration indigenous natural resource management realities such as fallow period in rotational agriculture cycle (non-continuous cultivation).

A further serious concern is the use of section 28 to supersede section 15 of the Ordinance, because it allows the Governor to alienate land for 'public purpose'. What 'public purpose' means is not well defined. Indigenous peoples have asked for section 28 to be repealed, because in many instances in the 1980s the section was used to alienate NCR land to government statutory bodies without compensation. Also, with the privatization of such lands in the 1990s, ownership did not revert to the rightful owners but was made the private property of companies and individuals. This was the case for the Sabah Forest Industries and the Sabah Land Development Board.

Non-implementation of existing safeguards is a further concern. Section 13 of the Ordinance requires the posting of a notice and validation in the area concerned in any application for land ownership. In reality this has not happened, with the posting of notices only in the district offices of the Lands and Survey Department, where indigenous people do not regularly visit or visit at all.

Section 17 states, "except with the written permission of the Minister all dealings in land between non-natives on the one hand and natives on the other hand are hereby expressly forbidden and no such dealings shall be valid or shall be recognised in any court of law". This section has often been circumvented, and many indigenous peoples have lost their traditional land in deals that did not benefit the indigenous owner. A controversial addition under section 12(5) to allow sub-lease of native titles up to 99 years is now being reviewed.

Sections 23 and 24 give the right to sub-surface and surface resources such as minerals, timber or other forest produce or any earth, gravel, stones, coral, shell, guano, sand, loam or clay, or any bricks, lime, cement or other commodities manufactured from these materials to the state.

Most indigenous people have opted for individual native titles over their land, mainly because this is the most strongly promoted by the government. However, the Land Ordinance provides for other forms of title, including communal title or native reserve, and simply registering land with NCR. Section 76 provides for the (Chief) Minister Communal Titles, "in cases where a claim to customary tenure of land has been established or a claim to native customary rights has been dealt with by a grant of land and such land

is held for the common use and benefit of natives and is not assigned to any individual as his private property”. The Director of Lands and Survey holds the title in trust for the community concerned, without power of sale. Section 78 provides for the gazetting of Natives Reserves by the Governor if he thinks it necessary to protect the present and future interests and well-being of the natives of Sabah or any community. The Native Reserve is held in trust by any person appointed by the Governor, in most cases the district officer or the village head.

3.2.2 Land Acquisition Ordinance

As mentioned, any land may be subjected to compulsory acquisition by the state if it is deemed for ‘public purpose’. Under section 2(h) a broad definition of ‘public purpose’ is provided, including resettlement, conservation and exploitation of natural resources. The Ordinance does provide explicitly for the determination of claims to compensation, although in many cases indigenous communities have lost Native Customary Rights land through such acquisition without compensation. This is because section 9 allows only three months for the owner to register their interest and serve a notice to the authorized officer after which claims to compensation are considered invalid.

3.2.3 Inland Fisheries and Aquaculture Enactment 2003

Under Part V of the Enactment on Riverine Fishing and Fisheries, sections 35 to 37 relate to Community Fisheries Management Zones. Section 35 allows for the declaration and recognition of indigenous system of resource management, while sections 36 and 37 create a new protocol by providing for the creation of a committee to administer such zones, and by introducing punishment related to the Community Fisheries Zone.

As mentioned earlier, although the law itself is very progressive in recognizing community system of managing riverine resources (by creating committees under sections 36 and 37), it has in a sense contributed to the weakening of traditional authority for the *Tagal* system (see also 4.1.3). Even though the state Fisheries Department has done an admirable job in promoting *Tagal*, by *not* specifying the need for equal partnership and equal decision-making by the community in all developments in inland fisheries, the success of the traditional *Tagal* system was in a sense taken over by the Department.

3.2.4 Forest Enactment, 1968 and Forest Rules, 1969

There is no provision in the Forest Enactment 1968 for the recognition of indigenous land rights. However, the enactment allows indigenous peoples to use forest resources for their livelihood, including use for the benefit of the individual and the community and their traditional way of life (section 41). Prior to the declaration of an area as a Forest Reserve, sections 8 and 9 require an enquiry to ensure that 'local inhabitants' are made aware of the intention and to settle any claims. These two provisions represent the two biggest areas of contention for communities, particularly regarding the process followed in the 'enquiries' and settlement of claims. Such enquiries and subsequent settlements have rarely been done in accordance with the requirements. Several communities claim that their objections were not recorded and they in fact suffered repression as a consequence of their objections. Today, the area gazetted as Forest Reserves (49 percent of the total land area of Sabah) is already established and there is no provision within the Enactment for appeals or settlement of claims.

3.2.5 Parks Enactment, 1984

The objectives and functions of the (Department of) Sabah Parks are, among others, to preserve significant geographical, biological or historical features for the benefit, education and enjoyment of present and future generations and to provide accommodation and amenities without disturbing the environment of the Parks. The Department controls, manages and maintains all areas legislated under the Parks Enactment 1984, which includes both inland and marine ecosystems. However, section 20 of the Parks (Amendment) Enactment 2002 empowers the Parks Board of Trustees to also carry out bio-prospecting and tree plantations as well as developing commercial and industrial enterprises.

The law, however, does not provide for the participation of indigenous peoples in collaborative management of the Parks.

3.2.6 Conservation of the Environment Enactment 1996 and the Environment Protection Enactment 2002

The Conservation of the Environment Enactment was enacted in 1996 and came into force on 1st August 1998, coinciding with the establishment of the Department of Environmental Protection. The Enactment has been amended twice to strengthen certain provisions, in particular providing for heavier penalties for causing serious environmental

degradation, mainly directed at large companies opening up tracts of land for plantations. However the Department of Environmental Protection lacks staff and resources and has not had any significant impact in realizing its mandate. The Department was the main body responsible for drawing up the Sabah Biodiversity Enactment 2000. The Environment Protection Enactment enacted in 2002 to complement the Conservation of the Environment Enactment is still not in force. The Conservation of the Environment Enactment also has no provision for indigenous peoples' rights, and in fact in several sections restrictions are imposed on the use of land (see, for example, section 28) and activities affecting vegetation (section 33).

3.2.7 Wildlife Conservation Enactment 1997 and the Wildlife Regulation 1998

The Wildlife Conservation Enactment 1997 recognises community hunting areas (section 32) and honorary wildlife wardens (section 7) from the community. The training of these wardens and the procedures to set aside community hunting areas that were developed by the Wildlife Department and Danish Cooperation for Environment and Development (DANCED) strongly emphasize indigenous knowledge on wildlife management and conservation.

As in all of the other Ordinances and Enactments to reserve land for specific purposes, the Wildlife Conservation Enactment provides an outlines in section 9 of the necessity for a notice to explain the purpose and call for settlement of claims. Section 9(2)(c) in particular requires explanation of "native or traditional rights that will continue to be exercisable after the coming into effect of the declaration of the proposed sanctuary". Section 9(2)(d) also requires a summary of representations made by communities likely to be affected. The main weakness of these provisions is the relatively short period of 90 days to be published in the government *Gazette* and posted in the office of the Lands and Survey Department located in town centres.

No specific provision exists with respect to indigenous knowledge under the Wildlife Conservation Enactment 1997. Many of the plant species that are used in traditional medicines are considered protected species and require a license to collect, a requirement for indigenous communities as well as others. It is not clear whether this restriction has affected the indigenous health practices of communities.

The Wildlife Conservation Enactment under section 68 provides for the right of traditional owners of caves to collect edible bird's nests and complements the Birds Nest Ordinance 1914.

3.2.8 Water Resources Enactment, 1998

The Water Resources Enactment 1998 recognises private water rights, which include the water rights of indigenous peoples. It takes into consideration the economic and social impact on the owner or occupier of the land when making a water resource management decision, implying the necessity to examine land ownership and occupation rights of indigenous peoples. A requirement for consultation also means that the government is obliged to involve indigenous peoples in the management of catchment areas and water bodies. The process and right to appeal are also stipulated in the law. (Section 16 on private rights to water states that the owner or occupier of land or premises may, free of charge and without requiring a license under the Enactment, exercise a private right to take, use and control, sufficient for household and subsistence agricultural purposes.)

Although the Enactment appears progressive with respect to management of water resources, there are gaps with respect to setting aside water protection areas. In section 36, interest to protect areas precedes the rights of indigenous peoples to land and does not recognize the fact that indigenous peoples may have been traditionally protecting the area adequately. An example is a case in Bundu, where communities have managed to stop large-scale loggers from entering their watershed area upstream. The area remained pristine but the declaration of the area as a water protection area did not stop logging companies from attempting to enter and devastate the entire area, creating havoc to peoples' lives in the process.



Fulfilment of sogit kampung for breaching the *tagal*,
Kampung Pongobonon, Penampang

Photo: PACOS Trust

3.2.9 Sabah Forestry Development Authority (SAFODA) Enactment, 1981

A number of state agencies have been created in Sabah—many established during the economic boom of the 1980s—concerned with use of natural resources. Much of the land alienated to these state agencies were indigenous peoples' land claimed under native customary rights. The land was acquired under section 28 of the Land Ordinance 1930 or under the Compulsory Land Acquisition Act, with little or no compensation. These agencies include Sabah Forest Industries (SFI) and the Sabah Land Development Board (SLDB). In the 1990s the state agencies were privatized whereupon the alienated lands became private property. Of the many state agencies created in the 1980s, only the Rural Development Corporation (KPD), the Sabah Rubber Industry Board and the Sabah Forestry Development Authority (SAFODA) remain full government agencies.

Section 39(1) of the SAFODA Enactment provides for compulsory acquisition of land. Although there are also provisions for appeal, the lack of mechanisms for notifying the owners on the ground effectively prevented indigenous peoples from recording and settling land disputes in an organized manner. Under an anomalous section, section 47, SAFODA is deemed a Native entity for the purpose of any law relating to land.

3.2.10 Biodiversity Enactment, 2000

Although the draft Sabah Biodiversity Enactment did not undergo much public scrutiny prior to its adoption in 2000, sustained efforts by indigenous organizations to engage the government and to raise issues on recognition of rights to lands and resources, traditional knowledge and benefit-sharing has resulted in a number of progressive sections within the Enactment.

The Enactment contains eight important sections that are relevant to indigenous peoples. Section 9(1)(j) provides for a system to ensure that indigenous peoples and other local communities are, at all times and in perpetuity, the legitimate creators, users and custodians of traditional knowledge, and collectively benefit from the use of such knowledge. It also recognizes rights to biological resources in land claimed under NCR (section 16(b)), and has provisions to ensure that any activities related to the collection of biological resources do not negatively impact the livelihood, quality of life and the way of life of indigenous peoples (sections 20(3) and 25(1)(b)).

The Enactment, however, cannot be implemented until the Rules that accompany the Enactment are formulated and adopted. In 2004, indigenous organizations again went

through a series of consultations with communities, NGOs and the government to produce the draft Rules related to sections relevant to indigenous peoples. The lack of any real movement towards adopting the Rules by the government indicates either low priority on these matters or the reluctance to impose restrictions on the state's 'green gold'. The Enactment signifies a potential coordinating body for natural resource management in the state. Recognizing this, indigenous peoples have asked that they be part of the decision-making body, the Sabah Biodiversity Council.

3.2.11 Other Laws

There are several other relevant laws on natural resource management but they are less often applied. These include the Birds Nest Ordinance 1914; Cattle, Grazing and Pounds Ordinance 1952; Country Land Utilisation Ordinance 1962; Drainage and Irrigation Ordinance 1956; Fauna Conservation Ordinance 1963; Town and Country Planning Ordinance 1950; Water Supply Ordinance 1961; and the Cultural Heritage (Conservation) Enactment 1997.

Apart from these, a number of federal natural resource management laws applicable to Sabah and Sarawak include the Environmental Quality Act 1974; Continental Shelf Act 1966; Fisheries Act 1985; Pesticides Act 1974; and the Petroleum Development Act 1974.

3.3 Policies on Natural Resource Management

3.3.1 Sabah Forest Policy 1954

The Sabah Forest Policy 1954 underscores the Sabah Government's commitment to natural forest management, conservation and reforestation. The policy strongly emphasizes the need for sustainable forest management, forest legislation, use of non-wood forest products, conservation of biodiversity, community forestry, recreation and tourism.

Under the policy, communities may cultivate within forest reserves, move inside the forest freely and collect any forest produce. They are allowed to reside within the limits of forest reserves and are encouraged to participate in forest management through a joint forest management approach. The latest action taken by the Sabah Forestry Department to legally recognize cultivation within forest reserves is the approval of Occupation Permits. Under the Sustainable Forest Management System, areas may be set aside for community forest

areas. License agreements between Forest Management Unit holders and the Sabah Forestry Department also recognise customary use of resources by indigenous communities.

All research and collection of specimens inside forest reserves requires a permit from the Sabah Forestry Department. However, enforcement is a huge task, as 49 percent of Sabah's total land area of 74,000 sq km has been gazetted as forest reserves. It is therefore still possible to acquire plant and animal specimens and relevant knowledge on the use of such specimens from the community without the knowledge of the department, and for it to be brought out of Sabah undetected.

3.3.2 Sabah Conservation Strategy 1992

Focusing on wise land use as the key to conservation and development in Sabah in the 1990s, the Sabah Conservation Strategy of 1992 calls for the establishment of a variety of protected areas, as well as improved management of resources on a regional basis. The Strategy proposes a variety of actions covering land-use, land revenue, multiple use management, water catchment areas, community forests, timber production, damaged forests, illegal logging, plantation forestry, biodiversity, mining, ecotourism, land applications, Environmental Impact Assessments, coastal development and others. For example, the Strategy calls for the preparation of a series of maps to assist in environmentally-friendly land-use planning. 'Environmentally sensitive' areas also need to be identified and reserved. Implementation of these strategies supports conservation efforts covering the entire country both at state and federal levels.

3.3.3 National Policies

Federal policies that are also relevant include the National Development Policy, the 5-yearly Malaysia Plans, National Agriculture Policy, National Environment Policy, National Forest Policy, National Mining Policy, Soil Conservation Action Plan and the National Biodiversity Conservation Policy.

4. The interface between Indigenous and Statutory Systems and Laws on Natural Resource Management

In this chapter the interface between indigenous and state systems and laws on natural resource management are assessed, with gaps and challenges identified for further action. The chapter looks at current efforts to combine indigenous systems with other systems on natural resource management to illustrate the need to further develop such initiatives; as well as examining and illustrating the current and potential roles of government, NGOs, community organizations and donors in improving natural resource management in Malaysia. Recognizing the need for indigenous peoples' involvement in natural resource management, section 4.2 highlights mechanisms and issues for effective participation.

4.1 Indigenous Peoples and the State Legal and Policy Framework

4.1.1 Ownership Rights Framework

The key to access and control of resources is recognition of land rights. Existing laws on natural resource management do have some provisions for the recognition of native customary rights to land, and for settlement of claims arising from the need to gain consent of first or existing settlers. However, as illustrated in the Sabah Land Ordinance, the interpretation of rightful occupation does not coincide with indigenous peoples' concepts and customary law on land ownership.

The recognition of collective rights for indigenous peoples would mean the preservation of collective identity. Collective rights include access to and control over lands and resources, and also participation in and control over decision-making. This has led to the dispossession of traditional lands, the main source of material and spiritual well-being of indigenous communities.

4.1.2 Use Rights Framework

Access to resources in many cases may be granted but this right is not consistent between the different laws, and is further complicated by gaps in the existing laws. Communities candidly refer to their continued use of resources as the 'close one eye' policy, indicating the fact that it is not an official policy of the government. The Sabah Parks is developing a policy to create Traditional Use Zones within the Crocker Range Park, but this policy

would be invalid without legal reform to allow it to be official. Continued use of resources in an unofficial manner leaves communities vulnerable to strict enforcement of existing laws, and such use must be made legally defensible. Explicit legal and policy attempts to do so, such as the policy to set aside Community Forest Areas under the Sustainable Forest Management System, are rendered useless as they are not implemented Forest Management Unit holders.

4.1.3 Incorporation vs Recognition of Customary Law

Recognition of indigenous resource management to date has been characterized by attempts to incorporate an aspect of the traditional management system into state/national laws. For example the customary *tagal* system of resource management was incorporated into the Sabah Inland Fisheries and Aquaculture Enactment 2003. However, such a strategy may not necessarily capture indigenous concepts adequately, a situation illustrated by the incomplete incorporation of indigenous land ownership into the definition of native customary rights to land in the Sabah Land Ordinance. There is no requirement to recognize customary law per se.

Part of this unwillingness to recognize customary law stems from the fact that customary law in general, and on natural resource management in particular, is not well-understood or documented, and there is often fear of recognizing it from the side of governments. Past efforts of the government to recognize customary law has thus involved some form of codification to lessen the fear of the unknown, a process which is inappropriate and rejected by communities, as it ignores the diverse nature of customary laws of communities.

The other weakness is the tendency to form committees to manage resources, taking away the control that was traditionally held by the community. Although such committees may in fact allow more participation, particularly from women and youth, it nevertheless means that the already-weakened traditional structure is increasingly sidelined. In the long run, it will further dis-empower indigenous communities in their aspiration for self-determination and a pluralistic society.

4.1.4 Consultation vs Consent

Provisions and procedures for obtaining consent are implicitly or explicitly contained in most laws relating to lands to be set aside for native titles and protected areas, or the rights to access and use resources found therein. It is assumed that in Sabah, where the rural areas

are traditionally occupied by indigenous peoples, the spirit of these laws is to give priority to indigenous peoples' claim to lands and resources. Settlement of claims is also expected prior to gazetting of lands, and the granting of a title or permit. But apart from the fact mentioned earlier about the non-compliance with these provisions to provide adequate notice, the gap in the law also lies in the requirement for *consultation* rather than *consent*. The state assumes control and authority on how lands and resources are managed, and its authority pre-empts indigenous authority. Consent from indigenous communities is secondary to the government plans for land use – they are consulted about the use of their lands but do not necessarily have to give consent.

4.1.5 Conflicting Provisions

Section 28 of the Land Ordinance 1930 continues to represent the most significant reason for indigenous peoples' dispossession of land in Sabah. This section is used widely to set aside land for 'public purpose', interpreted as activities that are in line with the government's economic interests. This includes large-scale oil palm and tree plantations.

Within the Land Ordinance itself, provisions for the recognition of native customary rights land under section 15 is considered secondary to the legal right to gazette provided for in section 28. Land titles, which are considered as the strongest proof of rights to land, can also be subjected to acquisition for public good through the Land Acquisition Ordinance.

4.1.6 Conflict in Development Paradigms

Differing concepts about the fundamental purpose and meaning of development lie at the heart of conflicts over land and natural resource management use. As far as the State is concerned, the 'use' of natural resources is mainly for exploitation to finance infrastructure development and other expenditures of the state. There is no regard for indigenous peoples' own concepts of development, which are often considered unproductive, and therefore indigenous peoples' customary use of natural resources is not encouraged or developed.

Policies on large-scale development through exploitation of natural resource management have resulted in either social exclusion or discrimination of indigenous peoples, or loss of culture and way of life. The majority of indigenous peoples in Sabah still live in rural areas, but are increasingly migrating – either temporarily or permanently – to urban areas as livelihoods deteriorate due to natural resources exploitation and insecure land tenure.

Indigenous peoples are increasingly joining, or are forced to accept, mainstream development and commercialization. This poses a challenge to natural resource management especially in and around sensitive areas. The gazettement or declaration of parks and other protected areas under the current laws is also an important factor leading to unresolved conflicts between the state and indigenous communities, due to loss of access to or restricted use of resources within these areas.

4.1.7 Recognition of Indigenous Natural Resource Management System

The underlying conflict between concepts on the appropriate use of resources by the State and indigenous peoples undermines recognition of indigenous natural resource management. The state views resources in a compartmentalized manner and separates the management of resources rather than conceptualizing resource management in a holistic way. The ecosystem approach is much closer to the concept of indigenous communities, employing traditional knowledge systems in the management of resources.

Traditional knowledge about the management of resources such as seeds, medicines and other biological resources is recognized in the Sabah Biodiversity Enactment 2000 but implementation is not possible as there are still no rules to accompany the Enactment. In the meantime, a Community Protocol on research and access to resources has been implemented by communities.

The fact remains that the indigenous concept of using and at the same time protecting the environment is not well accepted by the government. Ecologically sound practices such as rotational agriculture in upland areas are still considered destructive and discouraged, yet alternatives are not provided. At the same time, inputs such as chemical fertilisers and pesticides continue to form the bulk of government agricultural subsidies.

4.1.8 Repressing the Nurturers

Enforcement of existing natural resource management laws is also a challenge for many departments because of limited human and financial resources. In the past, particularly when dealing with conflicting claims by indigenous peoples over resources, police and army personnel would suppress communities that attempted to protect their rights to resources. Such direct and violent suppression would often happen when lands and resources were given to private corporations as logging concessions, plantations, dams and mining.

The positive provisions within natural resource management laws described above are seldom used. Instead, communities that are often protectors and nurturers of natural resources are the ones arrested and charged for a criminal offence under the penal code.

4.2 Harnessing Indigenous Natural Resource Management

One tool to assist in management of resources through the indigenous NRM system is zoning according to traditional use, with the involvement of communities in mapping and other related activities. Community boundary mapping and resource mapping can be established using modern instruments such as GPS, employing up-to-date satellite images for developing GIS. Zoning of areas can be crucial in implementing resource management that has been traditionally practiced but not recorded or done in a systematic way. Such zoning and mapping must be done locally with in-depth discussions involving those knowledgeable about the community area.

Customary laws may not be adequate to meet new challenges and issues in access and control of resources. When communities in Sabah realized that there was no comprehensive *adat* to regulate access and control over community resources, in particular by researchers and bio-pirates, they developed a community protocol for this purpose. Traditionally, indigenous communities monitor and assess their own resources on the level of responsibility and needs of the community. Since most communities do not own instruments such as early-warning systems, they usually rely on their observation and traditional knowledge to monitor and assess the condition of community resources. Hence, the development of a community protocol was to equip communities with tools generally available to the government and the encroachers.

4.3 Engaging Institutions

Cooperation between Donors, Government, NGOs and Community Organizations

While it is extremely important to engage all players in the management of natural resources, indigenous communities must be accorded recognition as 'rights-holders' over indigenous territories. Wherever possible, when indigenous peoples' organisations have sufficient organizational capacity to bring together various institutions, they should be encouraged to take the lead in such multi-sector cooperation. The role of each institution should be clearly outlined and specified. This section examines engagement and cooperation between various bodies and indigenous communities.

Lessons learned from experiences in a number of engagements in Sabah are:

- Community consultations must not be misused or misinterpreted;
- It is necessary to work to ensure inter-departmental coordination;
- It is important to ensure that in bilateral aid, the donor adheres to their policy on indigenous peoples based on accepted international human rights standards, and applies this policy to help raise awareness of the departments being aided;
- Sufficient time must be set aside to ensure indigenous communities understand the issues at hand, and NGOs working with indigenous peoples provide sufficient information for the communities to make informed decisions in a culturally appropriate manner; and
- Hiring of consultants, especially those dealing with communities, should take careful consideration to ensure that the person is willing to listen to other perspectives, especially community perspectives.

Box 2: Community Protocol and the SBE 2000

In an effort to find ways to protect indigenous knowledge and access to biodiversity in the traditional lands of indigenous communities, a series of community workshops were organised by PACOS Trust, a community based NGO, between 1998 – 2000, under the Sabah Anti-Biopiracy Programme. These consultations resulted in the formulation of a Community Protocol. The Community Protocol is aimed at getting bio-prospectors, specimen collectors and researchers to respect communities' ways of life and indigenous knowledge. After getting wide feedback from communities, government departments and NGOs, the protocol was finalised and printed as a poster for wide dissemination. Regional workshops and training were also encouraged and organized by donors of the programme. Then in 2000, as part of an effort to advocate for a law and policy on biodiversity, the PACOS Trust, together with communities involved in drafting the protocol, called for a seminar with relevant NGOs and government departments, in particular the Sabah Museum and the Environmental Conservation Department. It was at this seminar that the draft Sabah Biodiversity Enactment (SBE) 2000 was revealed. Although communities were not given an opportunity to comment on the draft SBE, which was circulated for comments for only one month, PACOS Trust felt that their effort to engage communities, NGOs and government has resulted in the inclusion of a number of good sections within the SBE 2000, adopted in November 2000.

