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land reform

LAND SETTLEMENT AND COOPERATIVES

réforme agraire

COLONISATION ET COOPÉRATIVES AGRICOLES

reforma agraria

COLONIZACIÓN Y COOPERATIVAS



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Preface

The United Nations General Assembly in its resolution 48/163 of 21 December 1993 proclaimed the International Decade of the World's Indigenous Peoples (1995–2004). The main objective of the Decade has been to strengthen international cooperation for the solution of problems faced by indigenous peoples in such areas as human rights, the environment, development, education and health. One of the main important outcomes of the UN activities undertaken during this Decade has been the establishment, in 2002, of the UN Permanent Forum on Indigenous Issues (PFII). The mandate of the Forum is to advise and make recommendations to the UN Economic and Social Council on economic and social development, culture, human rights, the environment, education and health relating to indigenous peoples. In particular, the Forum is asked to raise awareness, and promote the integration and coordination of UN activities related to issues of indigenous peoples.

As the Decade comes to a close this year, awareness and increased attention to indigenous issues within FAO work have been the positive results of the activities undertaken during the past ten years, and in particular as a result of the recommendations of the UN PFII. Present FAO activities involving indigenous peoples focus on, among others, topics such as food security, biodiversity and genetic resources, sustainable forest management, development law, gender demographics and indigenous education, and access to land and natural resources.

Within the areas of FAO-related work, and in particular within those concerned with rural development, indigenous peoples have consistently reiterated their main concern and interest in addressing issues such as: access to natural resources (including plant genetic resources) and biodiversity technology; fair conditions relating to employment in agriculture; good practices in agriculture; cultural indicators for the assessment of development projects related to indigenous peoples; and the recognition of indigenous peoples' rights to land.

Although ancestral rights to land are a cornerstone of the livelihoods of indigenous peoples, few countries have been ready to undertake their recognition. Lack of political will together with obstacles such as lack of legal recognition of indigenous rights in national legal frameworks and tenure regimes, different forms of discrimination and inappropriate policies towards indigenous peoples are at the root of some of the limitations that are found with regard to the recognition of indigenous peoples' land rights.

As a contribution to the particular interests of indigenous peoples, this issue of *Land Reform, Land Settlement and Cooperatives* addresses the main issues that are at the core of the recognition of indigenous peoples' land rights. The first five articles presented here, by Colchester *et al.*, Colchester, Griffiths, Nelson and Mackay, provide an overview of the whole issue of indigenous peoples and their land rights, analysed by geographical region. In the first article, the authors provide an overview of the issue of indigenous land rights, addressing definitions, obstacles, development options and institutional challenges for the recognition of indigenous peoples' land rights. In the second article, Marcus Colchester analyses the situation relating to land tenure and indigenous peoples in Asia. Although historically Asian governments have openly denied recognizing the concept of indigenous peoples, this situation is gradually changing. At present, few governments in Asia recognize collective land rights, although many have promoted collaborative natural resource management regimes. In the third article, Thomas Griffiths analyses the situation of land tenure and indigenous peoples in Latin America, which is one of the geographical regions where an important change in the recognition of indigenous peoples' land rights has taken place. From policies of assimilation and integration of the indigenous population

in the 1950s and 1960s, new legal frameworks and constitutions are increasingly taking into consideration the multi-ethnic and pluricultural nature of Latin American countries. However, recognition of land rights is an area in which progress has been slower. In the fourth article, John Nelson looks at the situation of land tenure in sub-Saharan Africa, where customary tenure remains the main form of land ownership, with a mix of individual, family and communal rights to land. Customary tenure has uneven levels of legal recognition in African countries, and it is often the case that customary rights are considered weaker than official registered titles to land. In the fifth article, Fergus Mackay analyses the legal issues behind indigenous land rights including indigenous rights to land from the point of view of English Common Law and the French Civil Code. Indigenous rights are deep-rooted in international human rights jurisprudence. New human rights instruments that look into indigenous rights need ratification but, to a large extent, they need to consolidate existing rights.