4.3.1 NGOs

Non-governmental organizations in Sabah have been key players in bridging the gaps in understanding of donors and the government, as well as providing indigenous communities information and knowledge regarding respect to indigenous peoples and natural resource management. In particular the PACOS Trust, a community based NGO, has not only helped enhance capacities of indigenous peoples in negotiation, it has also played a role in enhancing capacities of government departments.

It is important to note that NGOs that wish to support indigenous peoples' struggle for the recognition of their rights have to be consistent – both in bridging the communication gap that often exists and also in building communities to effectively and independently engage with government and companies in the long term.

Box 3: Watershed Conservation – Training of Government Staff by PACOS Trust

Between February 2002 and March 2004, PACOS Trust was commissioned by the Drainage and Irrigation Department (DID) of Sabah, with financial support from both the Sabah Government and DANIDA, to train DID staff in community participation. The training was aimed at providing the necessary skills, knowledge and sensitivity to DID staff to ensure effective participation of indigenous communities in its effort to consult with them on the proposed Water Resources Master Plan. Such training was possible due to strong support from the Director of DID and the Chief Technical Advisor from DANIDA.

Although the Master Plan 1994 and the Water Resources Enactment 1998 only provide limited protection for indigenous peoples, the fact that the DID is implementing the consultation clause in the Enactment has enabled indigenous communities to understand these provisions and express their concerns to the department. The DID recognized that without the assistance of PACOS Trust, which is experienced in establishing rapport and gaining the trust of communities, the consultation with affected communities would not have been possible.

4.3.2 Government

Several government departments have implemented the existing provisions in various natural resource management laws and policies which respect indigenous peoples' customary practices. However, the government still tends to undermine indigenous peoples' customary rights and often views indigenous resource management system with disdain. There is great potential, therefore, for further recognition of indigenous peoples' rights to avoid costly conflicts that could undermine natural resource management in Sabah.

Box 4: Implementation of the Customary *Tagal* system

Indigenous peoples in Sabah have practiced the *Tagal* system for generations to control over-harvesting of fish from rivers. It involves an agreement by the whole community on the conditions, areas, duration and fines with which the *Tagal* is to be enforced. Every member of the community is expected to monitor the implementation while the enforcement of punishment would usually be the responsibility of the village headman using the indigenous juridical system. A ceremony to mark the beginning and the end of the *Tagal* is a part of the whole system.

The Fisheries Department had for years been trying to control over-fishing in rivers in Sabah, with little success. The posting of signboards along riverbanks detailing department rules failed to deter offenders. A pilot initiative by the department using the *Tagal* system to control fishing, and a subsequent study in Kampung Babagon in Penampang district in 2000, was observed to be successful. In 2002, having concluded that this indigenous resource management system is effective in the conservation and protection of fish resources, the Department decided to incorporate the *Tagal* system into a new bill, which was subsequently adopted as the Sabah Inland Fisheries and Aquaculture Enactment 2003. In its implementation of this Enactment, the Fisheries Department organized seminars and workshops and supervised the enforcement of the *Tagal* system. It also carried out research on freshwater fish, replenished fish stocks in rivers, and continued to assess the effectiveness of the system. Currently, 212 areas involving 107 rivers in 11 districts in Sabah are revitalizing this traditional practice and are being coordinated and systematically managed. Awareness-raising efforts and cooperation between the villagers and the government are also ongoing.

4.3.3 Community Organisations

Since the traditional institution in indigenous communities no longer exists, many village chiefs and elders have had to take on the role of ensuring the continued management of natural resources. Some communities have now established community or peoples' organizations to facilitate various tasks, including securing land rights where they been contravened or compromised. Indigenous communities consistently state that they are not anti-development, and community organizations have an important role in expressing a community's own aspirations with respect to the management and development of natural resource in its territories. Participation and the informed consent of communities are key to such efforts. Community organizations also have an important role to protect natural resources from being exploited.

Box5: Community Organisation Reclaiming Traditional Lands

Under section 28 of the Sabah Land Ordinance, 4,940 hectares of native customary rights (NCR) land were acquired by SAFODA in Kanibongan for the planting of *Acacia Mangium* in 1983. The Rungus indigenous communities were given oral assurances that the land would be returned to the people after the trees were harvested. However, the agreement was never fulfilled and the people were told that the government would be developing the land further.

The communities involved organized several actions to protest this through a network of 21 villages under the leadership of KK Muringkat, the village headman and chairperson of the network. Their strategies included lobbying political leaders and organizing community land rights workshops with PACOS to raise awareness and to get support from other communities in other districts. Becoming more courageous after meeting with other communities facing similar problems, the network met with lawyers, the Malaysian Human Rights Commission and the Sabah Chief Minister in 2003. Finally, their struggle for the restitution of their land paid off and the communities' traditional lands were de-gazetted from the land vested in SAFODA on 1st March 2005.

4.3.4 Donors

Prior to 1997, participation of NGOs and community organizations in project planning and implementation was rare in Sabah. Technical cooperation between Germany (via GTZ) and the Sabah Government (Forestry Department) to develop the Sustainable Forest Management System at a pilot site in Deramakot Forest Reserve represented the turning point in incorporating a 'social component' in bilateral support to the state. Similar projects funded by the Danish development agency, DANIDA, and several government departments in Sabah further enhanced the participation of indigenous communities and NGOs. Technical cooperation with DANCED (and later DANIDA) which has firm commitment to a policy on indigenous peoples led to active participation of PACOS Trust and the community in the various pilot areas. The Japanese International Cooperation Agency (JICA), which does not currently have a policy on engaging with indigenous peoples, has the opportunity to formulate such a policy through the Borneo Biodiversity Ecosystem and Conservation (BBEC), a project between the Sabah Government and JICA.

Box 6: DANCED and Capacity Building of the Sabah Wildlife Department to Ensure Participation of Indigenous Peoples

With support from the Danish Government, through DANCED, a capacity building project was launched for the Sabah Wildlife Department (SWD), with the initiative to include a community component aimed at obtaining better understanding of various aspects of hunting and wildlife management by rural indigenous communities in Sabah.

In the Wildlife Conservation Enactment 1997 there are two provisions that relate to the participation of local communities in sustainable wildlife management – the Animal Kampung (Village) Hunting License, AKHL (section 32) and the Honorary Wildlife Warden, HWW (section 7). These two provisions involve developing an understanding of indigenous knowledge on wildlife management. In November 2001 the Sabah Wildlife Department Capacity Building Project and PACOS TRUST initiated the Pilot Project on AKHL and HWW. Two indigenous communities were selected as pilot areas, with the main objectives of the Pilot Project to develop a model for the issuing of AKHLs to local communities in Sabah, to develop appropriate wildlife management mechanisms, and to appoint a number of community Honorary Wildlife Wardens.

In cooperation with the local communities, mechanisms for participation in, and administration of, hunting and wildlife management were developed, including the formation of a Community Wildlife Committee; the appointment of a number of HWWs to assist SWD in implementing the Wildlife Conservation Enactment; an agreement on a hunting quota stating the types and number of animals to be hunted; development of a Community Hunting Protocol; and the development of a Hunter Ledger to be filled out by the communities to manage and monitor hunting quotas. The experiences gained during the implementation of the Pilot Project show that local communities are willing to participate and compromise on natural resource management, even if it restricts their hunting activities, if it ensures recognition of their rights to manage their wildlife resources and assists them in developing appropriate wildlife management mechanisms.

This potential role of donors in facilitating engagement between indigenous peoples and governments is very significant in Sabah.

4.4 Participation in Natural Resource Management

As demonstrated, the Sabah Government has articulated the need for indigenous peoples' participation in natural resource management through a variety of laws. Indigenous peoples themselves have created and strengthened many opportunities for participation, particularly when capacities are enhanced and openness is expressed by the government. Workshops, seminars and conferences organized by government departments, academia and NGOs are important venues to articulate opinions (although these have sometime been criticized as inappropriate for indigenous peoples as English is often used and the venue chosen is often not conducive to discussion). Communities have also facilitated several dialogues but government representatives have not reciprocated by attending these meetings, thus denying themselves the opportunity to listen to and see the conditions to which indigenous peoples are subject.

Another mechanism for participation is through the submission of written comments on natural resource management. This has not proven to be effective for either the government or indigenous peoples – the government being poor in providing relevant information in an appropriate form, and communities being inarticulate and unable to process feedback in the short time-frame often required for these comments. The role of NGOs in facilitating this process and bridging the gap has, however, made this mechanism more effective.

More recently, conditions attached by donors to development cooperation (see 4.3.4) have given rise to more direct participation of indigenous peoples in the implementation of pilot projects. However, the weakness of these pilot projects lies in the lack of commitment by both donors and the government departments involved to replicate the projects in areas outside of the pilot areas. The issue is not only about funding but about acceptance. It could be that these pilot projects present 'alien' solutions to natural resource management issues, which do not capture the minds and hearts of either the government departments or indigenous communities. Yet the pilot initiatives have led to successes. An example of a successful initiative that received tremendous support is the implementation of the *Tagal* system (see 4.3.2), which has been accepted without further injection of funds.

Participation would be ensured if decision-making with prior informed consent was recognized throughout the process. In many instances, the opportunities to express opinions 'granted' to indigenous peoples are mere lip service and often made to pacify communities. Sadly, input on natural resource management is often ignored.

Box 7: Women's Participation in Natural Resource Management

The Convention on Biological Diversity recognizes the important role of women and women's knowledge in conserving and nurturing biodiversity. Yet, development projects are often targeted at men and the recognition of women's knowledge by institutions still has a long way to go.

Nevertheless, after years of struggle, some changes have been achieved. Female heads of households, including single mothers, are now recognized by law and there are now more opportunities in capacity-enhancement for women (for example in food processing and teacher training).

However, projects and programmes are seldom designed to take into consideration active participation of women. For example, women are asked to cook during functions and women with children are not given necessary childcare support. If they do participate, they are not encouraged to speak and their ideas are not actively sought.

Box 8: Development of Rules for the SBE 2000

As mentioned above, the Sabah Biodiversity Enactment was adopted in November 2000. However, it could not be implemented until the Rules to the Enactment were formulated and adopted.

PACOS Trust thus undertook several consultations with communities and government to develop the Rules accompanying the Sabah Biodiversity Enactment 2000 in order to fulfil the requirements of section 9(1)(j) which requires the creation of a ‘system’ that ensures indigenous peoples “*shall all times and in perpetuity, be the legitimate creators, users and custodians of traditional knowledge, and shall collectively benefit from the use of such knowledge*”.

This system also draws upon the requirements of the various relevant international legal instruments, some of which have come into force subsequent to the passing of the Enactment. The result of an extensive consultation process with representatives from over 40 indigenous communities, the system provides a culturally appropriate means for the dissemination of information, the obtaining of consent on mutually agreed terms, in accordance with customary law and the equitable sharing of benefits with indigenous communities. Practical benefits include increased efficiency in collection efforts and effective monitoring of illegal collection activities, poverty alleviation and the realization of human food security and health and cultural integrity within indigenous communities.

5. Challenges and Drawbacks

This chapter focuses on the challenges and drawbacks in the implementation of laws and policies on natural resource management and the perceptions and responses of communities. A number of case studies are used to illustrate the challenges.

5.1 Implementation of Laws and Policies on Indigenous Resource Management System

As seen in chapter 2, there are numerous laws and policies that accord certain recognition to indigenous peoples but this information has not been effectively disseminated. As a result, many indigenous peoples have lost their land and resources, especially when

companies, government statutory bodies and outsiders have taken advantage of this lack of information. One important example is the requirement for making claims for native customary rights to indigenous lands. Here the Lands and Survey Department failed to provide information about a form (LSF 1898) that would make the process easy for indigenous peoples to secure their rights to their lands.

Another challenge is actual contravention of the laws themselves (such as use of section 28 of the Land Ordinance 1930) or in the course of implementation (when the government failed to settle NCR claims prior to the gazetting of forest reserves). The implementation of policies and strategies by the government has also failed to take into consideration the rich knowledge and experiences of indigenous peoples in natural resource management that has been handed down over generations.

It was only recently that remedial action was taken, with certain actors deciding to take a more serious look at these laws. However, the damage was done and the indigenous resource management system continued to erode as the alienation of land for resource exploitation occurred actively between the 1970s and 1980s. Today, 49 percent of Sabah's total land area of 74,000 sq km has been allocated as Forest Reserves, mainly for commercial logging, while 12 percent is for plantations.

5.2 Community Perceptions and Responses

Contradictions between policies and implementation have served to confuse the people. One example is in Bundu in the Tambunan district where villagers were shocked to be told that the area which they had been protecting for generations and which had been gazetted as a watershed area was handed over to loggers by the government. The logging activities devastated the catchment area and silted the river which they relied on for irrigating their paddy fields.

The situations within indigenous communities have also made it difficult to understand and appreciate the laws and policies. Although traditional institutions have been replaced by a so-called Village Development and Security Committee that is supposed to be composed of more educated and informed representatives, this has worked against the community. Very little information is actually transmitted to the ordinary members of the community, especially those in the rural areas, and if there is, the information is often biased towards the government. As a result there is little reflection on the policies and laws and how they affect indigenous rights.

Many communities are convinced that the laws and policies do not function, and cannot guarantee their rights to manage natural resources. Petitions to relevant departments have been sent, and when these failed to get a response, some communities filed police reports or press statements to draw attention to the disrespect of indigenous peoples' rights or exploitation of natural resources. Often the government response has been to reprimand communities, to voice its displeasure or threaten communities using laws that are unfair, resulting in further conflict. Some communities have thus resorted to bringing court cases against the encroaching company or the government. Three such cases, illustrated below, are Bundu in Tambunan, Tongod in the Kinabatangan district, and Desa Montoki in the Ranau district.

5.3 Cases illustrating Challenges and Drawbacks

5.3.1 Coordination between Government Departments

The Sabah Wildlife Department Pilot Project mentioned earlier (see 4.3.4) highlighted some of the major constraints preventing local communities from exercising their rights to participate in natural resource management as stipulated in the various enactments and policies. In this case, the Forest Management Unit holder—the Sabah Foundation—which was granted a 100-year term to manage the area sustainably, is not willing to recognize the community hunting area, as the Sabah Foundation plans to open the area up for logging. There is now an ongoing dialogue between the Sabah Wildlife Department, communities and relevant government agencies to make Forest Management Unit holders comply with their obligations under the Sustainable Forest Management System and for them to recognize the importance of involving local communities in natural resource management.

5.3.2 Non-recognition of Indigenous Peoples' Rights to Land

On 6 September 1999, the government issued and registered a Country Lease to a company for the cultivation of oil palm on NCR land belonging to the Dusun Minokok indigenous communities in Tongod in the Kinabatangan district, thus alienating their land from them. The communities had been residing as a native community in the Tongod Region for seven generations. They inhabited the Tongod Region even before the formation of the Colonial Government of North Borneo, and have established villages in various localities along the tributaries of Tongod River. As natives of Sabah, and by virtue of their long and continuous occupation and use of the land upon which they have continuously cultivated

and resided, the community acquired NCR, native titles and usufructuary rights over the land. The communities' customary and proprietary rights were not extinguished by any enactment or law subsequently enacted.

For years the government informed the community that it was undertaking a settlement scheme for their benefit, similar to the Tongod Regional Planning Study (TRPS), and that upon completion of the Study, the land occupied, used and enjoyed by the community would be allocated to them. Further, the government led or misled the community to believe that their land applications submitted and accepted since 1985 would be kept in abeyance, pending the finalization of the TPRS, and that until then there was no need to submit land applications.

The community filed a case against the company and the government, in which the court decided in favour of the community and ruled that the alienation through the issue of the Country Lease was unconstitutional, violating Article 161A(5) of the Federal Constitution with regard to the special positions of natives in the State of Sabah. It further decided that the government ought to have exercised their powers under Article 8(5) of the Federal Constitution and the Sabah Land Ordinance (Cap. 68) to protect the NCR land. The action of the government was thus discriminatory, unfair and unconstitutional, having violated Article 8 of the Federal Constitution which guarantees equality of all peoples before the law, and Article 13 of the Federal Constitution which guarantees that no person shall be deprived of their property without adequate compensation.

5.3.3 Implementing Resource Use Rights

In 2004, Sabah Parks drew up a management plan for the Crocker Range Park (CRP). Within the boundaries of the Park are a number of communities that existed long before the state came into being. After a series of consultations, two proposals were made on the settlement of claims by indigenous peoples. One is the establishment of 'Traditional Use Zones' for areas such as community hunting areas and watershed areas that will be jointly managed within the CRP. Another is the excision of land, particularly traditional agricultural areas.

Communities will be accorded rights to the resources within the Traditional Use Zones. However, the Parks Enactment and the categorization of CRP as a strict protected area (IUCN category II), currently does not recognize the utilization of resources and the involvement of communities in management committees. The challenge lies in the amendment of the law to accommodate these needs amidst debate within various government departments

that are not supportive of such moves within protected areas. A Collaborative Management Learning Network in Southeast Asia could help bridge the gap in terms of laws and policies for the recognition of resource use rights within protected areas.

5.3.4 Resettlement of Communities – GRID, Gana

Although the Forest Enactment and forest policy allows indigenous communities to remain within forest reserves, the resettlement of communities does occur, as seen in the Gana Resettlement and Integrated Development (GRID) project implemented in Kampung Gana, Kota Marudu in 1997. The project cost RM 8,765,000 (USD 2.3m) and has brought about physical and socio-economic changes to the Dusun Sonsogon indigenous community. The expressed goal of the project is to ensure sustainable use of forest resources in the area, as well as in the Lingkabau Forest Reserve (LFR), while improving the standard of living of the local communities. The plan is for the local population to be the main players in the management of the area, and to directly benefit from the forest produce. The key issue is the management of natural resources to ensure that all forest resources within the commercial forest reserves are managed on a sustainable yield basis for economic, social and environmental purposes.

To affected indigenous communities, the GRID project means the resettlement of communities living inside the forest reserve. The people living in or near a forest reserve can be the greatest threat to its survival, but can also be its strongest supporters and enablers. A forest reserve is more likely to survive if it has the support of the local people and working with local people is the only way to achieve long term forest protection. The Sabah Forestry Department recognizes that this can only be accomplished with active cooperation and participation of the communities bordering forest reserves.

5.3.5 Information Dissemination

Two initiatives by PACOS Trust in 2004—a process to draft both the Rules that would accompany the Sabah Biodiversity Enactment 2000 and the Crocker Range Park Management Plan—demonstrated commendable efforts in information dissemination, particularly to indigenous communities. In the past, various government officials and politicians have repeatedly expressed the need to take the views of indigenous peoples seriously, but this was always seen as mere lip service.

When the Crocker Range Management Plan was unveiled, only three months were set aside for comments. Sabah Parks was unable to provide official translation of the documents,

but were open and willing to financially support translation of the document into Malay. PACOS Trust undertook this challenge to translate, disseminate and collect feedback from affected communities within this stipulated timeframe. It is yet to be established whether the comments that were painstakingly collated by PACOS Trust and submitted to the Sabah Parks will be taken into consideration and incorporated into a revised management plan.

Responding to concerns by some government departments and communities, PACOS also initiated the dissemination of the Biodiversity Enactment and drafted the Rules relating to the provisions on indigenous peoples' rights. It was heartening to observe the active participation of many government departments, research institutes and NGOs in the drafting of the Rules.

5.3.6 Provisions and Mechanism for Obtaining Consent

Obtaining the consent of communities for the declaration or gazetting of protected areas such as watersheds, forest reserves, sanctuaries and parks has failed dismally in the past. In more recent Enactments, such as the Sabah Biodiversity Enactment 2000, stronger provisions for obtaining consent from communities serve as a test as to whether this will change. Internationally, the principle of Free, Prior and Informed Consent (FPIC) is gaining acceptance, and mechanisms are being drawn up to ensure that genuine consent is obtained from indigenous communities. FPIC gives indigenous peoples the right to be consulted and provide (or deny) their consent, to negotiate terms of agreement and to decline a project that is not beneficial.

A big challenge remains in ensuring that existing laws and policies are amended to include FPIC provisions, and to include provisions for redress and restitution to those communities whose claims were not settled when their lands and resources were taken for protected areas.

5.3.7 Interpretation of the Laws

Section 15 of the Sabah Land Ordinance 1930 was adopted from a standard law by the British colonial rulers and has not been changed much in subsequent years. Among the contentious elements in the definition of Native Customary Rights (NCR) under section 15(b) is the number of fruit trees per acre of land to be found when ascertaining NCR. Even though indigenous communities and organizations have repeatedly asked the

government to amend the section as it was not an appropriate indicator, these requests have fallen on deaf ears. A recent amendment instead increased the number of fruit trees from 15 to 50 per acre.

Indigenous communities have also petitioned to repeal section 28 of the Sabah Land Ordinance and have sent memoranda to the national Human Rights Commission and the Sabah Chief Minister. However, due to the low capacity in negotiation skills and the lack of sustained efforts on the part of communities, this has not been successfully achieved to date.

5.3.8 Enhancing Capacity of Indigenous Communities

Enhancing capacities among indigenous communities is also a big challenge because of the lack of resources and support for such efforts. Very few NGOs and support groups have the time or patience to do capacity enhancement in a manner that is sensitive to communities. Many young people who have had some formal education have either left or are seldom in the community.

Others who received tertiary education often see the efforts of their elders and members of the community to assert their rights over natural resources as futile or backward. Even though there are now more opportunities to engage with the authorities, many are unable to do so because these engagements are mainly based on conditions established by the government. Often meetings are held in 5-star hotels, conducted in English and further constrained by a limited number of invitations given at short notice. As such, these meetings do not build indigenous peoples' capacities but instead can be disempowering. Capacity enhancement through building of community organizations also takes much effort, resources and long-term partnerships.

5.3.9 Erosion of Indigenous Resource Management System

Natural resources are now viewed as individual property rather than being collectively owned by the community. This has created competition in some communities leading to unsustainable resource utilization. An example is the extraction of timber in a community forest by individuals for self-gain. The challenge is re-establishing communal responsibility and revitalizing the indigenous resource management system so that resources can be utilised in a sustainable manner for the wellbeing of the community.

Another drawback is non-genuine project development by some communities. In some instances, indigenous landowners have applied for various projects stated as forest management when the real intention is the extraction of timber. An example is the application for logging rights in a water catchment system for a gravity-fed water management project that results in the destruction of the area. Another example is the application for the establishment of less suitable grazing reserves in steeply forested areas instead of low-lying hilly grassland areas. These areas are abandoned after commercial logs have been extracted. The challenge is both in effective enforcement and in building understanding to overcome the desire for short-term monetary gains.

There are also many instances where communities facilitate illegal logging in their native reserves in return for various favours from the logging company, such as the repair of the drainage and irrigation for their rice fields or the repair of football fields. Such an idea stemmed for example in the early 1990s in Sabah, when the Forest Department sanctioned logging in return for building wooden houses to replace traditional houses. The challenges involve good dialogue with the community to ascertain their needs and for the government to respond appropriately to these needs in a timely manner.

5.3.10 Use of Police in Land Conflicts

The involvement of the police in resource conflicts is a serious and on-going issue in Sabah, and is in direct contravention of national and state law. The following example illustrates how the police were involved in a land-grabbing incident by a Chinese businessman, Mr Ooi Say Tuan, in the indigenous village of Kg Togudon in the Penampang district.

On 26 July 2005, two police officers came to the house of Mr Kopit Tayu, an indigenous person from the Dusun indigenous group, to arrest him. He was not told the reason for his arrest. It was only upon reaching the Penampang Police Station that he was informed of the accusation against him of stealing the belongings of Mr Ooi Say Tuan. Mr Kopit was held for 7 days.

Then on 25 August 2005, a plainclothes police officer and Mr Ooi came to the house of Mr Martin Galagub at 7.30 pm, asking him to go to the police station to discuss the land on which he had built his house. Martin was threatened that his non-compliance would result in actions against him. At the police station, Martin and the village headmen, Mr Gamato Galagub, were forced by Mr Ooi to consent to compensation of RM 7,800 (USD 2,053) and to sign a letter of agreement between Martin and Ooi, a letter written by Sergeant Hassan Sani.