The following four articles, written respectively by Carlos Nieto Cabrera, Laureano del Castillo Pinto, David Goodwin, and Olivier Évrard and Paul Mathieu, aim to provide an overview of the situation and examples of the ways in which land rights are dealt with in specific countries such as Ecuador and Peru in Latin America, Zimbabwe in Africa, New Zealand in the Pacific and the Lao People's Democratic Republic in Asia.

The articles presented in this issue of *Land Reform, Land Settlement and Cooperatives* have been commissioned by the Land Tenure Service of the Rural Development Division, which is the Focal Point unit in charge of indigenous issues in FAO. It is our hope that these articles will contribute to the debate on the issues relating to indigenous peoples and their land rights that will continue to be of importance beyond the closure of the International Decade of the World's Indigenous Peoples.

Adriana Herrera

FAO Focal Point for Indigenous Issues
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Préface

L'Assemblée générale des Nations Unies, dans sa résolution 48/163 du 21 décembre 1993, a proclamé la Décennie internationale des populations autochtones (1995-2004). L'objectif principal était de renforcer la coopération internationale afin de résoudre les problèmes des populations autochtones dans des domaines tels que les droits de l'homme, l'environnement, le développement, l'éducation et la santé. L'un des principaux résultats des activités des Nations Unies, au cours de cette Décennie, a été la création en 2002, de l'Instance permanente sur les questions autochtones. Son mandat consiste à fournir des conseils et des recommandations au Conseil économique et social des Nations Unies, dans les domaines du développement économique et social, de la culture et des droits de l'homme, de l'environnement, de l'éducation et de la santé, pour ce qui est des populations autochtones. L'Instance doit notamment faire œuvre de sensibilisation et encourager l'intégration et la coordination des activités des Nations Unies pour les questions autochtones.

La Décennie qui s'achève cette année a été marquée par une sensibilisation et une attention accrues aux questions autochtones, dans les travaux de la FAO. Ces résultats sont dus aux mesures prises au cours des 10 dernières années, et notamment aux recommandations de l'Instance permanente des Nations Unies. Actuellement, les activités de la FAO en la matière visent entre autres la sécurité alimentaire, la biodiversité et les ressources génétiques, la gestion durable des forêts, le droit du développement, les questions de parité, de population et de savoir autochtones, l'accès aux terres et aux ressources naturelles.

Dans les domaines d'action de la FAO, et notamment pour ce qui est du développement rural, les populations autochtones ont toutes réaffirmé l'importance d'aborder entre autres les questions suivantes: accès aux ressources naturelles (y compris aux ressources génétiques végétales) et technologies liées à la biodiversité; conditions équitables d'emploi dans le secteur agricole; bonnes pratiques agricoles; indicateurs culturels permettant d'évaluer des projets de développement destinés aux populations autochtones; et reconnaissance des droits des populations autochtones sur leurs terres.

L'existence des populations autochtones repose sur la reconnaissance des droits fonciers ancestraux, mais les pays qui se sont engagés dans cette voie sont rares. À l'absence de volonté politique viennent s'ajouter diverses contraintes comme le vide juridique relatif aux droits autochtones dans l'ordre juridique des pays et dans les régimes fonciers, diverses formes de discrimination et des politiques contestables. Cela explique, dans une certaine mesure, les limitations auxquelles les populations autochtones se heurtent pour faire reconnaître leurs droits fonciers.

Le présent numéro de *Réforme agraire, colonisation et coopératives agricoles* est une contribution à la cause des populations autochtones. Il aborde les questions qui sont à la base de la reconnaissance de leurs droits fonciers. Les cinq premiers articles de la revue (Colchester *et al.*, Colchester, Griffiths, Nelson et Mackay) offrent une analyse générale de la question des populations autochtones et de leurs droits fonciers, effectuée par région géographique. Le premier article donne un aperçu général de la question des droits fonciers autochtones, et fournit les définitions pertinentes, cerne les obstacles, les différentes possibilités de développement et les défis institutionnels à relever pour permettre la reconnaissance des droits fonciers des populations autochtones. Le deuxième article, de Marcus Colchester, décrit la situation des régimes fonciers et des populations autochtones en Asie. Bien que les autorités refusent depuis toujours de reconnaître les droits des populations autochtones, on a pu assister ces derniers temps à une évolution. Les pays qui ont reconnu les droits fonciers collectifs sont encore rares, mais nombreux