On 26 September 2005, Mr Soikun Sumporo received a call from a police officer from the Penampang Police Station ordering him to come to the station without giving any reasons. At the station, Sergeant David Jamilong informed him that he and his family were ordered to leave their present house within 7 days as the land was owned by Mr Ooi. The next day Mr Ooi and 7 others arrived at Soikun's house to forcibly evict him.

5.3.11 National Implementation of International Instruments

Current issues on natural resource management are being actively debated at the international level, particularly the processes related to the UN Convention on Biological Diversity (CBD). In line with usual international compartmentalization of issues, indigenous issues are being discussed separately at the UN Permanent Forum on Indigenous Issues (PFII), leading to inconsistency in debates and agreements across the two fora.

Malaysia ratified the CBD and is also often represented at the PFII. However, the representations at these fora do not reflect the decentralized manner in which the states operate. As such, government delegates from Sabah and Sarawak, where the majority of indigenous peoples reside and where laws and policies on natural resource management are enacted separately, are not included in the official national delegation. For example, none of the government departments from Sabah were officially invited to the 7th Conference of Parties hosted by Malaysia in 2004. The opportunity accorded in terms of understanding international debate on indigenous peoples and natural resource management are not maximized, making it an even bigger challenge to implement the international instruments.

5.3.12 Impact of Natural Resources Development on Women

In a study conducted by PACOS in the Bundu village in Sabah in 2001, women said that the depletion of natural resources has made it more difficult for them to go about their traditional activities, such as the preparation of food and making of handicrafts. Women also feel more burdened with the responsibility of looking for increasingly scarce income-generating alternatives, especially if they are denied access to natural resources for food, water and fuel (firewood).

Also, since the health of the family is often the responsibility of women, the burden is placed on them to keep families healthy in the face of a deteriorating environment. Once the forest resources are too far away or too dangerous for them to get, some of the traditional

social reproductive roles of women are taken over by men. Thus the independence of women erodes as they increasingly depend on men to accompany or assist them in getting the scarce resources for the daily needs of the family or for handicrafts.

6. Laws on Natural Resource Management affecting the Orang Asli

This chapter focuses on the Orang Asli, the indigenous peoples of Peninsular Malaysia. It attempts to demonstrate that while the various laws affecting Orang Asli rights to their traditional lands and resources may not be explicit in protecting these rights, there is actually enough in local laws to support recognition of this inalienable right – if we only want to do so.

The hierarchy of legislation in Malaysia is as follows:

1. The Federal Constitution;
2. Acts passed by Parliament;
3. Regulations and other subsidiary legislation passed by the executive (Ministerial Regulations);
4. State laws and regulations.

Ironically, as we shall see for the case of the Orang Asli of Peninsular Malaysia, it is the last category – state laws and regulations – that effectively take precedence in determining Orang Asli rights to their traditional land and resources.



Chewong returning from their farm with bananas for sale, Teris River, Pahang

Photo: Colin Nicholas

6.1 State Laws and Regulations

Several laws and regulations affect the status of the Orang Asli even though they may not directly concern them or mention them specifically. Some examples are the Town and Country Planning Act 1976 (Act No. 172) and the Local Government Act 1976 (Act No. 171). Both effectively remove any semblance of autonomy that the Orang Asli may have had over their traditional lands.

The following laws, however, have a greater bearing on the Orang Asli insofar as the management and control of their territories and the resources found therein are concerned:

- National Land Code 1965 (Act No. 56)
- Land Conservation Act 1960 (Act No. 385), revised 1989
- Land (Group Settlement Areas) Act 1960 (Act No. 530), revised 1994
- Protection of Wildlife Act 1972 (Act No. 76), revised 1976, 1991
- National Parks Act 1980 (Act No. 226)
- Aboriginal Peoples Act 1954 (Act No. 134), revised 1974

The **National Land Code** established a uniform system of tenure under which title to an interest in land depends on registration. This act applies only to the Peninsula and deals with matters of tenure, title, and land transfer. Under the Act, authority over all land, mineral, and rock material is given to the respective states.

The **Land Conservation Act 1960** consolidates the law relating to the conservation of hill lands and the protection of soil from erosion and the inroad of silt. Section 5 provides that no person shall plant any hill land with short term crops (i.e. crops that normally complete their life cycle within two years after planting) without an annual permit from the Collector of Land Revenue. Section 6 goes on to prohibit the clearing of hill land. These provisions are detrimental to Orang Asli communities who live in forest and forest fringe areas and who still depend on the traditional swiddens for their subsistence.

The **Land (Group Settlement Areas) Act 1960** enables land agencies such as the Federal Land Development Authority (FELDA), the Federal Land Consolidation and Rehabilitation Authority (FELCRA) and other agencies such as the Pahang Tenggara Development Authority (DARA) to take over state land and to develop it for the purpose of land settlement, which culminates in the issue of titles to the settlers. Frequently Orang Asli traditional areas have been converted to such land schemes, with them neither enjoying the fruits of the programme nor being entitled to obtain the titles.

A law that expressly mentions the Orang Asli (or 'aboriginal community') is the **Protection of Wildlife Act 1972 (Act 76)**. Wildlife Reserves and Sanctuaries may be declared by the state under this legislation. In such areas, an Orang Asli may shoot, kill or take certain wildlife for the purpose of providing food for himself or his family.

Another law that is applicable to the Orang Asli is the **National Forestry Act 1984**, which provides for the administration, management and conservation of forests and forestry development in the states. It also provides that forest produce is the property of the state and that harvesting requires a license. Basically, it treats the Orang Asli harvesters of such forest produce (e.g. rattan and *petai*) as labourers of the traders who hold the necessary licences (or 'bund' as they are called in Perak) from the Forest Department.

The **National Parks Act (Act 226) 1980** is an act to provide for the establishment and control of National Parks and for matters connected therewith. While usufructuary rights of the Orang Asli may not be curtailed in such parks, their right to own and control their traditional territories certainly comes under serious jeopardy.

The **Aboriginal Peoples Act (1954, revised 1974)** is the only law that specifically relates to the Orang Asli. While the Act provides for the establishment of Orang Asli Areas and Orang Asli Reserves, it also grants the state the right to order any Orang Asli community to leave – and stay out of – an area. In effect, the best security that an Orang Asli can get is one of 'tenant-at-will'. That is to say, an Orang Asli is allowed to remain in a particular



Jah Hut returning from the forest with herbs and leaves for a ritual, Kuala Krau, Pahang

Photo: Colin Nicholas

area only at the pleasure of the state authority. If at such time the state wishes to re-acquire the land, it can revoke its status and the Orang Asli are left with no other legal recourse but to move elsewhere. Furthermore, in the event of such displacement, the state is not obliged to pay any compensation or allocate an alternative site, and *may* only do so at its discretion.

Thus, the Aboriginal Peoples Act laid down certain ground rules for the treatment of Orang Asli and their lands. Effectively, it accorded the Minister concerned – or his representative, the Director-General of the Department of Orang Asli Affairs (JHEOA) – the final say in all matters concerning the administration of the Orang Asli. In matters concerning land, the state has final say.

All these laws give the federal and state governments a tremendous amount of leverage *against* the Orang Asli. (This, at least, is how the above laws, and especially the Aboriginal Peoples Act were interpreted – until, that is, the October 2005 decision of the Court of Appeal in the Sagong Tasi case, as discussed below.) Even supposedly sustainable and rights-respecting initiatives such as the Malaysian Timber Certification Council (MTCC) prefer to hide behind the catch-all clause ‘subject to national laws’, knowing full well that such national laws generally favour the interests and greed of the well-placed and well-heeled rather than the Orang Asli inhabitants of the areas they now seek to exploit or appropriate.

6.2 The Federal Constitution, Land, Natural Resources and the Orang Asli

The welfare of the Orang Asli comes under the Federal List in the Federal Constitution, while land and forest matters come under the State List. Also, as every state is independent under the Constitution, federal legislation in most cases is not binding on the states.

On the contrary, the Federal Constitution accords substantial powers over land use and natural resource management to the respective states. Although under the Constitution the Federal Government is empowered to make laws it deems necessary to ensure continuity throughout the country, the Federal Government often serves merely as a coordinating entity. As such, federal agencies like the Department of Orang Asli Affairs (JHEOA) would consequently assume only a liaison and cooperative role with respect to the state authorities.

In fact, the rationalization that, while the Orang Asli are a federal concern, all matters pertaining to land reside in the state, and the federal government has no say or influence, is an oft-heard explanation whenever those responsible for gazetting or reserving lands for

the Orang Asli are asked why such dismal progress has been made. That there is a glaring precedent in the case of FELDA—which effectively uses the Land (Group Settlement Areas) Act of 1960 to direct states to give up some of their land for landless settlers in their development schemes—is lost on these administrators and decision-makers.

The crux of the problem lies in the fact that with forests being such a valuable productive resource in the country, it is in the interest of the states to maintain control over their forest lands. Creating Orang Asli reserves in their now-valuable land banks would effectively deny the state a revenue-generating facility, as such reserves would come under the purview of the Federal Government. Thus, it does not make economic sense for the states to gazette lands for the Orang Asli.

This is, of course, based on the presumption that states enjoy the legal right to those lands that are contested by the Orang Asli as their own. But as we shall see below, this perception is steadily giving way to an interpretation of natural resource law that is bound to bring changes to the way traditional territories are controlled and managed.

6.3 The Changing Status of the Orang Asli in Natural Resource Law

6.3.1 Only Orang Asli have rights to forest produce in Orang Asli areas

Koperasi Kijang Mas v Kerajaan Negeri Perak

In 1992, the Ipoh High Court, in deciding the case of *Koperasi Kijang Mas v Kerajaan Negeri Perak*, held that the State Government of Perak had breached the Aboriginal Peoples Act 1954 (revised 1974) when it accepted Syarikat Samudera Budi Sdn. Bhd's tender to log certain areas in Kuala Kangsar. These areas included lands which have been approved by the State Government as Aboriginal Reserves—namely, the re-groupment schemes of RPS Sungei Banun and RPS Pos Legap. The High Court went on to hold that Syarikat Samudera accordingly had no rights to carry on logging activities and that only Orang Asli as defined in the Aboriginal Peoples Act had the right to the forest produce in these reserves.

An important point canvassed by the State Government was that the lands, although approved as Aboriginal Reserves, had not been gazetted. Justice Malek, in a strong opinion, held that gazetting was not a mandatory requirement for the recognition of reserves and the relevant laws therein. The approval of the State Government for the lands to be aboriginal reserves had, without the necessity of gazetting, created the reserves, and thereafter only Orang Asli have exclusive rights to the forest products in the reserves.

This decision has important implications for Orang Asli land rights as official sources indicate that some 29,144.18 hectares of aboriginal lands in 2002 were approved, but are yet to be gazetted. In respect to these lands, Orang Asli therefore have some measure of statutory protection from encroachment and displacement by many other interests.

6.3.2 Orang Asli have proprietary interest on the land

Adong bin Kuwau v. State of Johor

In 1997, the Johor High Court awarded compensation to 52 Jakuns for the loss of 53,273 acres of ancestral lands. The State Government had taken the forested land and leased it to the Public Utilities Board of Singapore, who subsequently constructed a dam to supply water to both Johor and Singapore.

Justice Mokhtar concluded that the Jakuns had proprietary rights *over* their lands, but no alienable interest *in* the land itself. That is to say, while the Jakuns may not hold title to their traditional lands, they nevertheless have the right to use it for their subsistence and other needs. In this instance, the court ruled that while certain lands are reserved for aboriginal peoples, they also have recognized rights to hunt and gather over additional lands – the “right to continue to live on their lands, as their forefathers had lived”.

Such proprietary rights are protected by Article 13 of the Federal Constitution, which requires the payment of ‘adequate compensation’ for any taking of property. In accordance



Semai traditional houses, Kuala Woh, Perak

Photo: Colin Nicholas

with this, the Jakuns were awarded a sum of RM 26.5 million for their loss of income for the next 25 years. With interest accrued, the final payment was RM 38 million. This judgment was upheld by the Court of Appeal in 1998, with no leave being granted for appeal to the Federal Court.

6.3.3 Orang Asli have a proprietary interest in the land

Sagong Tasi v Kerajaan Negeri Selangor

Sagong Tasi was among 23 family heads from Bukit Tampoi in Dengkil, Selangor who had 38 acres of their land taken from them for the construction of the Nilai-Banting highway linking with the new Kuala Lumpur International Airport in 1995. Some also had their crops and dwellings destroyed. While they were paid a nominal amount for the crops and dwellings, there was no compensation for the land. The authorities maintained that the Orang Asli were mere tenants on state land and as such were not entitled to compensation under the Land Acquisition Act 1960.

With the help of a pro bono team of lawyers from the Bar Council, the Temuans took their case to the courts. They asserted that they are the owners of the land by custom, the holders of native title to the land and the holders of usufructuary rights (i.e. right to use and derive profit) to the land. They also maintained that their customary and propriety rights over the land which they and their forefathers have occupied and cultivated for a long time were not extinguished by any law.

In April 2002, Justice Mohd ruled that the Temuans did have native title under common law over their lands. As such, compensation was to be paid to them in accordance with the Land Acquisition Act 1960. The four defendants—the Selangor State government, United Engineers Malaysia (UEM), Malaysian Highway Authority (LLM), and the Federal Government—appealed.

In October 2005, Court of Appeal Judge Gopal Sri Ram, sitting with two others, unanimously threw out the appeal and held that the High Court was not misdirected when it decided, based on a large quantity of evidence and fact that was not challenged, to rule that the Temuans did indeed have propriety rights over their customary lands. As such, these lands should be treated as titled lands and therefore subject to compensation under the Land Acquisition Act.

Thus it can be seen that the Orang Asli were deemed to be in possession of titled rights to their lands, a fact that state and federal authorities sought to undermine by imposing an

interpretation of natural resource laws that advantaged their own interests. Unfortunately, this was a right that had to be challenged in court and not one that was conceded with magnanimity as befitting a position that is just and equitable.

Earlier we noted that in Malaysia's legal hierarchy, state laws and regulations appear to be given greater weight and authority than the Federal Constitution. That this is so was clearly elaborated by Justice Gopal in his judgement of October 2005.

His 59-page judgment in the Court of Appeal is more than just an affirmation of the rights of the Orang Asli to their traditional lands. It was a condemnation of the way the Orang Asli have been treated by the authorities and a wake-up call to the government to fulfil its fiduciary responsibility towards the community. In his words, "Here you have a case where the very authority – the State – that is enjoined by the law to protect the aborigines, turned upon them and permitted them to be treated in a most shoddy, cruel and oppressive manner".

6.4 Failure in Fiduciary Duty

Acknowledging that the purpose of the Aboriginal Peoples Act 1954 is to "protect and uplift the First Peoples of this country", Judge Gopal asserted that "it was therefore fundamentally a human rights statute, acquiring a quasi-constitutional status giving it pre-eminence over ordinary legislation. It must therefore receive a broad and liberal interpretation."

This was in keeping with the early debates and discussions as recorded in the Federal Legislative Assembly hansards, newspapers of the day and archival records, which clearly show that Orang Asli lands were to be recognized. For example, as noted in the judgment, when the Orang Asli representative, Tok Pangku Pandak Hamid, asked the Minister of Education if the government had any plans to ensure that the hereditary lands of the Aborigines are reserved for their use, Enche Mohd Khir Johari replied:

"Steps are now being taken to create these reserves and there are also in existence others which were gazetted prior to the introduction of the Ordinance.... At the moment there are in existence in the Federation, 58 Gazetted Aborigine Reserves covering in all approximately 30 square miles, and including some 5,200 aborigines. An additional 120 areas are currently under consideration, with a view to gazetting as Reserves. They cover about 389 sq miles and include approximately 21,000 aborigines."

Alas, as the court was later to find out, none of these good intentions were realized. In the case of Bukit Tampoi, the Temuans faced both under-gazettement as well as non-gazettement of their lands. Thus, as a result of the state and federal governments' neglect in both under-gazetting and not gazettement areas which they knew were inhabited by the Temuans, the latter's rights in the land were placed in serious jeopardy. For the state and federal governments now to say that no compensation is payable to the Temuans because the disputed lands were not gazetted, is to add insult to injury – injury caused by their own neglect and failure. This prompted Judge Gopal to comment that, “I am yet to see a clearer case of a party taking advantage of its own wrong”.

6.5 Making the Aboriginal Peoples Act compliant with the Federal Constitution

The practice to date has been to use the 1954 Act as the legal basis for compensating the Orang Asli only for their crops and dwellings whenever their lands are taken. The 1954 Act has also been used to argue that the Orang Asli do not hold proprietary interests *in* their land, and that the state governments exercise wide powers as to the disposal and compensation of these lands. The Orang Asli as such are only tenants-at-will, living on state land at the state's largesse.

Citing a number of legal precedents and justification, Judge Gopal reversed this interpretation. In light of the obvious conflict between the 1954 Act and the Federal Constitution, wherein Article 13(2) states, “No law shall provide for compulsory



Temuan man at his swidden on the forest edge, Kelau, Pahang

Photo: Colin Nicholas

acquisition or use of property without adequate compensation”, he ruled that relevant portions of the 1954 Act *had to be brought into conformity with the Constitution*.

This is achieved, he says, by not reading the words in section 12 of the 1954 Act, “the State Authority may grant compensation therefore” as conferring a discretion on the State Authority whether to grant compensation or not. Rather it is by reading the relevant phrase as “the State Authority shall grant adequate compensation therefore”, that the modification is complete.

This is a pro-active move that has the positive effect of restoring justice to a community that has long been denied their rights by the narrow interpretation of natural resource laws.

The judge added that, “I am aware that ordinarily we, the judges, are not permitted by our own jurisprudence, to do this. But here you have a direction by the supreme law of the Federation that such modification as the present must be done.”

7. Conclusion and Recommendations

For the Orang Asli, the judgment of the Court of Appeal in the case of *Sagong Tasi v Kerajaan Negeri Selangor* is without doubt a landmark decision in many respects. It shows that there are enough laws to protect the rights of the indigenous peoples to their traditional lands and resources *if the government has the will to do so*. Indigenous peoples are increasingly pressured to file cases in the court and this is proving expensive – not just for indigenous communities but also for the government. For the government, losing a case can be a cause for embarrassment and bad publicity that can be avoided by being pro-active and reviewing policies and laws that deny indigenous peoples their rights to resources.

Various recommendations have already been made in the different chapters. However, indigenous peoples and governments, meeting at a local consultation to validate the preliminary report of this research, have unanimously agreed on the following:

The formation of an Inter-Ministerial Committee, or a body that has sufficient authority at the state and national level to review the various policies and laws on natural resource management and indigenous peoples, with a view to streamlining such laws and policies to protect indigenous rights. The Committee is also expected to identify sections that should be amended and the obstacles to the implementation of such laws and policies.

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Photo: Collin Nicholas

Thailand

The Challenges of Joint Management
in the Northern Hills

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AIPP FOUNDATION



Thailand

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Thailand

The Challenges of Joint Management in the Northern Hills



Karen threshing padi after harvest

Photo: Chris Erni

1. Indigenous Peoples of Thailand

1.1 Introduction

Thailand is home to various populations characterized by diversity of indigenous¹ and tribal peoples, with large numbers of peoples of different cultural beliefs and histories residing within its geographical borders.² Highland indigenous peoples are concentrated in around 20 provinces in the Upper and Lower North and the Western regions of Thailand, a mainly mountainous area. Official recognition as ‘mountain peoples’ has been granted to only 10 ethnic groups; the Karen, Hmong, Lahu, Iu Mien (Yao), Lisu, Akha, Lua (Lawa), H’tin (Kachin), Khamu, and Mlabri, despite there being many more.³ They are officially designated by the Thai government as ‘*Chao Khao*’ which is colloquially translated as ‘hill tribes’ or ‘people of the mountains’⁴. In addition to these highland peoples, the ‘*Chao Thale*’ or the ‘sea gypsies/people of the sea’ are also widely recognized as Thailand’s indigenous peoples, although the government does not use this term.⁵ Some of them, like the Lawa, H’tin, Mlabri and most probably the Karen, have been living in areas now part of the Thai nation state before the Thai speaking ethnic groups immigrated at the beginning of the second millennium. Others, like the Hmong, Yao and Lahu immigrated since the middle of the 19th century into present day Thailand and others still in the beginning of the 20th century like the Lisu and Akha.⁶ A 2002 survey quoted a population of 1,203,149 with around 164,413 households in 3,429 villages.⁷

Although the mountain peoples are viewed by the Thais as a homogenous group, they are highly heterogeneous. They have their own cultures, languages, customs, modes of dressing and belief systems which are distinct from the majority Thai lowland settlers, and which are distinct from each other.⁸ They have systems of natural resource management that are centered on traditional knowledge which they have developed, tested and passed down from generation to generation for hundred of years.⁹ There are many customs and mores to govern the practices of natural resource management within these communities, some of which will be looked at in detail in this study. Often these governing rules are, however, not known and comprehended by the authorities and the public.¹⁰

The hill tribes are not recognized as distinct in terms of their indigeneity.¹¹ In a 1992 submission to the UN Commission on Human Rights the Thai government stated, “one of the great sources of pride of the Thai people is their rich and diverse ethnic and cultural heritage. The hill-tribes of Thailand and their distinct lifestyles are part of this colourful heritage. These tribes are among the many ethnic groups that constitute Thai society. They are not considered to be minorities or indigenous peoples but as Thais who are able to enjoy fundamental rights and are protected by the laws of the Kingdom as any other Thai citizen.”¹² In reality the policies of the Thai government toward hill peoples have resulted in discrimination and exclusion.¹³

Some anthropologists have differentiated these groups according to the altitudes at which they traditionally form their communities. The Karen, Lawa, H'tin and Khamu thus identified as living in altitudes between 400 – 1000m above sea level and the Hmong, Iu Mien, Lahu, Lisu and Akha in the higher reaches above 1000m.¹⁴ Altitude of settlement is also directly linked to the dominant agricultural systems used in these communities. Groups living at the lower altitudes traditionally plant rice in sedentary forms of rotational swidden systems, sometimes in combination with paddy fields, while those living at higher altitudes practiced swidden cultivation with long cultivation and long fallow periods. However these bases of differentiation are becoming outdated. Due to state intervention and international development influences, agricultural practices and settlement practices have changed radically; and settlement patterns of these groups have undergone many changes. Those “traditionally” found in higher uplands can be now found in lower uplands and valleys, and there is a far greater diversity of agricultural systems practiced.

1.2 ‘*Chao Khao*’ or ‘Hill Tribes’

The term “hill tribes” is used as a generic, semi-official term for the various non-Thai groups living in the uplands of northern and western Thailand, dating from the late 1950s. Riener Buergin identifies the polarities implicit in the use of the term ‘chao khao’, or more historically, ‘chao pha’ or people of the forests. Among the various ethnic Thai groups of Southeast Asia, *pha* – referring to “forest”, “wild”, “savage” – is generally conceived as opposite to *muang* – referring to “civility” or the “human domain”. Frequently, the pole of “civility” was identified with dominant ethnic Thai groups, while the “forest/wilderness” pole was related to marginal ethnic minority groups at the edge of the Thai polity.¹⁵

During the 19th century, these “forest peoples” played an important role in the economy of Thailand by facilitating access to forest products aimed primarily at local Asian markets. However, with the growth of large-scale trade with European markets where Thais supplied goods such as rice and teak, the economic importance of these peoples decreased. With this decreasing economic importance also came shifts in approach toward these peoples from lowland power centres. The ruling elites began to perceive them backwards and largely left them to their own devices on the edges of the emerging nation-states. It was only in the middle of the 20th century when the state, in the name of modernization, national security, and ‘international’ anti-communism, expanded into the peripheral forest and mountain areas, and the *chao pha* re-emerged in national politics as the troublesome *chao khao* or ‘hill tribes’.¹⁶ The framing of the new social category *chao khao* was part of the nation building process in which, in the first half of the 20th century, national identity and definition of ‘Thainess’ was linked to cultural traits, particularly Buddhism, language, and monarchy.¹⁷ For the most part, highland peoples were not integrated into the Thai administrative system.

Important factors within these developments were the efforts to eradicate the opium trade and to control the communist insurgency. Opium was an important source of income for the state during the 19th century and the first part of 20th century, and highland peoples were the source of the primary resin, traded for lowland goods such as oil and salt. However with the illegalization of opium by most western countries, Thailand was pressured to prohibit cultivation of opium. Although previously part of an opium trade integrally dependent on the Thai middle men, soon opium growing groups such as the hill dwelling indigenous peoples came to be seen as a ‘problem needing to be solved’. Around the same time, problems with communist insurgents having their centers in remote hill areas started. As a result, the state became more and more interested in exerting stronger state control over the upland regions of the north and west of the country.¹⁸

Part of the response to this new perceived need for control, the Central Hill Tribe Committee (CHTC) of Thailand was established in 1959 and a national policy towards

the “hill tribes” was formulated for the first time. The objectives of the policy were to protect ‘national security’, reflecting fears that communist influences may spread among the ethnic groups of the uplands, control and substitution of opium cultivation, and the abolition of shifting cultivation, which in the international development community had been perceived as destructive, a threat to forest resources, and a hindrance to development.¹⁹ A policy towards the ‘chao khao’ framed in such terms of threat and control could only have one outcome, and soon the term was identified with a negative stereotype of forest destroying, opium cultivating, dangerous foreign troublemakers. Originally this image was mainly derived from the Hmong²⁰ as their swidden cultivation systems frequently included opium cultivation, and some communities were involved in the communist insurgencies of the 1960s. However the stereotype soon spread from reference specifically to the Hmong to all the different groups categorized as “hill tribes”.²¹

The creation of this category of people had major political connotations. Their traditional lands and resources were territorially included within the Thai nation state but were culturally excluded as what some scholars have called “others within”.²² One of the most prominent manifestations of this stereotype of “others” is the denial of citizenship to a large number of indigenous peoples in Thailand. A further manifestation has been the continued focus in government policy making on ‘solving the problem of the hill tribes’ Public perception of marginalized hill tribe communities was strongly influenced by all these prevalent official stereotypes which in turn reinforced official policies against the hill tribes. Since then, these negative stereotypes of hill peoples have remained widespread, and indeed have been revived and exploited in the debate around the drafting of the community forest bill and during the conflicts over water and forest resources in the 1990s.

Not only are the hill tribes seen as peoples who have, due to their place of residence and their way of life, excluded themselves from the Thai nation, they are seen as threatening the welfare of the country by destroying its forests, producing narcotics and harboring foreign influences.²³ Because of these negative stereotypes, a number of indigenous activists in Thailand do not like the term ‘*chao khao*’ and its literal translation of ‘hill tribes’ and a range of terms such as *chao thai phu khao* ‘Thai mountain peoples’ and *chon pao puen muang* ‘indigenous tribes’ have been used. For political correctness, the term ‘hill peoples’ has been introduced as the dominant English term.²⁴

1.3 A Brief Historical Look at Approaches toward Indigenous Peoples of Thailand

Much of the available literature on the history of Thai government policies affecting indigenous hill peoples report the 50s as the period when “problems” regarding indigenous hill people were first identified. For instance, Hengsuwan states, “Thai government first

acknowledged and started setting policies to problems related to highlanders in the late 1950s".²⁵ While it may be true that policies relating directly and specifically to indigenous hill peoples began to be pursued in the 50s, other laws were already in existence which had impacted on them. For instance early forestry laws were enacted before the 1950s which affected them as they mostly resided in forest areas. However, the earliest policy affecting hill tribes was the first Nationality Act of 1913, which granted Thai citizenship based on bloodline (Thai father) and territorial basis (born in Thailand), thus replacing previous customary laws. The first national census in 1956 failed to include hill tribes and thereby excluded them from Thai nationality, an exclusion that was only partially addressed in 1965 and created legal divisions very early on.²⁶

Clearly the early neglect of the Thai state in its relationship with highland communities was to have long-term impacts. Changes to this attitude of separation and neglect came most clearly with the establishment of the Central Hill Tribe Committee (CHTC), and the subsequent creation of the Hill Tribe Welfare Division within the Ministry of Interior. As a first step toward attaining the objectives of national security, control of opium cultivation and abolition of shifting cultivation, resettlement programmes were implemented in 1960-61 to concentrate the hill tribes in a few, easily accessible places. As Prof. Kesmanee notes, "At that time, the Department of Public Welfare had already established self-help settlements for the lowland Thai therefore it was felt that such settlements could also be set up for the



Karen man in rice swidden

Photo: Chris Erni

hill tribes. The settlements were established in four areas: Tak, Chiang Mai, Chiang Rai and Phetchabun provinces.²⁷ However several obstacles and difficulties, including strong disinclination by highland communities to being resettled, and to staying in the assigned (ecologically weak) resettlement sites and the resettlement project was shelved shortly after.

This was followed by the commissioning of a study in 1961-62, supported by the UN Narcotic Drugs Division, on the various indigenous groups in the uplands. This study led to the establishment in 1963 of mobile units called Hill Tribe Development and Welfare Centers to look after the hill tribe groups, as well as the setting up of the Tribal Research Centre in Chiang Mai University in 1964.²⁸

Because of the link drawn between hill tribes, opium cultivation and communist insurgency already mentioned, hill tribe policies, from the middle of the 1960s to the middle of the 1970s, were directed by such 'national security' concerns, and in the 'battle zones' the military became responsible for hill tribe communities.²⁹ Indeed, the attempt of the Thai government to eliminate opium cultivation by outlawing it in 1959 became the key factor that triggered (and misdirected) highland development policies.³⁰

The First National Economic and Social Development Plan (NESDP) of Thailand was drawn up for implementation in 1961-66. This plan included a section which aimed at preventing forest and watershed destruction; ending opium cultivation; bringing socioeconomic development to hill tribes; and instilling a feeling of loyalty to Thailand among the hill tribes. Besides building schools in some areas where hill tribes resided, the implementation of some minor development projects and the establishment of the Tribal Research Center, the plan was not implemented comprehensively.³¹

The policy toward the hill tribes was reformulated in 1968, to aim at concentrating scattered settlements, resettlement to the lowlands, and assimilation into Thai society to secure loyalty toward the state.³² For the most part, until the 1980s, no major changes in government policies toward the hill tribes took place.³³

Laws that affect indigenous peoples and their natural resource management are discussed in the Chapter III.

1.4 Citizenship

Currently there remain significant numbers of indigenous peoples in Thailand who have not received formal legal status, whether citizenship or other legal status providing the right to residence in the country.³⁴ Individuals without citizenship or other formal legal status

face numerous obstacles in everyday life; they are not able to formally access government services in health, education, exercise their political rights and enjoy basic rights such as the right to unrestricted travel. The implications of this with regard to natural resource management are numerous. Consistent management of resources is not possible when people without citizenship do not have the legal right to remain in their areas of settlement, whether they have been there for generations or not.³⁵ There are many documented cases of people pushed and trafficked into underground economic activity such as sex-work among indigenous women and children, resulting in high cases of sexually transmitted diseases like HIV/AIDS. Consequently, obtaining Thai citizenship and the rights inherent within has become a key priority for indigenous peoples in Thailand.

The first population census was conducted in 1956 in accordance with the National Household Registration Act. Indigenous peoples were largely excluded due to the lack of access to their villages, lack of officers and ingrained official prejudice. An official survey of the hill tribe population was conducted in 1969-70 covering 16 provinces of Northern Thailand and an estimated 111,591 people were officially recorded. However, the enforcement of the Citizenship Act had already made most hill-tribes aliens. The fact that most indigenous peoples could not speak Thai made it difficult to prove their origin even if they have been living in Thailand for hundreds of years.³⁶

The Nationality Act of 1965 extended Thai citizenship to people belonging to ethnic minority groups who were born in the kingdom providing both of their parents were Thai nationals.³⁷ Given the historical fact of exclusion, this criteria did little to extend citizenship in practice. In 1976 a Cabinet memorandum called for the acceleration of the registration of ethnic minorities who had entered Thailand prior to 1975, with the ultimate aim of enabling them to become citizens.³⁸ It also attempted to reduce the population growth rate among indigenous peoples by promoting family planning services. The distinction between those who entered Thailand before and after 1975 as the defining line between those who are, and are not, entitled to citizenship remains in effect today, despite the significant difficulties in proving date of entry into the nation.³⁹

Government officials have been accused of disinterest in effectively implementing policies that would recognize citizenship of indigenous peoples. One oft cited reason by officials is the influx of immigrants and refugees from neighbouring countries, especially Burma, which has caused officials to be more restrictive in granting citizenship. This has resulted in people with legitimate claims facing a long and tedious application process to obtain citizenship, despite Cabinet Resolutions aimed at reducing the bureaucratic obstacles to citizenship. District officials who are required to cooperate are also often not willing to go into the interior mountain areas and therefore neglect such areas.

2 Natural Resource Management System of Indigenous Peoples in Thailand⁴⁰

2.1 Natural Resources of Indigenous Peoples in Thailand

Most indigenous groups in Thailand do not have exact terms that can be translated into the English phrase “natural resources”, although there are obviously phrases that describe the concept of natural resources. The Karen (or Pga k’nyau) phrase *ta ba-ter* is often used to describe naturally occurring things and means ‘that which has arisen by itself.’ Another phrase used by the Pga k’nyau to describe naturally occurring things is *ta ler aku taw kawae* which means ‘things arising spontaneously’. Similar to the Pga k’nyau, the Hmong have the term *ib txwm ntuj tsim teb rau* meaning ‘things that arise by themselves naturally’.

The prefix ‘*ta*’ used by the Pga k’nyau has the simple meaning of ‘thing’. However it possess the deeper underlying meaning of things that are unseen, the existence of a force or power above everything else and from which nature emanates. This approach of associating natural resources with spiritual and cultural meanings is not unique to the Pga k’nyau, and other indigenous groups have similar belief systems. The Lisu also believe in the connectedness of natural resources with the spiritual world and that they originate as a result of some divine force.⁴¹

For indigenous peoples in Thailand, ‘natural resources’ is therefore understood to be an all encompassing concept including land, forest, water bodies, trees, wildlife, agricultural areas and watershed areas, all understood as having cultural, economical, political and spiritual significance. Natural resources are intrinsically linked to each other and any impact on one of them inevitably affects the rest. There are also different categories within the broader understanding of natural resources, with each indigenous people in Thailand classifying forests and lands based on their beliefs, climatic variations, vegetation and/or physical characteristics. The Pga k’nyau, for instance, have an extensive classification of forest categories, described further in Box 1.

Such a highly evolved understanding of natural resources clearly indicates strong systems of management based on such knowledge, and the fact that the last remaining forests and natural biodiversity hot spots of Thailand are in areas which have long been the domain of indigenous groups similarly provides evidence of the effectiveness of the existing, customary use patterns of indigenous peoples in Thailand for both conservation and for livelihoods.

2.2 Indigenous Natural Resources Management Systems

For indigenous peoples in Thailand, ‘natural resource management’ denotes the utilization and maintenance of natural resources through traditional knowledge on resource use and

conservation combined with modern technology.⁴² The various different peoples share similarities in the management of their resources but also possess distinct and culturally grounded ways of managing resources as well.

Because natural resources are understood to be an integral part of their everyday life, respect for them and their importance is manifested in everyday activities and practice, as well as in ceremonies and rituals. Knowledge for the management of these resources is embedded in the social, cultural, economic and political milieu of the peoples. Taboos, ceremonies and rituals which express respect and devotion to the spirits that are believed to guard different natural resources not only serve an important ceremonial role but also ensure that rules for resource use are adhered to by community members.

Some examples of how natural resource management is manifested in beliefs and culture, how they are practiced and how such practices have been institutionalized through the ceremonies and rituals of indigenous peoples in Thailand are given below.

2.2.1 Lands and Forest

Like indigenous peoples in other parts of the world, indigenous communities in Thailand have a strong affinity toward the land and forest in which they live and on which they depend. Land has physical, spiritual, cultural, economical and political significance.

Different indigenous peoples have differences in their concepts of land ownership and use as well as similarities. The Lisu, who traditionally practice shifting cultivation, choose their farming sites carefully, depending on the kind of cultivation they intend to take up, identifying forest areas which are cultivable, not prohibited by taboos or areas which they traditionally believe should not be disturbed and where the area does not slope too much as to cause erosion. A group of four or five families usually looks for a suitable site together. Once a site is selected, a sign such as a piece of wood with a cross on the top is cut and placed to mark the area as occupied. Planting occurs only after a ceremony is performed asking for permission, help and protection from the spirits of the area. According to their traditional knowledge, black and loamy soil is fertile and good for all kinds of crops; they plant rice, corn and sesame in warm places while opium poppy and beans are planted in cold areas. They believe that land has life and it dies if care is not taken in its use. This prevents them from exploiting land beyond what it can sustain. They leave their land fallow for a minimum of five years for regeneration. However there are no tenure rights over these fallow lands, anybody with the permission of the previous user can cultivate it if it has regenerated enough.

The Pga k'nyau also practice swidden cultivation, planting rice and various vegetables such as cassava, tubers, corn, pumpkins, chili and eggplant for domestic consumption throughout the year. This agricultural system involves leaving the land fallow for seven to ten years before replanting. Like the Lisu, they choose their agriculture area with careful consideration of a number of factors such as whether the area is a taboo forest, watershed etc. Ownership of swidden agricultural land is partially communal, in that if it is not used by the original owner, then that owner is obliged to hand it over for use by other community members. The land may not be sold or passed on to one's descendants. Clearing land for new cultivation sites is never done during the rainy season.

Forests are also categorized and differentiated by both the Lisu and the Pga k'nyau depending on a number of factors. Perhaps the most extensive forest categorization is practiced by the Pga k'nyau people. They classify forest according to various criteria – topography, altitude, climate, belief, and use. These categories have many more sub-categories which may overlap with each other.

Box 1: Karen (*Pga k'nyau*) and Lisu Classification of Forests

Karen (*Pga k'nyau*)

Ker Ner Mu (Montane Evergreen Forest), *Ker Ner Pa* (Evergreen Forest) and Kaw Be Ko (Deciduous Forest) are classifications of forest types by the Pga k'nyau based on topography, physical attributes and climate. There is also a spiritual classification of *Pga Ta Du* or Taboo Forest which includes *Du Mu Ber* (meaning a forest area with a shape resembling a toad or turtle); Pga Maw Pu ('salt lick' forests, where cattle find salt-licks); *Taw De Do* (meaning big hair-like forest); *Pga Ti Per taw* ('water coming out of a hole' forest, or forested areas around a spring); *Pga Swa Ko* (burial sites); and *Pga ta Nghae Lo Pu* (ritual area forests). Most of these types of taboo forest are in watershed areas, have trails and waterholes frequented by animals and support a diverse range of species of plants. All forest types classified as *Pga Ta Du* are absolutely forbidden to be disturbed.

Besides these taboo forest types, there are also the '*Th Ta*' (forests with powerful spirits), areas that were once cultivated but are associated with unpleasant events that occurred to the family or community in the year it was used, therefore creating fear in re-cultivating them; and the '*Du Pga*' (forests to protect and safeguard) which are forests that protect the ecological system in the main

cultivation area of a village. These forests can be cultivated, however no big trees can be cut or new areas cleared. This serves to provide sufficient fallow time and to protect wildlife preserving the ecological system.

The Karen (*Pga k'nyau*) also classify forest and land according to its use. The 'Hu' or 'Yi' comprises village areas where houses, rice silos and structures for other public use are constructed. Close to this area, but set apart, is the 'Der Ker' (adjoining the village) forest believed to protect the community. It is also the area where community members tie the umbilical cords of new born babies to selected trees. Once a tree has been selected for a child's umbilical cord, it is believed that the tree is then linked to the life of the child. The tree brings fortune, goodness and protection for the child throughout their lives. However any damage sustained by the tree is believed to damage also the child whose cord was tied there. This practice indicates and signifies the relationship between human and trees. Aside from the Der Ker, there is also an additional forest encircling the village called 'Ngaw Ker Ter' which protects the village from becoming too dry, provides food for domestic animals and where rituals to propitiate spirits such as the se k okra, the wit a, and the ser ta. Gardens and paddies called 'Ker Rer' and the swidden fields called 'Du La' are also separately classified.

Lisu

The Lisu also have important forest areas which they believe should not be disturbed. The A Pa Mo Hi, a forest area very close to the village, is believed to be the abode of the god 'A Pa Mo', in whose honour a shrine is set up within the forest. The Lisu believe that A Pa Mo protects and guards the village from harm and destruction, thus the continued existence of the village depends on A Pa Mo. This forest area is regarded with the high reverence and fear. No tree-cutting, hunting or collecting of plants are allowed here. The I Da Ma forest, found about two kilometers from the village and considered to be the abode of the god I Da Ma, is normally on a mountain-top. Hunting or tree-cutting are allowed not allowed here. The third important area is burial sites. No specific burial site exists in Lisu tradition and sites are selected according to the wish of the family or the dead person. The Lisu believes that if three people are buried in the same site or near each other, the area should not be disturbed. Besides these, forest areas for which the 'Mue Kua', the act of returning the forest back to the spirits has been performed, cannot be degraded in any way.



Lua with squash from her swidden

Photo: Chris Erni

Similarly other indigenous groups also have different classification and use of land and forest resources; and taboos and restrictions for the sustainable use of natural resources.

2.2.2 Wildlife and Animals

Indigenous communities in Thailand believe there is an owner for each and every life form. Each animal and bird species has their own protector. Further they believe that wildlife and the forest environment in which they live are interdependent on, and related to, each other. Without the forest, wildlife cannot survive; without wildlife, it will not have diversity. The role of animals in spreading and propagating plants by eating seeds of plants which they deposit elsewhere is widely acknowledged and recognized by indigenous communities. Accordingly, they are mindful of this when they go hunting for animals and birds.

The Iu Mien people conduct a ceremony before any hunting expedition in which they ask the permission of the protector spirit of the animals to hunt them. In the ceremony, they also have to specify how many animals they want to kill. There are strict ethical practices which hunters must follow. For instance, a hunter cannot hunt more than five big animals in a year. If a person hunts more than this, it is believed that it will bring bad luck and disaster to him. In such a situation, the hunter has to propitiate the gods by burning silver and gold so as to buy those animals from their gods. The Akha also have a similar practice where a person is limited by the number of animals they can hunt in a year.

Among the Lisu hunting can only be for food and only after permission from *I Da Ma* (the protector and owner of forest) has been obtained. Hunting certain wildlife such as hornbills, gibbons and elephants are considered absolutely taboo as it would bring calamity and disaster to the hunter and the community. There are also days on which no hunting can take place such as *Ab-fyu-thi-nyi* (the first day of the New Year), *Li-Hi-Sua-Nyi* (day of paying merit to a dead person), *Jue-nyi* (a village holiday once every 15 days according to the lunar calendar).

2.2.3 Watershed, Rivers and Aquatic Life

For indigenous communities, water does not just serve a physical need but spiritual purposes as well. Many indigenous communities use water for a number of rituals signifying its importance in their everyday life. According to traditional Karen (*Pga k'nyau*) beliefs there was water on earth before anything else. They believe that it is the origin of all life forms and therefore it must always be protected. This motivates their preservation of forest, which they know is intrinsically linked to the conservation of water. All indigenous communities have beliefs and taboos against disturbing any watershed area or springs. Often forest areas with watersheds and springs are considered taboos forests by most indigenous communities. It is no coincidence but an indication of the knowledge of indigenous communities about the importance of such forest areas for the sustenance of plant and life forms that depend on it.

The Karen (*Pga k'nyau*) liken the fontanel of a new born baby which they believe is the “brain water pushing up” to the source of a spring where the water “pushes up”. They believe the soul of a baby resides in the fontanel and similarly the soul/spirit of a stream resides in the spring. Therefore they do not commit any act that would disturb such sources. Doing so would incur the wrath of the spirit of the area.

There are a number of rituals followed by different indigenous communities which involve water and its use. The Hmong perform a ritual known as the *Teng Hao Te* in the area of the village's watershed. The purpose is to give thanks and to propitiate the Lord of the Water who protects and keeps the forest lush and the water source flowing the entire year for the community. This ritual is particularly important for communities where water is scarce, so as to ensure a yearlong supply. After the ritual, the watershed area cannot be disturbed. There can be no hunting, collecting of herbs or cutting of trees for any reason.

The Hmong also have taboos against playing around and unnecessarily disturbing water bodies. Thus they believe one should not throw rocks or things into water without a

reason as it will disturb the life forms that live in it. Among Hmong, houses cannot be constructed too near a stream as it could disturb the flow of water or in times of excess water flow, endanger the lives of those who live in such houses. There are also strict taboos against changing the natural courses or disturbing the flow of water.

2.1 Natural Resource Management and Indigenous Spirituality

For all indigenous communities, natural resource management always has a spiritual component to it. No natural resource exists without a spiritual connection. This belief is manifested in the ceremonies and rituals they perform. Some rituals and ceremonies are described below to highlight the connectivity between natural resource management and indigenous spirituality.

Box 2. Some Examples of Indigenous Spirituality

The Lisu believe that the *Juedu Suepa* and *Juedu Suema* are the protectors of watershed areas, *Jhatusuepa* and *Jhatusuema* are the god and goddess protecting the land, and *I Da Ma*, is the protector and owner of forest. The permission of these gods has to be received before any of the resources under their control are used.

The Iu Mien also believe that everything and every place in the world has a spiritual owner and a spiritual protector. Thus any action that affects natural resources or biological diversity must be done with care and forethought, and with the permission of the spiritual guardians, rather than being done as the actions of humans as owners of nature. These beliefs are reflected in various ways, in daily activities, in traditional and cultural forms that display traditional wisdom in the use and conservation of natural resources.

The Iu Mien perform the *Sib ta poong mian* ceremony at the community level three days after the Iu Mien New Year. The ceremony is performed annually in a particular area of forest referred to as *ho pry chan*. This area of forest is a fertile water catchment area higher than the village settlement itself. A tall and strong tree is the central point around which the ceremony is performed to give thanks to nature and the particular community spirits that are respected by the Iu Mien and which have provided protection to the community in the previous year-cycle. The *ta poong mian* spirit is invoked and thanked in particular, as is the *yud*

tay hoong (sky god), *taow te mian* (land god), *suy kaow mian* (water god), *ta tiew mian* (forest and mountain god), *ti taong mian* (god of the ancestors) and *tieb tin hoong* (god of the underworld). After this ceremony is performed, all community members are prohibited from entering or using the forest area. The ceremony expresses the community's beliefs about appropriate natural resource use and displays respect for biological diversity. It also serves as a means to convey the Iu Mien traditional knowledge about conservation, which is then practiced and taught to succeeding generations.

For the Hmong, resource management is closely linked with their dependence on the forest and its resources. Such close dependency fosters respect and reverence for natural resources that provides for its proper use and management. They believe that resources have spirits that protect and own them. For example *Xeeb Teb Xeeb Chaw* is the Lord of the Forest and Mountains; *Thep tu ti* is the Lord of the Water. The Hmong management of natural resources including forest, soil, water, and even wildlife resources is based on recognition of the inseparable relationship between these resources. There are strong taboos to control resource use and to enable equitable sharing of resources by all members of the community. At the same time, there are restrictions against making use of resources belonging to other individuals as well as people from elsewhere. They believe that use of natural resources must be tied with conserving them for sustained use; their traditional knowledge has elements of reviving resources. Certain ceremonies seek to bring these elements of use, conservation and revival together.

The *dong seng* is a divination ritual or sacrifice designed to invoke the Lord of the Land to protect land resources and forest resources to shelter the members of the community so they will have good land and forests as well as wildlife. A tall straight tree with a thick trunk and lush branches, in a spot overlooking the community, is chosen for performing this ceremony. Four guardian spirits are invited to reside in the area: *Thep Tu Ti* (Lord of the land, forests, hills, and plants); *Sasaeng Ti Chu* (Lord of Wildlife); *Fu Saeng/Yao Saeng* (Lord of dangerous or meat eating animals, such as tigers); and *Chu Seng Long Met* (Lord of things below the ground or under the earth's surface). A pig or a chicken is sacrificed in the ceremony and used together with whisky, joss sticks, candle, gold and silver papers, and cooked rice. Once the ceremony is performed, there is a taboo against anyone entering and using the area for hunting, collecting herbs, cutting trees or for any other purposes. The *dong seng* is performed at the community

level and has the role of fostering unity among community members. It also emphasizes the idea that different elements of nature are related to each other and that adverse action against one will affect everything.