sont ceux qui ont encouragé un régime collectif de gestion des ressources naturelles. Dans le troisième article, Thomas Griffiths se penche sur la situation des régimes fonciers et des populations autochtones en Amérique latine, région dans laquelle on a assisté à une forte évolution dans le sens de la reconnaissance des droits fonciers des populations autochtones. Les politiques d'assimilation et d'intégration des populations autochtones en vigueur dans les années 50 et 60 ont cédé le pas à un nouvel ordre juridique et à des constitutions récentes qui tiennent de plus en plus compte des diversités ethniques et culturelles des pays latino-américains. La reconnaissance des droits fonciers reste toutefois à la traîne. Dans le quatrième article, John Nelson examine les régimes fonciers en Afrique subsaharienne, région dans laquelle les régimes fonciers coutumiers, qui associent droits individuels, familiaux et communaux, sont encore la principale forme de propriété foncière. Les régimes coutumiers ne sont pas reconnus de manière uniforme dans les pays africains, et ils ont souvent une valeur inférieure aux droits officiellement enregistrés. Dans le cinquième article, Fergus Mackay analyse les aspects juridiques des droits fonciers des autochtones, y compris les droits des autochtones sur les terres du point de vue de la common law et du Code civil français. Les droits des autochtones sont profondément liés à la jurisprudence des droits internationaux de l'homme. On ne peut que ratifier de nouveaux instruments juridiques relatifs aux droits de l'homme qui examinent de près les droits des autochtones, mais il faudrait dans une large mesure consolider les droits existants.

Quatre autres articles, écrits respectivement par Carlos Nieto Cabrera, Laureano del Castillo Pinto, David Goodwin, Olivier Évrard et Paul Mathieu, étudient la situation générale et donnent des exemples de droits fonciers dans certains pays (Équateur et Pérou en Amérique latine; Zimbabwe en Afrique; Nouvelle-Zélande dans le Pacifique; et République démocratique populaire lao en Asie).

Les articles du présent numéro de *Réforme agraire, colonisation et coopératives agricoles* ont été réalisés pour la FAO, sous la responsabilité du Service des régimes fonciers (Division du développement rural), en sa qualité d'Unité de coordination pour les questions autochtones. Nous espérons que ces articles permettront de contribuer au débat sur les populations autochtones et sur leurs droits à la terre, thème dont l'importance n'est pas circonscrite à la Décennie internationale des populations autochtones.

Adriana Herrera

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Prefacio

La Asamblea General de las Naciones Unidas, en su Resolución N° 48/163 de 21 de diciembre de 1993, proclamó el Decenio Internacional de las Poblaciones Indígenas del Mundo (1995-2004). El principal objetivo del Decenio ha sido reforzar la cooperación internacional para la solución de problemas a los que se enfrentan los pueblos indígenas en ámbitos como los derechos humanos, el medio ambiente, el desarrollo, la educación y la salud. Uno de los principales resultados de las actividades de las Naciones Unidas emprendidas en este Decenio ha sido la constitución, en 2002, del Foro Permanente para las Cuestiones Indígenas. El mandato del Foro consiste en asesorar y formular recomendaciones al Consejo Económico y Social de las Naciones Unidas sobre el desarrollo social, la cultura, los derechos humanos, el medio ambiente, la educación y la salud, en relación con los pueblos indígenas. En especial, se pide al Foro que aumente el conocimiento y fomente la integración y la coordinación de las actividades de las Naciones Unidas referentes a cuestiones de los pueblos indígenas.

Dado que el Decenio concluye este año, el conocimiento y una mayor atención respecto de las cuestiones indígenas dentro del trabajo de la FAO han sido los resultados positivos de las actividades emprendidas en los últimos diez años y, en particular, como consecuencia de las recomendaciones del Foro Permanente para las Cuestiones Indígenas de las Naciones Unidas. Las actuales actividades de la FAO referentes a los pueblos indígenas se centran, entre otros asuntos, en la seguridad alimentaria, la biodiversidad y recursos genéticos, la ordenación forestal sostenible, el derecho del desarrollo, la demografía de género y educación indígena, y el acceso a la tierra y a los recursos naturales.

Dentro de los ámbitos relacionados con el trabajo de la FAO y, en especial, dentro de los relacionados con el desarrollo rural, los pueblos indígenas han reiterado insistentemente su preocupación principal e interés en que se traten cuestiones como las siguientes: acceso a los recursos naturales, incluidos los recursos fitogenéticos, y tecnología de la biodiversidad; condiciones justas en materia de empleo en la agricultura; buenas prácticas en la agricultura; indicadores culturales para la evaluación de proyectos de desarrollo referidos a los pueblos indígenas y el reconocimiento de los derechos de los pueblos indígenas a la tierra.

Aunque los derechos ancestrales a la tierra son una piedra angular de los modos de vida de los pueblos indígenas, pocos países se han mostrado dispuestos a emprender su reconocimiento. La falta de voluntad política junto con obstáculos, como la falta de reconocimiento jurídico de los derechos indígenas en los marcos jurídicos y regímenes de tenencia nacionales, diferentes formas de discriminación y unas políticas inadecuadas respecto a los pueblos indígenas se hallan en la raíz de algunas de las limitaciones del reconocimiento de los derechos de estos pueblos a la tierra.

A modo de aportación a los intereses particulares de los pueblos indígenas, este número de *Reforma agraria, colonización y cooperativas* trata los principales temas que constituyen la esencia del reconocimiento de los derechos de los pueblos indígenas a la tierra. Los primeros cinco artículos que se presentan aquí, por Colchester et al., Colchester, Griffiths, Nelson y Mackay dan una visión general de toda la cuestión de los pueblos indígenas y sus derechos a la tierra, analizada por regiones geográficas. En el primer artículo, los autores dan una visión general de los derechos a la tierra de los pueblos indígenas tratando las definiciones, los obstáculos, las opciones de desarrollo y los retos institucionales para el reconocimiento de los derechos a la tierra de los pueblos indígenas. En el segundo artículo, Marcus Colchester analiza la situación de la tenencia de tierras y los pueblos indígenas en Asia. Aunque históricamente los gobiernos asiáticos se han negado

abiertamente a reconocer el concepto de pueblos indígenas, esta situación está cambiando paulatinamente. En la actualidad, pocos gobiernos asiáticos reconocen derechos colectivos a la tierra, aunque muchos han fomentado regímenes cooperativos de ordenación de los recursos naturales. En el tercer artículo, Thomas Griffiths analiza la situación de la tenencia de la tierra y los pueblos indígenas en América Latina, que es una de las regiones geográficas donde se ha producido un cambio importante en el reconocimiento de los derechos a la tierra de los pueblos indígenas. Partiendo de políticas de asimilación e integración de la población indígena en los decenios de 1950 y 1960, los nuevos marcos jurídicos y constituciones toman cada vez más en consideración la naturaleza multiétnica y pluricultural de los países latinoamericanos. Sin embargo, el reconocimiento de los derechos a la tierra es un ámbito en el que los progresos han sido más lentos. En el cuarto artículo, John Nelson estudia la situación de la tenencia de la tierra en el África subsahariana, donde el régimen consuetudinario sigue siendo la principal forma de propiedad de la tierra, con una mezcla de derechos individuales, familiares y comunales a la tierra. La tenencia consuetudinaria tiene niveles desiguales de reconocimiento jurídico en los países africanos, y sucede a menudo que los derechos consuetudinarios se consideren con menor fuerza que los títulos oficialmente registrados. En el quinto artículo, Fergus Mackay analiza los aspectos legales de los derechos de los indígenas sobre la tierra, incluidos los derechos de los indígenas sobre la tierra desde el punto de vista de la Ley Común inglesa y del Código Civil francés. Los derechos de los indígenas están profundamente arraigados en la jurisprudencia de los derechos humanos internacionales. Es preciso ratificar nuevos instrumentos legales relativos a los derechos humanos que contemplen los derechos de los indígenas, pero en buena medida es necesario consolidar los derechos ya existentes.