The flexibility of indigenous systems has been able to accommodate or adapt to other institutionalized religions such as Buddhism. For instance, Buddhist beliefs and rituals, such as the saffron cloth tying ceremony around trees, are now practiced alongside traditional systems of natural resource management.

2.2 Intergeneration Transfer of Knowledge

Elders, priests and shamans in each indigenous community play a vital role in ensuring that their knowledge is passed down from generation to generation. There are various ways in which they do this. It could be through proverbs, sayings, poetry, songs, ritual chants, and riddles. For instance the Karen (*Pga k'nyau*) have an adage which goes “*Du pga o tit a yeu ti li lu no kae bo a sui*” which means “If you are seeking a fertile forest look for one with squirrels and tree shrews”. The Hmong has a song, “*Txuag siav ces siav ntevl txuag zam ces zam tshiab/ Txuag xyoob ces xyoob ntevl txuag ntoo ces ntoo siab*” which translates into “Never erring, life is long/ keep clean and your clothes will stay new/ Care for the bamboo, they will be straight/ care for the trees, they will be tall.”

In certain communities, there are teachers who transmit traditional knowledge. The Hmong have teachers in their villages who teach certain things like the performance of ceremonies such as the *Dong Seng*. This process involves learning the meaning and significance behind the ceremonies and not just the form of the rituals. Depending on the things taught, fees are given to the teachers. The Hmong also have different songs, poems and proverbs for different situations and circumstances. These ingenious ways of passing knowledge also ensures that the distinctive identity of this body of knowledge is preserved.

However, with the onslaught of new external practices and systems, much of the body of indigenous knowledge is being threatened. While indigenous knowledge keeps slowly adapting itself to changing circumstances, there are cases where there have been radical changes. This poses an urgent challenge for indigenous natural resource management.

2.3 Gender and Natural Resource Management

Socioeconomic factors play a very important role in how natural resources are accessed and managed. Tuong Vi Pham notes that “using resources generate benefits for both men and women, but access to these resources differs by gender and this differential in turn influences opportunities in the development process. As women get lesser opportunities, they depend more on natural resources.”⁴⁴ Indigenous women, like most poor rural women around the world, are severely affected by environmental degradation and limited access to natural resources due to their dependency on the natural environment for sustenance and health.⁴⁵ The situation is no different for indigenous women in Thailand. For instance, it was found that one of the most heavily impacted group of people in the Asian economic crash of 1997 in Thailand were women, of which indigenous women constituted a significant number.⁴⁶ Further, as indigenous women in Thailand face additional difficulties stemming from ethnic and racial prejudice in wider society, and negative impacts felt by women generally are no doubt harder still on women in marginalized groups.

It is important to note that within indigenous communities in Thailand, the role of gender in work allocation and labour responsibilities can be seen very clearly. For instance, among the Lisu and Hmong, the role of women in decision making are limited even though they take equal part in the utilization and management of natural resources. Women have no role in choosing cultivation or housing sites. However, there are skills and expertise that is traditionally the domain of women such as knowledge regarding medicinal plants,



Lua elder performing the rice ceremony

Photo: Rukka Sombolnggi

selection and preservation of seeds and plants for planting. These skills and knowledge are passed down from mother to daughter, thus ensuring their continuity and adaptation. However women also participate in managing and converting forest areas for use. Activities such as swiddening, burning the swidden, sowing seeds, building fences and harvesting are shared by men and women.

Seen in the overall context of indigenous natural resource management, the ability of women to observe, classify and experiment with plants and seeds plays a very important role in preserving the diversity of food sources and resource management.

3. Legal and Policy Framework on Natural Resource Management

In the past two decades, rapid industrialization in Thailand has witnessed an accompanying decline in the environmental health of the country. As with many neighbouring countries, Thailand has experienced a host of environmental problems stemming from rapid industrialization, ranging from deforestation and declining fish yields to air and water pollution in major cities and industrial areas.⁴⁷ The response of the government has been to enact laws and formulate policies. However such laws have not always resulted in positive developments for indigenous peoples.

3.1 Structure of Government and Hierarchy of Laws

Thailand is a constitutional monarchy, with the King as the Head of State. The Prime Minister heads the government and presides over a Cabinet of Ministers. The Thai Parliament is the supreme law-making authority, and consists of the Senate whose members are elected for six year terms, and the House of Representatives, whose members are elected for four-year terms⁴⁸. The structure of governance is divided into national, provincial and district levels, with the provinces headed by governors and districts by district chiefs. Recently, decentralization efforts have shifted more focus on administrative roles at the sub-district which is governed by a Tambon Administrative Organization consisting of the *Kamnan* and the village headmen of all hamlets in the Tambon, and the Tambon doctor, and of elected members, elected by the people in each of the hamlets in the Tambon.⁴⁹

The hierarchy of laws in Thailand is very clear and simple. The Constitution is the supreme law of the land from which the authority of other law emanates. "Acts" are passed by the Parliament under the Constitution. To clarify and implement the Acts enacted, the respective Ministries may make "Regulations" and "Notifications".

3.2 Environmental Institutions

The responsibility of managing natural resources in Thailand is shared among various ministries and departments. The Ministry of Agriculture and Cooperatives (MOAC) is an important player in natural resource management, under which are the Department of Agriculture, Department of Land Development, Department of Fisheries, and the Agricultural Land Reform Office. The new Ministry of Natural Resources and Environment (MONRE) includes three main administrative “clusters”: the environment cluster, covering pollution and environmental quality control; the inland water resources cluster; and the natural resources works cluster covering protected areas, forestry, coastal and marine conservation and mineral development, managed, for example, the Department of National Park, Wildlife, and Plant Conservation, Royal Forest Department, Department of Water Resources, Department of Mineral Resources, and Department of Coastal and Marine Resources.

The National Environment Board (NEB) and the Office for Environmental Policy and Planning (OEPP), previously under the Ministry of Science, Technology and Environment (MOSTE) have also been moved to MONRE. OEPP was changed into the Office of Natural Resources and Environmental Policy and Planning (ONEP). The NEB was formed as a policy-making and coordinating body on natural resources, chaired by the Prime Minister and comprised of the head of all the sectoral ministries whose activities affect the environment, head of departments and government boards, and the private sector. It seeks to coordinate the environmental protection efforts of governmental agencies *inter se* at the central level and with those of local governments at the provincial level. To do this, it submits policies and plans to the Cabinet for approval, and has the power to prescribe environmental standards, approve Environmental Quality Management Plans



Karen villagers clearing a firebreak in their community forest

Photo: Colin Nicholas

and provincial action plans, recommend amendments, improvements and enforcement of laws, and the monitoring of environmental compliance by government agencies and state enterprises. It is responsible for delivering policy recommendations to the National Economic and Social Development Board (NESDB), which incorporates these recommendations into its five-year National Economic and Social Development Plans (NESDP). Environmental policies stipulated in the NESDPs are translated into action plans by the various ministries and their constituent departments.

Following the government restructuring, the Ministry of Interior, Community Development Department and Department of Local Administration have been more active in efforts to help local communities develop integrated sustainable resource management plans. The Royal Project Foundation has been developing arrangements under which local communities and the environment can coexist harmoniously.⁵⁸

3.3 The Constitution of Thailand, 1997

Thailand has adopted 16 versions of Constitution since 1932 when it transformed into a democracy⁵¹. The most recent Constitution of 1997 is considered the true public version as the Thai people were involved in drafting it from the very beginning, it is however being re-drafted by the post-coup government of 2006. For the purposes of this paper, we will focus on this most recent Constitution and its relevant environmental clauses, in the hope that the new Constitution of 2007/2008 will not alter this too much. The intention of the 1997 Constitution was to create people's participation, recognition of human rights and dignity, creation of political stability, establishment of mechanisms for checking utilization of state power to promote good governance, and decentralization of power to the public.⁵² Significant provisions touching on issues of participation which affects indigenous peoples' rights are Articles 46, 56, 59 and 79.

Box 3: The Constitution of the Kingdom of Thailand

Article 46

Individuals who form into traditional, local communities have rights to preserve and revive their customs, local knowledge, arts or culture at the local and national levels; and to participate in the more balanced and sustainable management, maintenance, and utilization of natural resources and the environment. This would be in accord with the enacted law.

Article 56

The rights of individuals to collaborate with the state as well as community in the maintenance and benefit sharing of natural resources and biological diversity; and in the protection, promotion and maintenance of environmental quality, in order that they can continue to lead a normal life within an environmental context harmless to health and well-being; and their quality of life is protected. This would be in accord with the enacted law.

Article 59

Individuals have the right to be informed, explained to, and reasoned with, by government organizations, state agencies, state enterprises, or local official organizations, prior to the approval or implementation of a project or activity that may affect the quality of the environment, health, quality of life, or other important gains or losses related to them or their local communities; and the right to express their opinion on such an issue. This would follow the process of public hearings as indicated in the enacted law.

Article 79

The State is obliged to promote and support peoples participation in preserving, maintaining, and utilizing natural resources and biological diversity in equilibrium; this includes participation in promoting, maintaining, and protecting environmental quality following the principle of sustainable development as well as to control and eradicate pollution that can affect people s health, wellbeing, and quality of life.

Other provisions that are important to environmental management are Articles 49, 50, 69 and 290. Article 49 deals with rights and duties in the expropriation of immovable property. Preserving natural resources or the environment is a valid ground for restricting the liberty of individuals to engage in an enterprise or an occupation under Article 50. Article 69 cast a duty on every person to conserve the national arts and culture and local knowledge and conserve natural resources and the environment. Article 290 sets out the powers and duties of local governments in promoting and maintaining the quality of the environment.

3.4 Laws on Natural Resource Management

There are more than 20 laws on forest and resource management in Thailand.⁵³ Not surprisingly, there are conflicts in laws and policies and in the functioning of different departments and agencies of the government. For instance, there are 16 agencies for forest management, 6 agencies for mangrove forest, and more than 24 agencies for water resources provision and distribution.⁵⁴

3.4.1 Forest: Laws & Policies

A century ago, forests⁵⁴ covered 72 percent of Thailand's territory. This accounted for approximately 230 million rai (1 ha = 6.5 rai) of land. In 1961, less than 40 years ago, that number was still relatively high at 171 million rai or 53 percent of the country. However, most recently (1995), only one quarter or 26 percent (82 million rai) of Thailand remained under forest cover. From 1961 to 1995, Thailand lost an average of 2.6 million rai of forest every year.⁵⁵ In contrast with this, the area designated as National Forest Reserve continued to increase to about 46% of the country in the early 1990s.⁵⁶

In 1992, in compliance with the 7th NESDP and the increasing challenge of resettlement, the Royal Forest Department (RFD) divided the national forest reserve estate into three zones.⁵⁷ The Conservation Forest Zone (Zone C) is prohibited for agriculture and covers existing protected forest areas and areas of natural forest minimally affected by human activity. However, some of this area especially in the Northern watersheds remains occupied by permanent agriculture, shifting cultivation and associated human settlements. The Economic Forest Zone (Zone E) was set aside from arable land suitable for commercial tree plantations for distribution to landless farmers. The E-zone is often devoid of forest and some has been under cultivation for well over a decade. Some E-zone lands are in degraded forest areas. The Agricultural Zone (Zone A) portion of the national forest reserve estate was set aside expressly in deforested areas deemed suitable for agriculture. These areas are in the process of being allocated to farmers by the Agricultural Land Reform Office (ALRO). Transfer of land from the national forest estate to ALRO is accompanied by transfer of management responsibility.

Until recently, the history of laws on resource management, particularly forest resource, has been one of resource extraction rather than its sustainable use. For instance, the 1941 Forest Act reflected the fact that Thailand still had abundant forest areas, but beginning in 1961 a succession of five-years NESDPs began to progressively reflect the fact that substantial declines in forest area had occurred, and that forest conservation and replanting were becoming increasingly essential.⁵⁸

3.4.1.1 Thailand National Forestry Policy (TNFP), 1985

A National Forest Policy was drawn up and adopted by the Cabinet in 1985 in an attempt to unify forest policy in the country and to place forestry within the context of overall national development.⁶⁰ The TNFP seeks to “achieve a long term and coordinated national forest administration and development and for better understanding between *state and private sectors*” (emphasis added).

Some key aims of the policy⁶¹ are the establishment of guidelines for maximizing national social, economic benefits, national security and environmental protection with emphasis on harmonized utilization of resources; promotion of shared roles and responsibility between government and private sector in forest management and development; maintaining *40% of the country area under forests with 25% as protected forest and 15% as production forest*;⁶² management of forest for perpetual benefits to the country; science and technology use to increase efficiency in agricultural productions; development of a forest management plan; improved efficiency in timber production; accelerate city planning and designation of forest, residential, rural and agricultural areas; establishment of National Forest Policy Committee; undertaking awareness programs on positive forest resources use; encouraging reforestation and *export of wood and wood products and community forestry such as reforestation on public land by private sector, tree planting on marginal agricultural land* and establishment of forest woodlot for household consumption; encourage integrated wood use; amendment of forest laws; substituting fossil fuels with wood use through energy plantations; designation of land with a slope of 35% or more as forest land; formulate guidelines to deal with *forest degradation problems e.g. shifting agriculture, forest fires, forest clearing by the hill tribe minorities etc*; incentive for reforestation by the private sector; and rural settlement planning to conform with national natural resources management and conservation plans. (Italics added).

It is evident that the policy does not include any design that encourages community participation in forest management. The policy encourages the private sector to become involved in tree planting projects for both domestic and export supply and there is an emphasis on partnership with the private sector. However, the private sector was interpreted to mean concessionaires and business people rather than rural people.⁶³ This led to a sharp rise in the number and total area of industrial tree plantations in the Northeast.⁶⁴

Further it identifies hill peoples and their practices such as shifting cultivation as causes of forest degradation. Most importantly, it fails to even marginally address the conflict over forest resource use by indigenous hill peoples, often identified as “illegal encroachers”. The policy’s aim of maintaining 40% forest cover would give rise to many problems for indigenous hill peoples later.



Lahu terrace-rice field

Photo: Kittisak

3.4.1.2 Forest Act 1941

There is a very strong sense of State ownership of forests in Thailand, which began with the creation of the Royal Forest Department (RFD) in 1896.⁶⁵ The establishment of the RFD planted a long-lasting influence on the future of Thailand's forestry policy, which saw its inception as a policy of "cutting and processing timber for export to Europe."⁶⁶

The Forest Act of 1941 further strengthened State ownership by declaring that any land not acquired or possessed under the land law would be considered as forest [Sec. 4 (1)]. It automatically brought such land under state ownership. From the outset, the main purpose was the control of the harvesting of forest products, and the act did not contain any specific conservation goals.⁶⁷

The Act mainly focuses on timber trees or forest products seeking to regulate activities within the forest and prohibiting such activities as logging of preserved species of timber, extracting forest products, firing, and land occupation. It divides reserved timber species into two categories: (i) ordinary reserved timbers which are species for logging for which permission must be obtained; and (ii) special reserved timbers which are rare species or species needing to be preserved for which logging permission cannot be granted [Sec. 6].

A provision which has direct consequence for indigenous land use and natural resource management is Sec. 54 which prohibits the clearing, burning, occupying or possession of any forest land. Contravention of this provision attracts a fine extending from fifty

thousand baht to one hundred thousand baht and possible imprisonment for between two and fifteen years.

3.4.1.3 National Reserved Forest Act 1964

The National Reserved Forest Act, at the time it was enacted, sought to revise the law on the protection and reservation of forests. This Act, along with the National Park Act of 1961, now forms the basis for the determination, control and maintenance of National Reserved Forests and other protected areas in Thailand. The National Park Department oversees the management, control and use of National Reserved Forest under the law.

“Forest” is defined as land which includes mountains, creeks, swamps, canals, marshes, basins, waterways, lakes, islands or seashore which has not been taken up or acquired by a person in accordance with the law [Sec. 4]. The Minister of Agriculture is responsible for the implementation and execution of this Act and is empowered to appoint competent officers and issue ministerial regulations [Sec. 5]. Section 6 declares reserved forest existing at the time this 1964 law takes effect to become National Forest Reserve under this law. Further it gives power to the competent Minister to determine any other forest as National Reserved Forests with a view to reserving its nature, timber, forest products or other natural resources, which shall be made by a notification in the ministerial regulations. The Ministerial Regulation along with a map of the determined area is required to be put up in the office of the District or Sub-district, Sub-district Headman and in open and conspicuous places in the villages concerned [Sec. 9].

Once a forest is determined as National Reserved Forests, a committee for such National Reserved Forests shall be set up [Secs. 10 & 11]. A person having a claim over or to exploit any National Reserved Forest can file an application within 90 days from the point at which the regulation comes into force [Sec. 12]. The Committee inquires into the claim and depending on their findings, can fix compensation; or file an appeal with the concerned Minister against the decision of the Committee [Sec. 13].

Within the National Reserved Forests, no person shall occupy, possess, exploit and inhabit the land, develop, clear, burn the forest, collect the forest products nor cause by any other means whatsoever any damage to the nature of the National Reserved Forest [Sec. 14]. However logging or collection of forest products and logging of reserved timber species may be done after obtaining permission from the Director General [Secs. 15 & 16].

Sec. 16 (bis) provides that in cases where any National Reserved Forest, in whole or in part, is so deteriorated that it's old shifting cultivation land or grassland or valuable timber has become scanty or otherwise with fewer standing trees and cannot naturally be rehabilitated, it will be regarded as deteriorated forest. Such deteriorated forest can be declared to be part of a land reform scheme. A person can apply to inhabit and exploit such land [Sec. 16 (bis) (1)]. Such person can also regrow and reforest in additional land if he can prove his competence to do so [Sec. 16 (bis) (2)].

The Act also has penal provisions which impose liability for an offence ranging from five hundred baht to imprisonment up to 15 years.

Most forest officers recognize that the National Forest Reserve Act focuses on 'land', whereas the Forest Act mainly targets timber trees or forest products. However, the Forest Act also contains provisions that regulate forestlands spatially.⁶⁸

As with other laws described in this paper, the impact of the imposition of the National Forest Reserve Act had direct negative impacts on highland indigenous communities. It is stated in the law that any claim to user-rights or ownership rights to land declared as National Forest Reserve must be made within 90 days of the demarcation and declaration of the new status. Indigenous communities simply are not informed of these legal changes to their lands and territories, due either to the remote sites of their communities or language barriers. As with other laws regarding the legal status of lands in Thailand, this Act led to many indigenous communities becoming illegal encroachers on their own lands.



Karen spirit forest

Photo: Chris Erni

3.4.1.4 National Park Act 1961

The concept of protection of forests in National Parks stemmed from the United States of America, where parks were established in the last century to protect extraordinary natural features of educational and recreational value for the sake of all (non-Indian) Americans.⁶⁹ The model of Yellowstone National Park in the USA was taken as the basis for protected areas in Thailand, mainly on the advice of US National Park officials.⁷⁰

There are a total of 102 national parks in Thailand of which 81 are terrestrial parks and the remaining 21 are marine parks.⁷¹ A national park is an area of at least ten square kilometers that contains natural resources of ecological importance or unique beauty, or flora and fauna of special importance. An area may also be declared a national park for its historical or cultural features.⁷²

The National Park Act of 1961 closely followed the enactment of the Wild Animal Preservation and Protection Act (1960) and provided the legal basis for the creation of national parks in Thailand. The Act is a very short law with only 30 provisions; however it has wide ramifications for indigenous hill peoples. It is identified as one of the most used laws in arresting and detaining indigenous hill peoples.⁷³ Under the law, a national park may be created from “any area of land which is *of interest* and be maintained with a view to reserving it for *the benefit of public education and pleasure ...* (such) land shall not be owned or legally possessed by any person other than a public body [Sec. 6. *italics added.*].” It is very clear that the purpose of creating parks under the law is not for conservation or preservation of resources, and that “education and pleasure” superseded the emphasis on sustainable use of resources.

Under the law, a National Park Committee has the duty to give advice to the Minister in charge of implementing the law on: (1) determination of land to be reserved as National Park and extension or cancellation of the National Park; (2) protection and maintenance of the National Park; and (3) matters consulted by the Minister [Sec. 15].⁷⁴

Section 16 of the law is the main backbone on which the maintenance and protection of a national park rest. It prohibits a number of activities within a national park. Most significantly it makes unlawful any act that a person depending on forest resources would commit. As such it impinges directly on the use rights of forest resources for indigenous peoples. The penalty for violation of section 16 ranges from paying a fine of 500 baht to imprisonment not exceeding five years [Secs. 24 – 27].

Box 4: Section 16 of the National Park Act, 1961.

Within the National Park, no person shall:

1. occupy or possess land including build up, or clear or burn the forest;
2. collect, take out, or alter any act whatsoever things, endanger or deteriorate timber, gum, resin, wood-oil, turpentine, mineral or other natural resources;
3. take wildlife out or alter any act whatsoever things or endanger the wildlife;
4. alter any act whatsoever things, endanger or deteriorate soil, rock, gravel or sand;
5. change a waterway or cause the water in a river, creek, swamp or marsh to over flow or dry up;
6. close or obstruct a water course or way;
7. collect, take out, or alter any act whatsoever things, endanger or deteriorate orchid, honey, lacquer, charcoal, bark or guano;
8. collect or alter any act whatsoever things, endanger flowers, leaves or fruits;
9. take in, take out any vehicle or drive it on the way not provided for such purpose, unless written permission has been obtained from the competent officer;
10. cause any aircraft to take off or land in the place not provided for such purpose, unless written permission has been obtained from the competent officer;
11. take cattle in or allow them to enter;
12. take in any domestic animal or beasts of burden; unless he has complied with the rules laid down by the Director-General and with the approval of the Minister;
13. carry on any activity for benefit, unless written permission has been obtained by the competent officer;
14. post a notification or advertisement, or scratch or write on any place;
15. take in any gear for hunting or catch wildlife or any weapon, unless written permission has been obtained from the competent officer and the conditions stipulated by the latter have been complied with;
16. fire any gun, cause any explosive article to be exploded or let off any fire work;
17. make a noisy disturbance, or alter any act causing trouble or nuisance to any person or wildlife;
18. discharge rubbish or things at the place not provided for such purpose;
19. leave any inflammable article which may cause fire.

3.4.2 Laws on Wildlife & Fishery Management

The basis for wildlife preservation and protection before the enactment of the 1992 law was the Wildlife Preservation and Protection Act of 1960. The 1960 law provided protection for wild animals in general by establishing wildlife sanctuaries and non-hunting areas. The 1960 law provided total protection to nine species, prohibiting hunting of these species. This has been increased to 15 species in the 1992 law.

3.4.2.1 Wildlife Preservation and Protection Act 1992

This Act establishes a National Wildlife Preservation and Protection Committee, chaired by the Minister of Agriculture and Cooperatives and with a membership drawn from various government departments [Sec. 9]. The Committee is empowered to designate wildlife conservation areas, to list species subject to protection, and to undertake certain related activities [Sec 15].

The Act forbids hunting, propagating or breeding, possessing, trading, collecting, endangering or possessing any protected and preserved wildlife or their nests [Secs. 16 – 21]. Exceptions to some of the prohibitions are acts such as killing protected and preserved wildlife for educational or research purposes may be permitted by the Minister [Secs. 29 – 3]. The competent Minister has the power to declare wildlife sanctuaries by announcement in the Royal Gazette [Sec. 33]. No person can hunt wildlife, collect or endanger any nest within a wildlife sanctuary except for educational purpose and then only with permission [Sec. 36]. Further no person can enter, possess or occupy land, construct, cut, fell, clear, burn or destroy trees within such wildlife sanctuaries [Secs. 37 & 38]. These provisions make unlawful most acts that forest dependent communities living inside wildlife sanctuaries would perform for their daily survival. Extensive penal provisions for violations of the Act are set forth with punishment ranging from 5 thousand baht to imprisonment not exceeding five years.

3.4.3 Land Laws

Historically, the evolution of individual land rights and enforcement mechanisms is the result of increases in population density relative to land availability.⁷⁵ Before 1900, all land belonged to the king from which he made grants to nobles, officials, and other subjects. Such grants could be passed on to heirs, mortgaged or sold. Land could also be cleared and used by farmers who, after three years of continuous cultivation, established an informal land claim. In 1901 the Department of Lands (DOL, Ministry of Interior) was

established to formalize title deeds. The process of administrating land evolved gradually and culminated in the formulation of the Land Code of 1954.