Los cuatro artículos siguientes, escritos respectivamente por Carlos Nieto Cabrera, Laureano del Castillo Pinto, David Goodwin, y Olivier Évrard y Paul Mathieu, se proponen dar una visión general de la situación y ejemplos de cómo se tratan los derechos a la tierra en determinados países como Ecuador y Perú en América Latina, Zimbabwe en África, Nueva Zelandia en el Pacífico y la República Democrática Popular Lao en Asia.

Los estudios presentados en este número de *Reforma agraria, colonización y cooperativas* han sido encargados por el Servicio de Tenencia de la Tierra de la Dirección de Desarrollo Rural, que es el centro de coordinación encargado de las cuestiones indígenas en la FAO. Deseamos que estos artículos contribuyan al debate de las cuestiones referentes a los pueblos indígenas y sus derechos a la tierra que seguirán teniendo importancia después de la conclusión del Decenio Internacional de las Poblaciones Indígenas del Mundo.

Adriana Herrera

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Régimes fonciers autochtones: défis et perspectives

Le présent article donne un aperçu des informations disponibles sur les droits fonciers des populations autochtones, principalement dans les pays en développement et dans les pays en transition. Après un rappel des droits des populations autochtones reconnus en droit international, il est précisé si ces droits ont une existence juridique concrète en Amérique latine, en Afrique et dans la région Asie et Pacifique. Les résultats de l'enquête sont passés en revue dans la conclusion qui examine aussi les aspects fondamentaux dont les pouvoirs publics devront tenir compte dans leurs décisions relatives aux droits fonciers autochtones. Il est également fait mention des avantages et des inconvénients des différentes options envisageables.

Tenencia de la tierra indígena: retos y posibilidades

Este artículo resume la información disponible sobre los derechos a la tierra de los pueblos indígenas, centrando la atención en los de países en desarrollo y países con economías en transición. Resume los derechos de los pueblos indígenas en el derecho internacional, y examina luego cómo se reconocen o no estos derechos en América Latina, África y Asia y el Pacífico. El artículo concluye con una visión general de las conclusiones de la investigación y señala cuestiones esenciales que deben considerarse al tomar decisiones sobre medidas referentes a los derechos indígenas sobre la tierra, acompañando comentarios sobre las ventajas y desventajas de diferentes opciones de actuación.

Indigenous land tenure: challenges and possibilities

Marcus Colchester, Tom Griffiths, Fergus MacKay and John Nelson
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This article gives an overview of the information available on the land rights of indigenous peoples, with a focus on those in developing countries and countries with economies in transition. It summarizes the rights of indigenous peoples in international law, followed by an examination of how these rights are being recognized, or not, in Latin America, Africa and the Asia-Pacific region. The article concludes with a review of the findings of the survey and identifies key issues to be considered in making policy decisions about indigenous land rights, with comments on the advantages and disadvantages of different policy options.

INTRODUCTION

Over the past 20 years, “indigenous peoples” has emerged as a distinct category of human societies under international law and in the national legislation of many countries. The rights of indigenous peoples that are notably distinct are those collective rights that are now recognized for indigenous peoples but that have not, as yet, been widely recognized for other human groups. Accordingly, this study focuses on collective rights related to land tenure (while recognizing that not all indigenous peoples seek collective land rights for all their lands) and summarizes the extent to which these rights are recognized in law and in practice, what are the main obstacles to the effective recognition and administration of indigenous lands, and what are the implications of collective tenure for the promotion of natural resource management, community development, poverty alleviation and the rights and needs of indigenous women.

DEFINITIONS

There is no internationally accepted definition of the term “indigenous peoples”.

The term has gained international currency in the context of international debates regarding the rights of “ethnic minorities”, “tribal peoples”, “natives”, “aborigines” and “indigenous populations”, who have quite evidently suffered, and continue to suffer, discrimination and marginalization as a result of colonialism, and postcolonial projects of nation-building, development and modernization. The term “indigenous peoples” has been adopted by a large number of governments, international agencies and, most significantly, a broad movement of self-identified peoples as the best catch-all term available to incorporate consideration for their rights into international law. Despite, or rather because of, growing acceptance of the phrase and a growing recognition of indigenous peoples’ inherent rights, its use has been objected to by a number of governments, especially in Asia.

The International Labour Organization’s (ILO) Convention No. 169, adopted in 1989, applies to both “indigenous and tribal peoples” and thus includes many such peoples from Asia and Africa. It ascribes the same rights to both without discrimination.

Article 1(2) of ILO Convention No. 169 notes “self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply”. The principle of self-identification has been strongly endorsed by indigenous peoples themselves and has been adopted in Article 8 of the United Nation’s (UN) Draft Declaration on the Rights of Indigenous Peoples. The Chairperson of the UN Working Group on Indigenous Populations notes that indigenous peoples tend to be those who have close ties to their lands or to a specific territory, seek to maintain their identity and cultural distinctiveness, and have an experience of subjugation, exclusion or discrimination, whether or not it persists (E/CN.4/Sub.2/1986/7; Daes, 1996).

INDIGENOUS RIGHTS AND RIGHTS TO LAND

As reasserted in the UN Conference on Human Rights in Vienna, in 1993, human rights are indivisible. Political, social, cultural, economic and civil rights all interrelate and provide the basis for justice, equity and dignity. Indigenous peoples’ rights are no less indivisible. Rights to land are only one element crucial to their existence and futures. Indigenous peoples view securing ownership, control and access to their lands, territories and natural resources as only one part of their quest for self-determination.

This study’s focus on indigenous land tenure must therefore be seen as incomplete, not just because it cannot claim to be exhaustive in its own terms, but because tenure systems cannot be understood when divorced from their wider context. The functioning of collective land tenure systems is directly affected by the extent to which collectives are given legal recognition, the extent to which indigenous knowledge is respected and the extent to which customary law is allowed to operate. The viability of these “institutions” in turn depends on the degree of self-governance achieved by the collectives, whose coherence also depends on maintenance of

social identity and respect for customary forms of decision-making – elements often underpinned by traditional belief systems and “cosmovisions”. The introduction of new religions and values can transform the way customs operate and thus the way land is managed, owned and transferred; and these changes can have variable impacts on different sectors of these societies.

OBSTACLES TO LAND SECURITY

As detailed in the articles in this edition, indigenous peoples face multiple obstacles to maintaining secure rights to their lands, including: racism, social prejudices and entrenched forms of discrimination; inappropriate, assimilationist social policies towards indigenous peoples; lack of legal recognition of indigenous rights in national constitutions, laws and land tenure regimes; inflexible or deficient land administration services; and the lack of resources, capacity, political connections or awareness in indigenous communities to take advantage of existing legal opportunities.

Pressure on indigenous lands is intense. Indigenous peoples’ rights are denied by forestry, mining, oil and gas, dam-building and agribusiness interests, which seek unimpeded access to natural resources. Conservation schemes have also often led to the forced resettlement of indigenous peoples. Government-sponsored colonization has historically been a major cause of dispossession but has lessened in recent years owing to international campaigns against such programmes and greater awareness of the rights of indigenous peoples and the value of tropical forests. Notwithstanding, pressure on indigenous lands from landless peasants and small-scale miners remains a major threat to the security of indigenous populations. Indigenous peoples’ resistance to dispossession has often been met with violence and human rights abuse (Bodley, 1982; Burger, 1987; Colchester and Lohmann, 1993; Colchester 2000; Verolme *et al.*, 2000). Detailed treatment of these wider issues is outside

the scope of this study, but any attempt to secure indigenous peoples' lands must be developed taking into account the wider context in which indigenous peoples find themselves.