Land is administered by 14 government departments in two ministries; the Ministry of Interior and the Ministry of Agriculture and Cooperatives. Three broad classification of land can be made: 1. State Land; 2. Undocumented Land; and 3. Private land.

State Land: Forest Land is administered by the RFD; Government Real Estate is under the Treasury Department; Public domain land is under Department of Lands. This gives rise to a situation where different documents for land use and ownership are given by different agencies, sometimes in conflict with other. **Undocumented Land:** In forest areas, where “encroachment” has taken place, for land that is privately cultivated, the RFD gives an STK-1 claim or the Agricultural Land Reform Office (ALRO) gives a Sor Por Kor⁷⁶ - 401 claim certificate. This can be converted to a certificate of utilization by DOL through a complex process. NS-3 certificates are issued by the Department of Public Welfare (DPW) for communal self-help projects; KSN certificates for cooperative settlements are issued by the Department of Cooperatives Promotion. **Private Land:** Again for private lands, that is land not owned by the state, there are different types of title and utilization documents. NS-4 from DOL indicates of full ownership while NS-3 or NS-3K from DOL proves that the person named has put the land to use. STK-1 and NS-2 allows temporary land occupation and a claim of a person who possessed the land and made use of it prior to 1981. Within the classification of private land also comes Communal Land which is not further defined.

Indigenous peoples were initially excluded from getting titles over land on the basis that they were not Thai citizens when the Land Code came into being. More recently, it is based on the watershed classification that designates most highland areas as off limits to human activity.

3.4.3.1 Land Code 1954 & Land Code Promulgation Act, 1954

The Land Code of 1954 (“the Code”) was promulgated through the Land Code Promulgation Act of 1954. The Code has the most important bearing on the question of land ownership and by implication on the process of centralization.⁷⁷ The Government, through Sec. 5 of the Land Code Promulgation Act, provided the option that anyone occupying any forest land as of November 30, 1954 can receive a land use claim certificate provided he/she can prove his/her claim within 180 days. Most indigenous hill peoples living in remote areas were unaware of this law and even those living close to provincial

towns were unaware of this time stipulation and failed to take advantage of it, thus becoming encroachers. The Land Code also declared 50% of the country as forest land under the management of the Royal Forest Department (RFD) [Sec. 1].

The Land Code defines land as the land surface everywhere including mountains, hills, streams, ponds, canals, swamps, marshes, waterways, lakes, islands, and the sea coast [Sec. 1]. It vested ownership with the state of all lands for which there is no owner [Sec. 2]. The Land Code classifies land by soil fertility and land suitability, and used the first general soil map produced in 1953 as a basis.⁷⁸

Chapter 2 of the Code concerns cadastral survey for land reform purposes and the establishment of the National Land Allocation Commission which shall be the main public body to administer land allocation. Three types of documents corresponding to stages of land acquisition are defined in the Code: occupancy, utilization and legal possession [Secs. 29 – 33]. This system has the potential to be exploited where a person after getting legal possession sells the land and starts a whole new process of occupancy in another land area leading up to legal possession again. Deforestation has been attributed to this as the Land Code encouraged the clearing and occupation of forest land by establishing legal systems for land titling.⁷⁹

Chapter 3 deals with delimitation of rights in land. Sec. 34 places a limit on the size of land that may be owned for agricultural or other uses. Detailed rules on the size of land that may be owned by one or more persons are given in the Chapter. It allows a person



Lua men threshing newly-harvested rice

Photo: Rukka Sombolnggi

to own land beyond the limit in certain cases, one of which is that he has the ability and equipment to utilize the land [Sec. 47]. Industrial ownership of land beyond the limit is also allowed under Sec. 48. A reason given for the disparity in land ownership in Thailand – 10 per cent of the population owns up to 100 Rai (16 hectares) and above, while as much as 90 per cent of the population own only 1 Rai (0.16 hectares) each and 2 million families are landless – is the land ownership prohibition under the law that preferentially grant the ownership rights to the government and private sector, overlooking the rights of community and practices of common property ownership.⁸⁰

Chapter 4 deals with the issuance of documents of title to land. A complicated process of applying for different titles is set out in the chapter. Other chapters in the Code are Cadastral survey (5); Registration of rights and juristic act (6); Limitation of rights in land for religious purposes (7); Limitation of aliens' rights in land (8); Limitation of rights in land of some categories of juristic persons (9); Trade in land (10); Fees (11); Penalties (12).

3.4.3.2 Land Development Act, 1983

The main emphasis of this Act is the regulation of land development which is defined as “any act done to soil or land in order to increase its richness or quality, or to increase agricultural produce, and includes the improvement of soil or land which lacks natural fertility or lacks fertility due to its utilization, and soil and water conservation to maintain natural balance or for suitable utilization of land for agriculture” [Sec. 3]. A “Land Development Committee” composed of ministers and Government officers is envisaged [Sec. 4]. The Committee considers land classification, planning for land utilisation, land development and determination of areas for land utilisation for submission to the Council of Ministers for approval; determine the areas for land survey for the benefit of surveying the fertility of land and suitability in the utilisation of land; prescribe measures for soil or land improvement or measures for soil and water conservation so that State agencies may employ them and advise farmers to that effect; and approve the establishment of land development agencies at various levels in any area; etc.

The Land Development Department is responsible for carrying out a survey and analysis of soil or land in order to ascertain the fertility and suitability for the utilisation of land, to effect land classification and land development, to prepare census of land or the economic condition of land pursuant to this Act and to carry out other matters as assigned by the Committee [Sec. 10].

Beside these two laws, others such as the Civil and Commercial Code, Article 1304; Mineral Act 1967; Petroleum Act 1971; Regulation of the Prime Minister's office on 'Resolution of state land encroachment 1992, National land policy (1987) and Related Cabinet's decisions affecting Land management in Thailand.

3.4.4 Other Laws and Policies Impacting Natural Resource Management

3.4.4.1 Enhancement and Conservation of National Environmental Quality Act, 1992

The law is a framework piece of legislation which sets out broad standards for the maintenance and conservation of environmental quality. The law also seeks to improve and maintain environment quality. Environment quality is defined as the "balance of nature, being composed of animals, plants, *natural resources* and man-made objects" [Sec. 4. *Italics added*]. It calls for participation of the public in the management of matters affecting the environment and lay down the framework for collaboration between the government and NGO's [Secs. 6, 7, and 8]. A private individual can lodge a petition against a person who violates laws on conservation of natural resources.

Sec. 12 establishes a National Environment Board consisting of cabinet members and government officials. The Board has the power to submit policies and plans for enhancement and conservation of the environment to the Cabinet, prescribe environmental quality standards and carry out other functions as outlined in Sec. 13. Chapter 2 establishes and governs an "Environmental Fund".

Secs. 32 to 51 (Chap. 3) provide for environmental quality standards, environmental quality management planning, conservation and environmentally protected areas, and environment impact assessment. The Minister shall, with the approval of the National Environment Board, formulate an action plan called "Environmental Quality Management Plan" to implement the national environment policy [Sec. 35]. Secs. 42 to 45 provide for the establishment of national parks, wildlife reserves watershed areas, and other protected areas. Environmental Impact Assessments are mandated for specified types of projects [Secs. 46-51].

Chapter 4 addresses pollution control while Chapter 5 deals with promotion measures for pollution control. The next chapter imposes liability on any person who pollutes or does anything that damages natural resources. Chapter 7 contains penal provisions for violations of the Act.

3.4.4.2 Thai Forestry Sector Master Plan

In 1993, the RFD proposed the Thai Forestry Sector Master Plan (TFSMP). The TFSMP was strongly influenced by the Tropical Forestry Action Plan.⁸¹ Another factor attributed to the proposal is a policy paper “Ten Measures to Save the Forests,” submitted to the Thai Government which highlighted three areas for action: a comprehensive plan for protecting forest areas that had been part of the concessions; the administration of “economic” and “conservation” forests under separate regulations; and the rights for local villagers to own and manage their ecosystems as community forests.⁸²

The TFSMP admitted that past approaches to forestry has failed and that there was a need for a more participatory forest management with local people as partners. Consequently it encouraged a more participatory approach. It stated that “local communities and individual villagers will have decision-making powers entrusted to them concerning the forest resources they depend on.”⁸³ Further it attempted to strengthen sustainable management and conservation of natural forests and ecosystems, develop a strategy for policy implementation through sustainable and participatory methods, and enhance capacity building for monitoring and evaluating the progress. The RFD saw the proposed TFSMP as a “means to calm critique of top-down management”⁸⁴ and under which “an amount of land and the rights to this land shall be given over to local management as so called “community forestry”⁸⁵.

However there was widespread opposition to the plan from NGOs and community organizations. One reason given is that it was seen as largely driven by outside technical experts, and therefore had little national ownership.⁸⁶ The Plan also failed to pay sufficient attention to broader sectoral issues; was not sufficiently attuned to changing societal interests in forest management, particularly the shift from an emphasis on exploitation to one on conservation; the process used to develop policy positions was too technically driven and lacked effective participation of key stakeholders.⁸⁷ As a result the Plan was never implemented.

3.4.4.3 Watershed Classification and Management

The RFD started watershed management programs in 1953 by setting up four watershed rehabilitation field stations under the Silviculture Division. The main task was focused on up-stream watershed rehabilitation by reforestation on abandoned shifting cultivated areas. This is symptomatic of an approach used for watershed management at that time, a ‘re-greening’ of the watershed area by reforestation assuming that only the forest can produce optimal yield and distribution of water. This was the first effort at

formal management of watersheds in Thailand.⁸⁸ However degradation of watershed areas continued and hence an inter-institutional watershed management program was initiated and a Committee on Watershed Conservation and Development was set up. Problems of non-cooperation were encountered in its functioning and it was abandoned quickly. Meanwhile the Soil and Water Conservation and Management Division under the Land Development Department and Watershed Research Sub-Division under the RFD were established. The latter became the Watershed Management Division in 1975. Presently, responsibility for watershed management in Thailand falls under the Watershed Management and Conservation Office within the Department of National Park, Wildlife & Plant Conservation.⁸⁹

The first watershed classification was made by the National Environment Board soon after it was established in 1975. It divided watershed into 3 classes in which 60% of highland areas fell into Class 1 where no resource utilization could take place and all residents were required to be evacuated. Much controversy was generated as a result. Due to the controversy over the first watershed classification, a revised version was presented in 1983 by the National Environment Board. The classification divided watershed forests into 5 classes according to physical features. The current status of this classification remains:⁹⁰

Watershed class		Physical environment	Proposed management	Area in Sq. Km.	Ratio
Class 1	Class 1A	High elevation (> 500 m), very steep slopes (> 35 %)	Protected or conservation forest, headwater source		
		High elevation and very steep slopes (> 35 %)	Permanent forest cover	84,463.70	16.66
	Class 1B	Similar to 1A, yet partly cleared for agriculture or settlement	Should be reforested or maintained in permanent agroforestry	7,626.66	1.48
Class 2		High elevation and steep to very steep slopes	Commercial forest, with logging, grazing allowed	42,768.62	8.32
Class 3		Uplands (200-500m) with steep slopes	Fruit tree plantation, grazing, agricultural crops	39,283.77	7.65
Class 4		Gentle sloping lands	Upland farming, row crops, grazing, fruits	81,033.69	15.81
Class 5		Gentle slopes, flat areas	Lowland farming, paddy and other crops	251,483.62	49.01

No settlement can exist in Class 1A and 1B. However, this remains highly controversial as most of the indigenous hill peoples are settled within these areas and the classifications were made without consultation. Therefore, a more comprehensive review of factors influencing management should inform appropriate amendments.

The policy focus of watershed rehabilitation has been an evolving process. The later part of the 70's focused on watershed rehabilitation with reforestation of abandon swidden area, relocations of hill tribe villages and improvement of quality of life as the main activities. The period between 1980 and 1990 saw shift in policy toward integrated watershed management with land use planning, soil and water conservation measures, forest fire control and promotion of agricultural extension as the main activities. This changed to participatory watershed management with an emphasis on local people's participation, village committee, watershed network, rules and regulations in 1990 – 1999. From 2000 onwards, policy focused on watersheds for the people.⁹¹

However, watershed management is already being affected by the privatization of water in Thailand.⁹²

3.4.4.4 Cabinet Resolution of 30th June 1998

The Cabinet Resolution of 30th June 1998 is perhaps the most important singular document that currently affects the rights of indigenous peoples in Thailand and natural resource management.



Karen women harvesting

Photo: Chris Erni

A series of three Cabinet Resolutions, popularly known as the *Wang Nam Khiaw* resolutions, were issued in April 1997. These resolutions were influenced by the Assembly of the Poor campaign.⁹³ While one of them (22 April 1997) was a general policy statement, the other two issued on 19 and 29 April 1997 allowed villagers who had been living in reserve forests prior to 1993 to remain there on the condition that they take part in forest conservation. Proof of settlement for the first time took into account the village's history as well as the age of fruit trees and buildings, and the government tried to settle land rights conflicts in 107 forest communities in the north and northeast.⁹⁴

In the early part of 1998, large parts of northern Thailand were affected by forest fires. Indigenous hill peoples were the most convenient scapegoats. The then Deputy Agriculture Minister went on record to say 'encroachers' (clearly referring to 'indigenous hill peoples') were behind the forest fires.⁹⁵ Very soon thereafter, the forestry chief was reported to have raised the possibility that settlers in conservation forest may be relocated even though they settled before the declaration of the protected area, and that the Ministry is of the view that the April 17, 22, and April 29 cabinet resolutions of 1997 are impractical and encourage more forest encroachment.⁹⁶ Meanwhile a logging scandal in the Salween forest of Mae Hong Son involving provincial and district forest and officials was exposed in April 1998.

All these led to a halt of settlement approval in the form of another cabinet resolution on 30 June 1998, which cancelled the three April 1997 resolutions regarding human settlement in forests and recommended the old strategies of classification and zoning, with the eviction of villagers living in "sensitive areas".

3.4.4.5 Cabinet Resolution of 10th August, 2004

This Cabinet Resolution intends to initiate a 'New Plan of Forest Villages Project'. This Project aims to lessen the incidence of trespass on forests; create collaborative management practices, to protect, conserve and sustainably use resources, with communities living within the Project areas. The target area includes many indigenous communities living in forested areas. This Resolution is very positive in its recognition of the possibility of people and forest coexisting. The Department of National Parks, Wildlife and Vegetation and the Department of Marine and Coastal Resources are responsible for implementation of this Resolution.

Unfortunately, the method of implementation is based on the Cabinet Resolution of 30th of June 1998 which has had very negative impact on people living in forested areas and does not support original patterns of community living.

3.4.4.6 Cabinet Resolution 17th January 1989 (Order number 32/2532).

Between 19 and 24 November 1988, heavy rains triggered massive landslides, affecting all of Thailand's eastern coastal provinces, killing 373 people, injuring hundreds and rendering thousands homeless.

Many reasons for the flood were identified but logging became the most infamous culprit. Persistent pressure following the disaster convinced the Government to impose a total logging ban on 17 January 1989 in the form of a Cabinet Resolution (Order number 32/2532). This resolution revoked all logging licenses in natural forest and effectively banning all forms of logging, particularly in the uplands.⁹⁷ However logging in plantations and mangrove forest continued.

The main goal of the resolution was the protection of remaining natural forests and the punishment of encroachers in protected forests. However the ban is not without its controversy. When the ban was imposed, there were no clear policies and strategy in place to implement it. As a result, illegal logging continued and the ban was largely seen as a political maneuver. At the same time the ban, with the intention of protecting remaining forest, also had the effect of putting more pressure on the government to address the "problem" of indigenous hill peoples living inside protected areas, in some cases resulting in relocation and forcible removal.

3.4.4.7 Tambon⁹⁸ Council and Administrative Authority Act, 1994

Political developments in the last two decades have served to shift the administrative structure in Thailand toward an increasingly decentralized model. On the wave of political reforms initiated in the 1990s and the demand for an opening of the governance structure of the country to allow people's direct participation, decentralization became a high point on the agenda.⁹⁹

The Tambon Council & Tambon Authority Act was promulgated in 1994 but it came into effect only in 1995. In view of its relatively easy birth, it can be explained as a result of popular demand for decentralization in the midst of the enduring atmosphere of political reform.¹⁰⁰

The Ministry of Interior is responsible for implementation of the Act [Sec. 5]. A Tambon Council is to be created in each Tambon [Sec. 6] composed of the Kamnan, Phuyaibans (Village headmen), Tambon doctors and other elected members [Sec. 7]. The Tambon Council each have the powers and duties of developing the Tambon [Sec. 22]. Among the many different activities it can perform, maintaining natural resources and the environment is also one [sec. 23 (4)].

A Tambon Council with an average annual income of not less than 150,000 Baht over the last three years can be converted to a Tambon Administrative Authority [Sec. 40] which is a juristic person and a local government administration [Sec. 43] and is comprised of a Tambon Administrative Authority Council (TAAC) and a Tambon Administrative Authority Council Administrative Committee [Sec. 44].

A TAAC comprise of two elected members from each hamlet/village or in the case of Tambon Administrative Authority having only one or two villages/hamlets, six members [Sec. 45]. The TAAC has the powers and duties to approve Tambon development plans, draft Tambon regulations, annual expenditure and budget regulation etc [Sec.46]. The Tambon Administrative Authority Council Administrative Committee (TAACAC) is composed of one Chairman and two Members elected by the TAAC [Sec. 58] and has the powers and duties of administering the day to day businesses of the Tambon Administrative Authority (TAA).

The TAA has a number of duties and businesses listed out in Secs. 67 and 68 of the Act, amongst which is the duty to “protect, look after and maintain natural resources and he environment” [Sec. 67 (7)]. The TAA has the power to collect taxes and generate revenue within its jurisdiction and duties to provided essential day to day services [Secs. 74 to 89].

The District officer has the power to supervise the performance and functioning of the TC [Sec. 38] and TAA [Sec. 90] to ensure they are in accordance with law. The district officer can report to the Provincial Governor and recommend the dissolution of the TC [Sec. 38] and TAA [Sec. 91] if he deems fit.



Threshing rice in Lua Indigenous Community

Photo: Rukka Sombolinggi

The TC and TAA are expected to be self-governing and financially self-sufficient. However in many cases, the structure of these organizations is highly bureaucratic and still involves the Ministry of Interior controlling the activities of these organizations through the provincial governors and district officers. They are also required to get their plans and budget approved from higher authorities. In these respect the aim of decentralization is not achieved. At the same time, there is also a presence of autonomy in areas such as fund and revenue generation. The amendments that were made to the law have increased the role of these organizations to include even activities of natural resource management.

The decentralization of administrative authority, and importantly budgetary control, to the *tambon* level has had beneficial effects on the levels of political participation among indigenous peoples. Demographically weak at the national level (indigenous peoples account for only 2-3% of the national population) indigenous peoples have never been represented in national politics, and only twice to date in provincial politics. At the district level, participation in politics has been slightly higher, but with the devolution of authority to *tambon* levels, indigenous peoples are for the first time (in some cases) holding the majority of the local political seats and controlling the local decisions about health, education and other matters devolved to the *tambon* level.

3.4.4.8 Determining Plans and Process of Decentralization to Local Government Organizations Act, 1999 (Decentralization Act, 1999)

The Act provides for setting up a “Committee of Decentralization to local government Organization” compose of the Prime Minister or Deputy Prime Minister as the Chairman and Ministers and heads of departments, twelve representatives of local governments and another twelve persons or experts [Sec. 6]. This Committee has the powers and duties, amongst others, to establish decentralization and implementation plans; to delineate powers and duties in the management of public services between the state and local governments; to improve the ratio of taxes, duties and income between the State and local governments etc [Sec. 12]. More importantly the Act determines powers and duties in public services. It gives local administrative organizations power to systematize public services for the benefit of local communities [Sec. 16]. Amongst them is local self development plan; social welfare and development of the quality of children, women, old people and disadvantaged people; enhancing democracy, equality, rights and freedom of people; enhancing the participation of people in development of local organizations; and provide, maintain and benefit taking from forestry, land, natural resources and environment etc [Sec. 16]. It also sets out a set of similar powers and duties for the provincial administrative organization.

The Act also sets out a series of procedures through which decentralization can take place and proceed [Secs. 30 – 34]. The Act changed the ratio of expenditure between central government: local government to 80:20 in 2001 and 65:35 in 2006 [Sec. 30 (4)]. Previously, it was 91:9 where half of the 9% was allocated to the Bangkok Metropolitan Administration.¹⁰¹ As touched on earlier, this devolution of budgetary control means a real shift of power in terms of the decisions made at a local level. For indigenous areas, it has meant at least some budgetary control, for the first time, is vested in the tambon and thus within reach of indigenous community leaders.

3.4.4.9 Master Plan on Highland Development

The first Master Plan for Development of Highland Populations, Environment and Control of Narcotic Crops (Master Plan for Highland Development) was implemented in 1992-96 by Centre for the Coordination of Hilltribe Affairs and Eradication of Narcotic Crops (COHAN) although it was drafted much earlier in 1983.¹⁰² The Office of the Narcotic Control Board (ONCB) coordinated projects in the 20 provinces in which the plan was implemented, together with the respective Provincial and District Hilltribe Committees (DHCs).¹⁰³ The objectives of the plan were to improve the socio-economic situation of the hill tribes, to encourage permanent settlement and community registration and to conserve the environment.¹⁰⁴ In this sense, the Master Plan was no different to other policies on hill peoples that had already been formulated before.

To implement the Master Plan, hill tribe communities/villages were classified into four groups:¹⁰⁵

1. Permanent villages which had more than 50 households with permanent settlement and no migration for the last 20 years, suitable for permanent agriculture, outside watershed class 1 or wildlife areas, with government agencies present and car transport possible;
2. Potential permanent settlements which were those villages that posed no threat to national security, has 20-50 households, with no migration for 10 years, with permanent houses and suitable for permanent agriculture;
3. Non-permanent settlements which were communities that did not fulfill the conditions for group 2; and
4. Special: special community.¹⁰⁶

To get legal recognition, a community must not be a threat to national security; it must have government agencies operating on a permanent basis; it must have accepted development initiatives of the government and can support them; it must be located in suitable zones where permanent cultivation is possible; it must comply with the Local Administration Act of 1914 and the voluntary self-protection law of 1979; and it has at least 50 households, not shifted in the last 10 years and practices permanent

agriculture. Once these criteria are fulfilled, it must register with the Village Directory of the Department of Local Administration where it obtains a village number and a Thai name. It must also have a village committee chaired by a headman with two assistants, one in charge of community defense and the other of village management. These criteria are clearly discriminatory against highland communities, many of which have been made illegal by changes to land zoning and the declaration of national parks and other forms of reserved areas. Similarly, the criteria focusing on permanent agriculture and permanent site (having not shifted in 10 years) means that many smaller indigenous communities are rendered illegal by their inability to match the required criteria.

The 2nd Master Plan for Highland Development (1997-2001) did not show major changes from the first one, though it mentioned implementation problems such as a lack of coordination among agencies, restrictive forest policies, a slow citizenship process, and a lack of planning meetings between provincial and local organizations.¹⁰⁷ It was characterised by three strategies: the creation of security for highland communities; the management of natural resources with a focus on people and forest living together, economic diversification and land use boundaries; and administrative cooperation between the government and the private sector.¹⁰⁸ It also stressed the importance of the clear demarcation of village land use boundary for planning, temporary residence and relocation. This period also saw the adoption of the new Thai constitution which recognized and granted communities the right to participation in the preservation and conservation of natural resources.¹⁰⁹

The present 3rd Master Plan (2002 – 2006) emphasizes the relocation, control and ‘management’ of highland communities instead of a concept of cooperative development. The Master Plan stresses the use of the Cabinet Resolution of the 30th of June 1998 which details a process of rights verification that is inappropriate for the reality of indigenous hill peoples. The Master Plan also divides all highland communities into 4 groups, according to which the future of the community is determined, as shown here:

1. Formally registered villages under the Local Administration Act of 1914
 2. Villages established without yet receiving formal registration, but likely to qualify for registration
 3. Villages established without formal registration, and lacking the capacity to be registered formally (to be relocated)
 4. ‘Special category’ communities with special dispensation from the Cabinet to remain for the time being.
-

The current Master Plan reinforces negative stereotypes of indigenous hill peoples. For instance it associates drug trading, destruction of forest and water resources, soil degradation with indigenous hill peoples. In spite of the decentralization initiatives that are already present, such as the Constitution, the Master Plan encourages a centralized approach without involvement of local administrations.

One of the biggest challenge and shortcoming of these Master Plans is that there was completely no involvement and participation of indigenous communities in their formulation despite the fact that they are the target and “beneficiaries” of the Plans. Aside from the problems this approach poses in formulating a policy sensitive to the needs of the community, there are problems in implementation as well.

3.4.4.10 The National Economic and Social Development Plan (NESDP)

As previously mentioned, the first NESDP contained some provisions that affected indigenous hill peoples. However it was not until the 5th NESDP that indigenous hill peoples’ issues were directly included for the first time.

The entry of a host of international development agencies and donors in the 1980s “divided northern Thailand into development project areas”¹¹⁰. It required coordination and hence the 5th National Economic and Social Development Plan (NESDP 1982-86) included hill tribe issues for the first time.¹¹¹ Security concerns, opium reduction,



Karen women in rice swidden

Photo: Chris Erni

reforestation, reduction of population growth and conversion to ‘good Thai citizens’ were the main objectives.¹¹² During the implementation of this plan, a special Committee for the Solution of National Security Problems Involving Hill Tribes and the Cultivation of Narcotic Crops was created by the Ministry of Interior. The Centre for the Coordination of Hilltribe Affairs and Eradication of Narcotic Crops under the Third Army was also set up in 1986 to coordinate between government agencies.

Around the same time that the First Master Plan for Highland Development was implemented, the 7th NESDB was also executed. This plan called for sustainable development and three development key objectives were adopted. They included economic growth, income distribution, and development of human resources, quality of life and environment. The most important feature, vis-à-vis indigenous hill peoples, of this Plan was the declaration that 25% of the country should be protected conservation forest. The period also saw the enactment of the new Watershed Act 1993 which classified 45.9% of the country as national forest reserve.¹¹³

The Asian economic crash of 1997 brought home the fact that the rapid growth Thailand had enjoyed could not be sustained without adverse social and environmental consequences. It also led to the realization that vulnerable people in remote rural communities needed to be empowered to enable them to participate more actively in future growth and development.¹¹⁴ These concerns were reflected in the 8th NESDP which marked a distinct shift from previous Plans that emphasized economic growth, to focus on sustainable use of resources and participation of people. Amongst other things, it stated, “*Local people and community organizations should be urged to play an increasingly active role in the management of natural resources and environments... Furthermore, restraint and greater efficiency should be promoted, so that natural resources can be used to the greatest possible advantage for the economy as a whole, while having the least possible environmental impact.*”¹¹⁵ It also envisioned increasing employment opportunities in rural areas and developing local economy.

The present 9th NESDP was presented as embodying the king’s concept of “sufficiency economy” which was explained as based on adherence to the middle path, and involving moderation not just as a guide for economic policies but as a way of life. The 9th NESDP which was formulated in consultation with NGOs, civil society and the private sector has its main goals as poverty alleviation, good governance, sustainability, stability, and strengthening development foundations.

3.4.4.11 International Treaties and Documents

Aside from these national laws and policies, Thailand is also party to important international treaties and documents on environment which impact natural resource management such as the Convention on Biological Diversity (CBD), Agenda 21 and the Ramsar Convention. The National Policies, Measures and Plans on the Conservation and Sustainable Utilization of Biodiversity (1998-2002), was approved as an administrative framework to implement the CBD. Seven strategies were outlined in the Plan for implementation:¹¹⁶

- Build capacity of institutions to conserve biodiversity;
- Enhance efficiency in management of protected areas;
- Improve incentives for conservation of species, population and ecosystems;
- Conserve species, populations and ecosystems;
- Control and monitor activities that threaten biodiversity;
- Encourage traditional cultural management of biodiversity;
- Promote cooperation between international and national agencies in the conservation and sustainable utilization of biodiversity.

4. Interface between Indigenous and Statutory Systems and Laws on Natural Resource Management

One obstacle in local communities' participation in natural resource management is the gap between the way of living of indigenous peoples, policies and other legal frameworks put forward by the government which impinges the community's rights and ignores the people's customs and tradition. Such obstacle had led to conflict and violence in enforcing laws on the part of the government agencies.¹¹⁷

The present Thai legal framework of natural resource management is based on the concept that public resources can be divided into separate categories according to their utilitarian value, encouraging commercial ends for their use. Such a perspective places emphasis on the physical property of the resources and ignores the value in other domains such as local culture and tradition that serve as the basis for customary legal framework for resource management. It results in the statutory laws serving the interests of only certain groups in the society. There is a need therefore to look at how such gaps can be negotiated.

4.1 Interaction between Indigenous Systems and Statutory Systems

A constant point of interaction between indigenous systems and the codified system of the State is the conflict that regularly arises when they overlap, or as often is the case, exclude each other. Some key issues that need to be acknowledged to address the problems include:

4.1.1 Non - Recognition of Indigenous Natural Resource Management System

Most of the existing laws and policies of Thailand on natural resource management were enacted and formulated without the participation and consultation of right holders. And often, these laws were modeled on the laws of other countries that fail to appreciate local situations. Further, the adoption of “scientific” approaches to natural resource management continually encouraged a top-down forest and resource management approach. A consequence of this approach was the sidelining of indigenous knowledge and institutions and non-recognition of indigenous systems in natural resource management. However it is important to recognize that “indigenous institutions represent established local systems of authority and other phenomena derived from the socio-cultural and historical processes of a given society.”¹¹⁸

Because they originate from local cultures, their implication and potential for natural resource management is vast. There are already indications that certain state agencies have already incorporated a participatory approach toward natural resource management incorporating the views of indigenous rights holders. For instance, a Community Forestry Development Center was established in the Phupan National Park, a site of constant conflict and contestation over natural resources, to study and develop the process and method for use of natural resources with the local people. It was previously under the management of the Community Forestry Division of the RFD but it has been decentralized to the Udonthani Forestry Region Office, a further indication of a more participatory approach.¹¹⁹ However, it is often the case that participation is defined and viewed differently. Government agencies understand participation to mean only giving information to the public without proactive consultation and decision-making roles.

4.1.2 Land Tenure and Use Rights of Natural Resources

The many cases of conflict over natural resources in Thailand revolve around land tenure security. As it has been rightly observed, “The fierce and often violent arguments

on deforestation and strategies for forest protection are only intelligible against the background of the unsolved land rights issue in Thailand.”¹²⁰

Much of the insecurity over land tenure, and the consequent impact this has had on natural resource management, is centered on the manner in which the government has approached and viewed natural resources as the legitimate domain and subject of State policy making without considering other rights holders. Such claims of power comes with arbitrariness in policy making. In this respect the Thai government has been extremely inconsistent vis-à-vis its policies for natural resource management. Policies have been modified or changed radically to suit economic or political interests, and this is especially so when such policies intersect with indigenous hill peoples. As it has been observed, “[the] government’s political and administrative policy affecting tribal populations changes continually”.¹²¹ For instance, while laws and policies on national parks and wildlife sanctuaries do not allow settlements or use of resources within its borders, and it has resulted in the relocation of indigenous hill peoples, tourism in these protected areas is widely promoted. Infrastructure and private construction for tourism is allowed in national parks.¹²²

Use-rights of resources within national reserved areas and wildlife sanctuaries are ambiguous and not clarified. It gives vast leverage to authorities to use the law at their convenience. On the other hand, in areas where there is a strong collective community initiative, this ambiguity also allows indigenous communities to negotiate use rights with the local authorities. For instance, in the Sopsai watershed in Nan Province, indigenous villagers have been able to gain recognition from the local authorities over their “community forest” and land use practices. This has been attributed to the presence of a strong community mobilization within the watershed.¹²³ Similar experiences in other places have also been documented.

4.1.3 Citizenship

Another significant factor compounding land tenure insecurity and affecting natural resource management is the denial of citizenship to a high number of indigenous hill peoples. As pointed out previously, the possession of citizenship documents is essential to accessing any facilities in Thailand. Without such document no use rights can be proven, let alone right over land.

Box 5: Citizenship and Land Rights

In 1999, between April and June, indigenous peoples organized demonstration in Chiang Mai to ask for Thai nationality and land rights. The demonstration was broken up by 1,600 police and rangers in the middle of the night - presumably on the orders of the then governor of Chiang Mai.¹²⁴ However it resulted in some efforts by the government to recognize the citizenship rights of indigenous hill peoples. After the protest of 1999, the government decided to review the citizenship applications. On 29 August 2000, the Cabinet adopted a resolution to complete the review of citizenship applications by 28 August 2001.¹²⁵ Under the Cabinet Resolutions hill people were classified under three groups: 1. People residing in Thailand who migrated to Thailand between 1913 and 1972¹²⁶; 2. People who migrated to Thailand between the 14th of December 1972 and the 3rd of October 1985 and are eligible for permanent resident status¹²⁷; and 3. People who have allegedly migrated after 3 October 1985 and are considered "alien and illegal" and can be forcibly removed from the country.¹²⁸ The process of reviewing citizenship applications were to be completed within one year; however, four more subsequent cabinet resolutions were made and even by mid 2004 there were 377,677 individuals who did not have Thai citizenship or any legal status.¹²⁹

In June 2005, in a meeting discussing citizenship rights, participants called for the amendment of Sec. 7 (bis) (3) of the Nationality Act which denies citizenship to children born to parents with alien status in Thailand. This provision is said to affect over 200,000 tribal children whose parents have yet to be granted legal status in the country. These children have been classified as stateless and, as such, have been denied rights to education, health services and other welfare benefits granted to a Thai citizen.¹³⁰ The law requires proof that a person, plus one parent, is born in Thailand. However most indigenous hill peoples who live in remote mountains do not have birth registers or other means of proof.

In another recent development, in September 2005, the Supreme Administrative Court at Chiang Mai ordered the reinstatement of the names of 1,243 villagers into the citizenship register from Mae Ai after it was arbitrarily ordered to be removed by the Mae Ai district Local Administration Department which had the effect of taking away the citizenship rights of these villagers.

4.2 Participation of Indigenous Hill Peoples in Policy Formulation

Participation with regard to natural resource management, as envisaged in the 1997 Constitution, is the involvement of individuals, groups or communities in receiving relevant information, accordingly identifying problems, planning and managing, monitoring and evaluating, and coming up with solutions and answers for the problems that are identified through such processes.

However Thailand has long suffered from a top-down approach that failed to involve local people and represented the ideas and viewpoints of only a few people.¹³¹ By excluding communities from participatory natural resource management, intensive competition for resources resulted and, in turn, more degradation of the natural resources occurred.¹³² However new institutions and legal frameworks are providing opportunities to address this. The Tambon Council and Administrative Authority Act of 1994, the Decentralization Act of 1999, the Enhancement and Conservation of National Environmental Quality Act of 1992, the Constitution etc all lay down provisions for involving people at the local level. In spite of criticisms against some of these laws, their potential is immense.

Given the participatory and democratic nature of indigenous communities in decision making, it would not be difficult to adapt participatory approaches as envisioned in these enactments to natural resource management. There are already a number of projects and programs undertaken by the government as well as NGOs and community organizations that seek to implement decentralization plans based on these laws. However it also has the danger of displacing the already much threatened indigenous institutions. One of the greatest strength of indigenous institutions and systems are their ability to adjust and the space they allows for maneuvering according to different situations. Rather than adapting indigenous systems to a rigid structure with codified rules and regulations, statutory provisions must be flexible enough to accommodate the malleable nature of indigenous institutions.

Further, the failure of many programs and policies of the government formulated without the involvement of communities illustrates the need for the active involvement of target communities as right holders. For one, involving communities from the outset would give a much better insight into the needs and concerns of the communities but more importantly it will give them a sense of ownership which is very vital to the success of any policy.

Box 6: Community Forest Bill

Community forestry is not a recent concept but has been traced far back in the history of what now constitutes the Thai state.¹³³ However community forestry as an approach entered the official forest resource management lexicon in 1985 with its appearance in the Thai National Forestry Plan (TNFP). Unfortunately, community forestry was inferred to mean commercial plantations by private concessionaires under the TNFP.

The history of the Community Forestry Bill is closely linked to the political, social and economical developments of Thailand.¹³⁴ Community forestry in Thailand is a highly politicized issue, it involves contesting discourses between centralized, professionally-oriented forest management, and a social movement of marginalized forest communities who advocate social justice and decentralization of resource management.¹³⁵ It is not only a struggle for control of forest resources but is also increasingly becoming a constitutive struggle for power by the local people to govern themselves.¹³⁶

The failure of the forestry policy that favoured private commercial plantations and conservation at the expense of forest communities during the 80s led to increased pressure on the government resulting in the RFD proposing a community forest bill in 1990.¹³⁷ However no definite outcome resulted. Community forestry re-emerged in the political arena in 1992 in the context of national elections that were to be held the year with each political party proposing their own versions. It is no surprise that most of these attempts sputtered out after the election. However academics, researchers and NGOs drafted a version in 1993.¹³⁸ Another draft known as the “Suanbua Draft” was brought out in 1996 which was approved in principle by the Cabinet, however political developments that toppled the government then again relegated the bill to the background. Using the provision of Article 170 of the Constitution which allows the public to propose new legislation if 50,000 or more signatures can be collected, the Assembly of the Poor proposed a people’s version in 1997. After much discussion and lobbying, in Nov. 2001, the Council of State approved the community forest bill and sent it to the Senate for approval. However the Senate, in March 2002, passed the bill after making substantive changes that diminished the whole point of the bill. A table comparing the draft Community Forestry Bill passed by the Council of State and amendments made by the Senate indicates the changes are shown below:¹³⁹

Draft Community Forestry Bill	Amendments by Senate
<p>Section 18. The right to propose an area of community forest was limited to groups of 50 or more persons aged over 18 years and from a traditional community native or indigenous to the area that has been active in forest preservation for at least the previous five years.</p>	<p>The number of proponents increased from 50 to 100 and community forests excluded in protected forest areas such as watersheds, wildlife sanctuaries, the time frame for forest conservation activity 'to at least five years before the bill takes effect'.</p>
<p>Section 29. Permits the community forestry group to request changes to the boundaries of the community forest areas for the improvement of its management plan or for the revocation of the entire or part of a community forest provided valid and clear reasons are detailed to the Community Forestry Committee.</p>	<p>The expansion of designated community forest areas to be prohibited</p>
<p>Section 31. Prohibits commercial-scale cutting of trees in all types of protected forest areas. Trees to be cut only for subsistence and public utility, which should follow guidelines set by a relevant policy committee.</p>	<p>Locals cannot gather any forest products in the community forest except with permission from the Royal Forest Department</p>

The changes made to Section 18 have been particularly of concern as it would affect more than 500,000 families living in 5,000 community forests across Thailand. As it now stands, the Council of State will consider the amended bill and if they do not agree to the amendments, a joint committee will be formed to study the bill again.

Several groups with different ideologies and political ambition have since then debated and made known their point, sometimes violently and forcefully. The most contentious issues concern the area permitted for establishing community forests, the activities to be allowed on the land and the control of the area, including penalties for contravening the rules.¹⁴⁰ The whole debate is shaped by two conflicting stories about people and forests. One is that forests have to be generally protected against people, and the other, that village people, are suited to live in harmony with forests.¹⁴¹

[Ed. note to the second edition. The Community Forest Bill has been passed in the Senate-amended form described above in late 2007. However the passage of the Bill took place under a military government, and many within civil society in Thailand do not accept the amended version passed. It remains to be seen whether the Bill is revised again]

4.3 Connecting Different Institutions – Government, NGOs, Donors and Community Organizations

Three main actors are usually identified in the discourse on natural resource management in Thailand: the government, NGOs and local communities, or more specifically indigenous hill peoples. Each has tried to influence natural resource management in different ways. However it is also important to factor in the role of donors within the natural resource discussion as they have a huge say in how resources are managed and allocated.

It is important that the specific roles of these institutions are identified within the overall framework of natural resource management, and at the same time, to examine how they interact with each other.

4.3.1 NGOs

NGOs in Thailand have been instrumental in shaping policies on natural resource management. Within the environment discourse, two general categories of NGOs can be seen - the “Dark Green”¹⁴² and the “Light Green” groups. The Dark Green groups are mostly middle class environmental groups who believe in strong conservation methods and the exclusivity of natural spheres and human beings. They argue that protected areas are too fragile for human use and should be completely preserved as “untouched wilderness” undisturbed by human intervention.¹⁴³ The Light Green groups on the other hand emphasize community involvement in natural resource management and believe that even within protected areas, human and nature can coexist. Not surprisingly, most indigenous organizations fall within this latter category. The difference in perspective has resulted in fragmentation of NGO opinions which has affected natural resource management gravely.¹⁴⁴ For instance, the Community Forest Bill has been a strong site of contest between these two groups, preventing its enactment.

As NGOs have the crucial role of synergizing and linking different agencies and organization, most importantly, connecting governments to the community, it is important that the differing approaches and viewpoints toward natural resource management among NGOs themselves are bridged.

Box 7: IMPECT Association

The Inter Mountain Peoples Education and Culture in Thailand Association (IMPECT) is an indigenous organization founded and staffed entirely by representatives of indigenous communities in Thailand. It focuses on developmental work with seven indigenous groups found in the northern provinces of Thailand: Akha, Hmong, Lahu, Lisu, Lua, Karen and Iu Mien.

Currently it is implementing the Highland Mapping Development and Biodiversity Management as one of its many projects. The project is an important effort towards involving communities in the decision making process through innovative use of technology. The project operates at two levels.¹⁴⁵ Community and land use mapping is done using GIS. This information is then used in enhancing the capacity of communities by facilitating a more critical understanding and analysis of resource use. A number of trainings, consultations and workshops have been organized in which community maps are used as the negotiating basis for resource use. A participatory approach is utilized and emphasized in which everyone within a community is involved in decision making, notably women. Communities have been able to effectively engage with local governments, Forest and Park officials, using the information from this project to demarcate and negotiate resource use, even within national parks and protected areas.

One of the limitations pointed out, though, is its inability to influence policy making at the national level. However, IMPECT has actively networked with other organizations to push for policy change. Besides the national network of indigenous groups, it actively engages with national level community and peoples organizations such as the National Federation of Peasants (NFP), Northern Farmers Network (NFN) etc. Organizations such as the NFP and NFN, where many lowland Thais are also actively involved, are potential platforms for fighting the negative stereotypes attributed to highland indigenous peoples. IMPECT also has been instrumental in formation of networks on indigenous health and women.

4.3.2 Community and People's Organizations

Community and people's organization in Thailand, such as the Northern Farmers' Network, Assembly of Indigenous and Tribal Peoples etc, have been highly active in negotiating with different players within the natural resource management setting in developing a people-centric approach toward natural resource management. These organizations came about as a response to the adverse impact government policies and actions by dark green NGOs had on the lives of indigenous hill peoples. They have been able to create cultural spaces to express indigenous traditional knowledge, concepts, and beliefs in the use and management of natural resources. Most importantly they have been able to put into place self-governing rules on natural resource management within their communities. However community organizations need to be strengthened further and promoted in all levels of governance.

Box 8: The Highland Nature Conservation Club

Some academics, community leaders and social workers recognized and felt the need to respond actively to put forward the case of the indigenous hill peoples in the context of forest policies which encouraged forceful relocation and resettlement of indigenous hill peoples, and the campaign of lowland conservation groups targeting indigenous hill peoples as the culprits of environmental degradation in the late 1980's. The Highland Nature Conservation Club (HNCC), a community organization resulted.

Over the years, HNCC has taken up many activities of lobbying for positive policy change as well as implementing community activities at the local level. HNCC have been quite successful in combining technology and indigenous knowledge in demarcating use zones, regulations and rules for community forests and land use, setting up fire-break zones. These rules have been recognized by the authorities. HNCC established a Committee to Prove People's Land Rights which have been negotiating with government bodies for resolving land related problems. HNCC was also instrumental in setting up a pre-school child development center among the Pgakenyaw. Inter-generational transfer of traditional knowledge is also an important feature of their activities with recordings of folk-songs, proverbs and poetries. They are presently involved in the implementation of a pilot project in four schools at Khun Tae, Khun Ya, Some Poi and Khun Pae where the curriculum consist elements of traditional knowledge and customs. The positive result of their capacity building activities can be seen from the level of participation of women in decision making which numbers almost as much as men.

4.3.3 Government

A recurring criticism of the government's approach to natural resource management is the overlap between different government agencies and institutions that deal with natural resource management. Closely related to the overlap between government agencies is the overlying characteristic of provisions in key laws governing natural resource management. The recent restructuring attempts to address this problem but further clarification of roles and streamlining is needed. There are still a lot of institutional limitations and reluctance to address issues related to indigenous hill peoples. There is also an inherent problem with the segmented approach that the government takes in addressing natural resource management and indigenous hill peoples' issues. However there is a growing realization and recognition among government agencies on the need to involve all parties, especially the target groups in program and policy formulation.

Box 9: Participatory Land Use Planning of the RFD

As an alternative to infeasible resettlement programmes and in order to address the complexity of environmental problems, a model called "Participatory Land Use Planning" was developed jointly by the Royal Forest Department and the University of Chiang Mai. The approach integrates measures of soil and forest conservation whereby emphasis is put on enabling local communities to assess and modify local land use systems according to watershed management objectives. After promising results during a pilot implementation that started in 1987, the model has been adopted by various large projects of international donors and has gained widespread popularity also in other countries.

Critics, however, claim it overemphasizes social and psychological aspects such as community organisation and environmental awareness without providing clear guidelines for resource management and proof of its resource effectiveness.

4.3.4 Donors

At the height of the development push during the 1980s, there were a total of 168 agencies from 31 government departments and 49 international donors active in Thailand.¹⁴⁶ Donors have been instrumental in influencing the government to undertake programs and projects for highland development, starting with the controversial opium replacement monoculture cash-crop plantation projects and progressing to a plethora of programs now.

Most of the projects now have a strong component focus on a decentralized natural resource management model that seeks to ensure the livelihoods and socio-economic needs of affected groups. However problems are still encountered in implementation of programs. There are criticisms against donors for pushing their self-defined agendas of “development” that are not sensitive to the needs of indigenous hill peoples or which would not realistically improve their situation.

Box 10: JOMPA

Presently one project that touches the core issue of conservation, natural resource management and indigenous issues is the Joint Management of Protected Areas Project (JoMPA). JoMPA is a sub-component of the Thai-Danish Programme for Co-operation in Environment funded by DANIDA. It aims at promoting participatory approaches to protected area management in Thailand securing both biodiversity conservation and improved livelihood of local communities. Key problems addressed by the sub-component are the continued loss of biodiversity, degradation of the ecosystem functions, loss of livelihood opportunities for the rural poor and lack of democratic involvement of a broad range of stakeholders in the protected area management.¹⁴⁷

JoMPA, in the long-term, aims to secure biodiversity conservation with responsibilities and outcomes of sustainable management shared among authorities, local stakeholders and general public..¹⁴⁸

It supports the implementation of basic principles of peoples’ participation and decentralisation as stressed in the Constitution of Thailand and policies on decentralisation. It involves key stakeholders including protected areas authorities, local communities, local authorities, civil society organisation and private sector. Support is provided to Department of National Park, Wildlife and Plant Conservation under the Ministry of Natural Resources and Environment, which is the key government partner, as well as to a range of NGOs, considered important partners in supporting joint management activities. This project has pilot areas throughout Thailand in 11 different National Parks, 6 Wildlife Protection Areas and 2 National Marine Parks. One of these areas is the Ob Luang National Park which covers some of the area of Chomthong District in Chiang Mai Province.

Indigenous hill peoples' NGOs involved in the project have identified this project as a possible site for fostering more understanding between government agencies and the people over natural resource management.

Box 11: Chomthong Case Study

This case study briefly examines events during the late 1990's in Chom Thong district, Chiang Mai province which brought the debate over resource conflict to the centre of the national consciousness. It is taken as an example because of the complexity of issues involved – the government's perceived need for creating protected conservation areas, increasing water demands, pressure from lowland agriculturists and conservation groups, criminalization of indigenous hill peoples and their response to such criminalization.

Background

Chom Thong district is located in Chiang Mai Province in northern Thailand. Karen oral history places their settlement (the village of Ban Klang) along the banks of the Mae Klang 200 years ago. Doi Inthanon National Park which includes Thailand's highest peak, Doi Inthanon, was demarcated in 1972 in the area above the village. The Park included many upper watershed areas and embraced many villages of the Karen, Hmong and other indigenous groups. Water from the Mae Klang, which originates in the upper watersheds of Doi Inthanon, is used to irrigate longan fruit orchards and paddy fields in the lowlands of Chom Thong. In 1985, the National Forestry Policy was adopted which aimed at maintaining 40 percent of Thailand as natural forest. The Policy resulted in more rigid and increased control over reserved forests areas. Communities were strictly prohibited from living or using any resources within protection zones and watershed class 1A areas. Further limited use of resources was allowed only in the buffer zone.

The RFD used satellite images to demarcate most of the forest areas. Contrary to ground realities, they also assumed that older secondary forests were uninhabited. Indigenous hill peoples were excluded from any part of the process, the exclusion even extending to receiving any information about the land use planning decisions years after plans were adopted. The demarcations made illegal almost all the settlements in the area. Many communities came to know about their illegal status only when they were arrested. Much later, RFD officials working at

the ground level came to realize that collaborative management of resources with the affected indigenous hill peoples was better than their exclusion. However, the idea of segregating “nature” and “people” was too deeply entrenched among policy makers. Many communities were relocated and resettled, often coercively, to areas that were infertile or already settled or with negligible agricultural areas. It created a new level of conflict and social, cultural and economical repercussions that were either unanticipated or ignored. In any case, such severe steps did not stop the degradation of natural resources but further aggravated the situation. Meanwhile, longan orchards were eating up huge parts of the lowland area around Chom Thong, which increased by about 50 square kilometers, demanding a steep rise in consumption of water. Unsurprisingly, water resource management became the focal point of resentment among lowland Thai farmers. The Chom Thong Watershed and Environment Conservation Club was formed in 1989 by these farmers to manage water resources for their interest across the whole district. They soon allied with the Dhammaanat Foundation which sought relocation and removal of indigenous highland peoples from their traditional settlements.

The conflict reached a head in the late 1990s when a severe drought destroyed many fruit trees. Immediately, lowland conservation groups blamed the indigenous highlanders claiming they destroyed the forest through fires to open new areas for agriculture. On the other side, indigenous highlanders pointed out businessmen who wanted to set up resorts as the culprits of the fires. Extreme steps were taken by lowland conservation groups, including blocking access roads to the highlands and barb wiring certain areas. The cement pillars of the barb wire fences were painted in the colours of the Thai flag – a clear sign that they considered the highland peoples to be foreigners or ‘non-Thais’. They also campaigned successfully to overturn the three April 1997 Cabinet Resolutions that gave rights to communities to manage their forests.

While the conflict is often characterised as a conflict over resources between lowland Thai farmers and indigenous highlanders, it is much more complex involving conflicting ideologies operating at several levels, most notably, the clash of ideas on conservation between groups such as the Dhammaanat Foundation, who espouse “urgent termination of settlements” in conservation areas, and supporters of indigenous hill peoples and their traditional system of sustainable natural resource management. Underlying differences in social, economic, political and cultural groundings amplified the conflict. The conflict was also used by influential lowland farmers to increase their control over resources.

Response

While the conflict has abated, it still remains largely unresolved. However it has served to underline proactive steps taken by indigenous hill peoples for sustainable management of resources. Indigenous communities put into place a more institutionalized set of regulations based on their traditional practices. They reduced their shifting cultivation areas drastically and learned new resource management skills. Community activities for resource management such as making forest fires breakers, checking illegal logging etc were conducted more efficiently. At the same time, efforts to counter negative propaganda against them were also undertaken.

As a response, the conflict also saw the creation of the Northern Farmers Network (NFN) which links 107 villages located in 14 sub-watersheds in the upper northern region of Thailand. NFN strives to promote community forestry and local participation in natural resource management and the application of indigenous knowledge to management strategies. Many self-regulatory practices on a number of topics ranging from watershed management to harvesting non-timber forest products are negotiated and discussed among members. They recognize the need for dialogue with government and lowland communities and actively seek to involve them. NFN creates awareness about government policies and laws among their members and has been partly successful since then in encouraging government agencies to involve local communities and people's organizations in natural resource management.

Lessons Learned

The case highlights the tense lines drawn over resource use with increasing pressure on it from every quarter. It indicates some useful lessons as well.

- Indigenous communities have taken positive steps to respond to changing resource availability and pressure.
- Community forestry can be strengthened if there is institutional support from the government and a legal framework as its basis.
- Coordination and cooperation between watershed communities facilitated through networks and associations can greatly enhance and stabilize natural resource management.

5. Challenges and Drawbacks

5.1 Democratization, Decentralization, Participation and Sustainability

It is evident that the conflict over natural resources management in Thailand – be it land tenure insecurity, dispute over water resources or others – stems from the myopic process behind policies and laws that seek to govern resource management. Lack of participation from the affected quarters stymied most of the policies and laws before they were even implemented. What is the way out then?

It is not so much the substance of a law that is the answer. However good a law is on paper, it would still need to pass the challenges of implementation. For implementation to be successful, it needs to involve the rights holders and stake holders. Involvement cannot be expected if there is no sense of ownership. It is here that democratization and decentralization with emphasis on participation comes in. It is only through such a process that the sustainability of any process, law or policy can be expected. Ultimately good resource management is a question of ensuring social justice.

However, seeing the history of top-down administration in Thailand, democratization and decentralization remains a great challenge.

5.2 Implementation of Laws

As can be seen, laws that were drafted before the last decade expressly exclude the utilization of resources within national forest reserves and other protected areas. They criminalize activities of indigenous communities which they have traditionally carried out for their sustenance. Though there are thousands of communities managing and protecting their local forests, their activities are deemed illegal. Further, current laws and regulations prioritize the private sector.

It has been found that strict enforcement of laws have not worked in arresting problems of natural resource management but instead exacerbated it. This can be attributed to two factors: the conflicting and overlapping nature of different laws governing natural resource management in Thailand; and the non-involvement of communities as right holders in natural resource management. The first have led to confusion among various government agencies about their roles which in turn leads to a more haphazard and arbitrary enforcement of laws. The second factor is a consequence of the conservation oriented approach of these laws which do not factor in the sustainable traditional resource use

methods of indigenous peoples which alienates them further from government initiated activities as they do not get a fair share of benefits. Rural communities, specifically forest communities, have become important to the success of forest and environmental objectives as their relationship with the forest is rooted in culturally based indigenous knowledge and because of their proximity to the forest which ideally places them to either protect or destroy the forests.¹⁴⁹

Fortunately some positive signs are emerging. The adoption of the Constitution of 1997 heralded a significant benchmark toward a more inclusive participatory approach. Along with this, the Tambon Council & Tambon Authority Act and the Decentralization Act, if implemented effectively and sincerely, has the potential to not only overhaul the bureaucratic set up of natural resource management but also the whole administrative structure of Thailand. In Tambons, such as Ban Luang TAO, where there is a strong representation of indigenous communities, there are already signs of the local administration being more receptive to resource management initiative of indigenous hill peoples. Although community forests do not have a legal basis, authorities have informally started recognizing them indicating a more open interpretation of laws. Further, the restructuring, reassignment and revision of responsibilities for natural resource management under Ministry of Natural Resource Management is a welcome initiative toward streamlining that will hopefully make law implementation more sensitive to ground realities and bring in the required changes.



Hui Kha Nu village, Chom Thong, Chiang Mai

Photo: Udom Charenniyomphai

5.3 Bridging Gaps between Different Actors

With the decentralization and streamlining initiative, there is increased potential in bridging the gaps in perception of natural resource management among state agencies, NGOs and indigenous communities. However to be effective certain underlying issues need to be addressed.

Closely related to the top-down approach of decision making is the negative attitude toward indigenous hill peoples and their use of natural resources. Government officials often assume that indigenous hill people are the culprit of natural resource degradation. They are unable to see resource use based on traditional customs and traditions as sustainable. Government programs usually tell communities what to do rather than try to understand how the forest is used and how that use can be improved to support the objectives and needs of both parties.¹⁵⁰

Bridging gaps also need strong commitment and trust from all parties involved. The conflict of ideologies between different NGOs, conflict between stake holders and right holders etc all function at different levels to effect natural resource management adversely. Commitment should also come with the readiness to acquire the required skills necessary for natural resource management. Because of the strong bureaucratic background in which the government operated in the past, state agencies continue to see activities with indigenous hill peoples as a means to control them and not as a means to achieving better management of natural resource management. Therefore skills such as community organization, community liaison, facilitation qualities etc are required from those in a position of decision making.

5.4 Competing Discourses on Natural Resource Management

In the analysis of natural resource management laws and their impacts on indigenous hill peoples, one angle that is often not given the importance it deserves is the conflict in ideological discourse between different NGO camps: the Dark Green and Light Green camps. Because of middle class support and elite representation, Dark Green NGOs, whose concept of nature is associated with an idealistic self-contradictory notion of an “undisturbed” nature, have been quite successful in blocking promising initiatives such as the Community Forest Bill that would have changed the whole structure of natural resource management in Thailand.

The opposing discourses are not as simple as a disagreement in approach toward natural resource management but also contain a lot of sub-text of power relations, class equations

and social structuring. These needs to be taken into account while addressing this challenge.¹⁵¹

5.5 Gender in Natural Resource Management

The effect and role of gender in natural resource management varies widely across different peoples and across different times. However it is fair to say that the bargaining power of women is often not as strong as men which put them in a more vulnerable situation when the natural resources that the community is dependent on are no longer accessible. In addition, there is sometimes an apparent contradiction between policies designed to protect the environment and those intended to improve local living conditions, and these contradictions also affect men and women differently due to their different roles in the collection and use of natural resource.¹⁵²

Gender roles within indigenous communities are changing continually as a result of state policies. It is necessary that any policy formulation take gender into account. There is a need to acknowledge the specific needs, perspectives, and roles of women in natural resource management in Thailand. Their active participation in decision-making and the equitable sharing of benefits between men and women is crucial for ensuring the long term sustainability of natural resource management.¹⁵³ In light of the many roles that women play, it is necessary to empower and impute them in natural resource management.

Notes

- 1 The term “indigenous” as used in this paper exclude the majority Thai population, the Muslim Chams of Southern Thailand and the Chinese. In certain places, this paper also uses the terms “hill tribes” or “ethnic minority/ minorities” to mean “indigenous” as explained. In Thailand, the term “indigenous peoples” has been rejected by government agencies. Kesmanee & Trakansuphakorn (2005). pp. 345 – 346.
- 2 Thailand: Country Case Study. p.145.
- 3 Kesmanee & Trakansuphakorn. p. 346.
- 4 The Karen in Thailand belong to two main sub-groups of the Karen, the Plo and the Sgaw Karen. The research in this paper was conducted primarily in Sgaw Karen areas, and thus the terms ‘Karen’ and ‘Pga k’nyau’ (the self-naming term for the Sgaw Karen) are both used when describing research results.
- 5 Laungramsri (2005)
- 6 Buergin, Reiner. (2000). p. 5.

- 7 Hill Tribe Welfare Department (2002). See also the data of the Tribal Research Institute, Thailand, March 2002, wherein they conclude the population of the Karen, Hmong, Lahu, Akha, Mien & Lisu to be 794,566 with 137,770 households in 3,229 villages.
- 8 IMPECT & FPP
- 9 Saelee, Kamonphan. (2005). (Mimeo). For Similar Conclusion see also IMPECT & FPP.
- 10 IMPECT & FPP
- 11 Kesmanee and Trakansuphakorn. p. 346.
- 12 This information was supplied by the Department of Public Welfare and the Office of the Permanent Secretary of the Ministry of Interior of Thailand. UNCHR, Sub-Commission on Prevention of Discrimination and Protection of Minorities. WGIP 10th Session. E/CN.4/Sub.2/AC.4/1992/4. (12 May 1992).
- 13 See for instance Lohmann, Larry. (2000). Lohmann, Larry. (1999). and Laungaramsri, Pinkaew. (2001).
- 14 For a more detailed description of this division please see Puginier, Oliver. (2002). p.4
- 15 Buergin, Reiner. (2003). p. 382.
- 16 Thongchai, W., (2000). p 38–62 and Turton, Andrew.(Ed.).
- 17 Buergin (2003)
- 18 Djedje R.S., & Korff, R. (2003). p 6
- 19 Sumarlan, Yanuar. (2004). p 55-59 and Kazuhiro, Harada & Nanang, Martinus (Eds.) p. 51.
- 20 The Hmong, were identified as the main communist challenge in Thailand. For a brief discussion on the causes behind Hmongs joining the Communist insurgency in the 50s and 60s and its implications, see Lee, Gary Y. (1987).
- 21 Buergin (2003). and Buergin (2000)
- 22 Thongchai (2000).
- 23 Buergin. (2003). p383
- 24 Djedje & Korff. (2003).
- 25 Hengsuwan, Paiboon. (2003).
- 26 Puginier, Oliver. (2002a) p 73
- 27 Kesmanee, Chupinit. (1988)
- 28 Buergin. (2000). p 8.
- 29 Ibid.
- 30 Puginier. (2002). p 1
- 31 Djedje & Korff (2003) p 7
- 32 Buergin. (2000). p 8.
- 33 Buergin (2003).
- 34 Siriphongwanit, Anuphong & Leake, Helen.
- 35 Jantakad, Prasong, & Gilmour, Don.(1999). They support the viewpoint that lack of security to access and use rights (tenure) of these peoples acts as a disincentive for them to invest in long term resource management.
- 36 Asia Center for Human Rights. (2005).
- 37 Aguetant, Joseph L. (1996). p 47 - 72
- 38 Dennis. Ibid.
- 39 Aguetant (1996).
- 40 This part is drawn from information supplied by IMPECT and IMPECT & FPP publication.
- 41 Saelee, Kamonphan (2005)
- 42 Thailand: Country Case Study. p 145.
43. Ibid. p149.
44. Pham, Tuong Vi. (2002).
45. Mikkelsen, Caecilie. (2005).
46. For a brief analysis of the impact of the 1997 economic crash, see: Dennis. (1997). *Supra* n. 36. For a brief discussion on how changes in access to natural resources have impacted indigenous hill peoples, particularly women with regard to HIV infection, see Symonds, Patricia V. & Kammerer, Cornelia Ann (1992).
47. Asia Pacific Center for Environmental Law. (1998)
48. At the time of writing, the Constitution of Thailand, and the format of the constituent bodies of government, are being re-written by the post-coup government. The pre-coup arrangements are detailed here, as the replacements are as yet unknown.
49. Sec. 7. Tambon Council and Tambon Administrative Authority Act (B.E. 2537).
50. International Center for Environmental Management (ICEM). (2003). p. 46.

51. Since the writing of this case study, Thailand has adopted a new Constitution drafted by the military government in 2007. This new Constitution remains controversial and will likely be changed again in the short-term. Citations of the Constitution in this study have not been changed.
52. Bureekul, Thawilwadee. (2004). P. 1
53. Makarabhirom, Pearmsak. (1999).
54. *Ibid.*
55. The country has two main forest types, evergreen and deciduous. They make up 36 & 54% each. Jantakad & Gilmour. 12,253 species of flora have been identified while an estimated 87,500 fauna species exist in Thailand. Of these, 457 plants and 554 animals are threatened and needs special protection. Office of Environmental Policy and Planning (OEPP). 2000.
56. Kaosa-Ard, Mingsarn Santikarn. (2000). For a more detailed discussion on forest status and policy, see also: Jantakad & Gilmour.
57. Wataru, Fujita. (2003).
58. See: Jintanakul, Jira. (1998).
59. Rasmussen, J.N., *Et Al.* (Eds.). (2000). p. 20.
60. Jantakad & Gilmour.
61. The policy can be accessed at <http://www.forest.go.th/rfd/policy/policy_e.htm> (Visited 11. 09. 05)
62. Originally it was 15% protected forest and 25% production forest.
63. Jantakad & Gilmour.
64. Sumarlan. p. 52.
65. Bugna, Sahlee, & Rambaldi, Giacomo. p. 40.
66. Sumarlan. p. 49.
67. Rasmussen *et al.*
68. Wataru.
69. Brenner, Verena, *et al.* (1999, Rev. Edn.).
70. Kesmanee And Trakansuphakorn.
71. A list of the 85 terrestrial national parks can be found at the National Park Division webpage at <<http://www.forest.go.th/nrco/english/npd.htm>> (Visited 11. 09. 05); while a list of the marine parks can be found at Marine National Park Division web page at <<http://www.forest.go.th/nrco/english/mnnpd.htm>> (Visited 11. 09. 05).
72. National Park Division. *Ibid.*
73. From interview with Mr. Sumitchai Hathasan, a lawyer who works with the Center for Community Right Protection & Rehabilitation.
74. Public body is not defined under the Act.
75. Puginier (2002a). p. 85.
76. Sor Por Kor documents are title deeds for cultivation and can be used as bank loan security, but cannot be sold legally.
77. Banerjee, Ajit Kumar. (1997). p. 9.
78. Puginier (2002a). p. 85.
79. Dennis.
80. Sustainable Development Foundation. (2003).
81. Colchester, Marcus, & Lohmann, Larry. (1990). See also: Lohmann, Larry. (1993). Lohmann argues strongly that the TFSMP was also a result of influence from “Jaakko Poyry Oy, the largest logging, pulp mill and plantation consulting firm in the world and active in commercial forest exploitation in dozens of countries”.
82. Sureeratna Lakanavichian. (2001) p167-184 and DURST, Patrick B., et al (Eds.). (2001)
83. RFD (1993). Thai Forestry Sector Master Plan (TFSMP), vol. 1-7. Royal Forest Department, Bangkok. Cited in Puginier (2002a).
84. Broge, Niels. et al. (2001).
85. *Ibid.*
86. Jantakad & Gilmour.
87. IUCN (1996)
88. Watershed Management Division.
89. ICEM. pp. 87-88.
90. Adapted from PUGINIER (2002a). p. 76. & OEPP (1996)
91. Jantakad & Gilmour.
92. For an analysis of the impact of privatization of water on its management in Thailand see: CHANTAWONG, Montree, et al. (2002).
93. Lohmann (1999). p. 99.
94. Puginier (2002a). p. 83.
95. 28/3/1998 (Bangkok Post)

96. 15/4/1998 (Bangkok Post)
97. Jantakad & Gilmour.
98. There are four different types of local administrative units envisioned by the new Constitution: the provincial administrative organizations, the municipalities, the tambon (sub-district) administrative organizations (TAOs), and special administrative bodies, namely, the Bangkok Metropolitan Administration and the City of Pattaya. Cuachon, Nora. (2002). p. 144. A tambon is a group of 5-15 mubans (village or hamlet, averaging 200 households), the head of which is the kamnan. A muban is supposedly the lowest unit in the state administrative system, the head of which is the phuyaiban.
99. Orlandini, Barbara. (2003). p. 97
100. Rajchagool, Chaiyan. (1999).
101. Cuachon. p. 147.
102. The 1st Master Plan was drafted by the United Nations Fund for Drug Abuse Control (UNFDAC), the Social Research Institute of Chiang Mai University (CMU) and the United Nations Development Programme (UNDP).
103. Puginier (2002). p 35.
104. Rerkasem, K. And Rerkasem, B. (1994). p. 26.
105. Puginier (2002). p. 37; See also Puginier (2002a). pp. 77 – 78.
106. Not further defined.
107. Puginier (2002a). p. 81
108. Royal Thai Government. 1997. 2nd Master Plan for Development of Highland Populations, Environment and Control of Narcotic Crops. p. 5. Cited in PUGINIER (2002). p. 42.
109. See Articles 46 and 78 of the Constitution.
110. Puginier (2002).
111. Ibid.
112. Chotichaipiboon, T. (1997). p. 100
113. At the time, conservation forest constituted 27.5%, and economic forest 16. 2 % and agricultural production areas 2.2%.
114. Ross, Dr. William & Pounsomlee Dr. Anuchat. 2003. p. 69. For discussion on the impact of the economic crisis on rural communities, especially those in the North East of Thailand, see: Subhadhira, Sukaesinee, et al., (2004). pp. 46 – 59.
115. NESDB. 1997, 109.
116. Bugna & Rambaldi. p. 40.
117. IMPECT & FPP.
118. Appiah-Opoku, Seth & Hyma B. (November 1999).
119. Ngamcharoen, Chanchai.
120. Brenner et al. p. 11.
121. Chotichaipiboon.
122. Leepreecha, Prasit. (2005) p. 8.
123. Kitewachakul, Nitaya. (2005).
124. "Defending Thailand from invaders".24 August 1999. Found at <<http://www.geocities.com/changnoi2/hillpeople.htm>> (Visited 18.11.05).
125. ACHR.
126. About 100,000 people was estimated to fall within this category.
127. Their children are eligible for full Thai citizenship. Approximately, 90,000 hill tribes fall into this category.
128. About 220,527 persons were estimated to fall under this category.
129. ACHR.
130. "Call to change clause denying rights to Thai-born children of aliens," The Nation, 3 July 2005.
131. Makarabhirom, Pearsak. (2002).
132. Ganjanapan, Anan. 2003. pp 207-212
133. Sumarlan. p. 52.
134. For an excellent historical account and analysis of the developments and factors that shaped the Community Forestry Bill debate, see BRENNER et al. They divide developments into four phases: emergent phase (1985–1991), the hot phase (1991–1992), the submergent phase (1993–1996), and the Bill agenda (1996 until today).
135. Maneekul, Rachnee., et al. p. 171.
136. Wittayapak, Chusak. (2003) p. 4.
137. Brenner *et al.* pp. 16 -17.

138. Maneekul *et al.* p. 172,
139. Adapted from Maneekul, *et al.* p. 173.
140. Makarabhirom, Pearmsak. (2000). pp. 60-61.
141. Brenner *et al.* p. 21.
142. Organizations such as the Sueb Nakasathien Foundation, Loak See Khiew Foundation, Thammanat Foundation, and the Association of Art and Environmental Conservation fall under this group.
143. See Laungramsri, Pinkaew. (1997). "Reconstructing Nature: The Community Forest Movement And Its Challenge To Forest Management In Thailand." *Community Forestry at a Crossroads: Reflections and Future Directions in the Development of Community Forestry*. Proceedings of an International Seminar. Bangkok: RECOFTC.
144. For an analytical look at the competing discourses within civil societies in Thailand, see: Laungramsri, Pinkaew. (2002). "Competing discourses and practices of "Civil Society": a reflection on the environmental movement in Thailand and some implications for the Mekong Region." Paper presented at the Mekong Dialogue Workshop "International transfer of river basin development experience: Australia and the Mekong Region". 2 September 2002. Found at <<http://www.mekong.es.usyd.edu.au/events/past/Conference2002/pinkaew.pdf>> (Visited 12. 12. 05).
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147. DANIDA. June 2003.
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150. *Ibid.*
151. For a discussion on the contradictory approach of intervention for preserving "pristine nature" and how it affects natural resource management see: Laungramsri, Pinkaew. (2002a). "On the Politics of Nature Conservation in Thailand" Iss. 1. *Kyoto Review of Southeast Asia*. Oct. 2002. Found at <http://kyotoreview.cseas.kyoto-u.ac.jp/issue/issue1/article_168.html> (Visited 18. 11. 05).
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153. See Mikkelsen.

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BRIDGING THE GAP

Policies and Practices on Indigenous Peoples' Natural Resource Management in Asia



Indigenous knowledge, innovations and practices on natural resource management are little understood by outsiders. Yet they are highly complex systems, closely interlinked with other indigenous systems. They incorporate a keen awareness of the environment and an appreciation for conservation and continuity. They also encourage sustainable innovation and place the long-term wellbeing of the community as the focus of all activities.

Indigenous resource management systems are also closely linked with other indigenous systems – including social, cultural, spiritual, economic, governance, juridical, health, technological and learning. The case studies from Bangladesh, Cambodia, Malaysia and Thailand contained in this book reveal how indigenous natural resource management systems can be viable alternatives to current attitudes and practices to natural resource management. They also show why it is important that autonomy and indigenous rights to their territories are crucial for the successful implementation of their natural resource management systems.



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