DEVELOPMENT OPTIONS

Indigenous peoples stress that their own notions of development differ fundamentally from the notions of economic progress that evolved principally in western Europe and North America. Development is seen first and foremost as a matter of achieving security – in terms of access to land and resources, institutional recognition and self-sufficiency – before being about increased access to markets and trade (Colchester, 1992; Chase-Smith, 1996; Gray, 1997). Maintaining social relationships and building on custom and traditional knowledge are seen as central elements of community development and not ancillary or secondary objectives. These perspectives weave together social, economic and environmental objectives into a single and coherent whole.

This is not to romanticize or overlook the conditions in indigenous communities where standards of health, hygiene, income and education often fall far below those enjoyed by national majorities. Most indigenous spokespeople readily admit the need for, and actively seek, improvements in their conditions of life. However, they seek to achieve these improvements without prejudice to other valued aspects of their ways of life, which give their life meaning and dignity. Such aspirations are entirely in line with the recently agreed "right to development" adopted by the UN.

Indeed, in response to a five-year dialogue with indigenous peoples, the UN Development Programme (UNDP) also adopted a policy on indigenous peoples, which accepts the validity of these distinctive visions of development:

The UNDP Human Rights Policy recognizes the rights of distinct peoples living in distinct regions to self-determined development and control of ancestral lands. This embraces a concept of development that incorporates

indigenous peoples' own aspirations, spirituality, culture, social and economic aims.
(UNDP, 2001)

INSTITUTIONAL CHALLENGES AND PROCEDURES FOR RECOGNIZING INDIGENOUS TENURE

Despite recent gains in the recognition of indigenous peoples' rights in particular countries and development projects, indigenous communities still face serious obstacles to the titling of their lands. As the following articles in this edition note, these obstacles are particularly severe in Asia and Africa, where the advantages of recognition of indigenous peoples' collective rights to land have yet to be widely appreciated. However, even in Latin America, significant obstacles to the recognition of indigenous tenure rights remain.

In Brazil, indigenous communities still suffer land invasions and endure intimidation by henchmen hired by powerful landed interests (Survival International, 2000). In Colombia, assassinations of indigenous leaders pushing for extensions to *resguardo* (reserve) lands are still commonplace (ALMACIGA, 2001). In Guyana and Suriname, the general legal framework still fails to recognize indigenous tenure and livelihood regimes that involve a combination of cultivation, hunting, fishing and gathering. In many countries, rural development strategies are still devised and implemented with little or no indigenous participation (IWGIA, 2001: p. 96).

Where countries have undertaken constitutional reforms to safeguard indigenous land rights, there are still numerous obstacles to implementation. In the Philippines, indigenous communities face major financial obstacles to securing their lands under the Indigenous Peoples' Rights Act, as the costs of carrying out land surveys have to be borne by the communities. Some communities are even reclaiming their territories piecemeal, to bring the survey costs down to levels that they can afford. Moreover, even where indigenous communities have been awarded legal titles, government agencies may lack

resources and capacity to protect such titled lands from encroachment. In Costa Rica, for example, 49 percent of the area of indigenous reserves is occupied by illegal settlers. In particular reserves, as much as 85 percent has been settled by outsiders (Ardito, 1996: p. 67). In short, despite progress in legal protections for indigenous territories, such laws are often not enforced on the ground. In many cases, because of a lack of training, local communities are unable to use legal measures to counter the predatory activities of illegal businesses on their lands.

Despite commitments to secure indigenous land tenure, few governments have well-funded national-level demarcation and titling programmes for indigenous peoples. In most countries, indigenous affairs bureaus are a low priority for governments and consequently they suffer repeated budget cuts, which limit their capacity to fund land titling and restitution programmes (IWGIA, 2001: pp. 149, 162). In 2000 and 2001, Latin American indigenous organizations in several countries were again obliged to stage mass protests to urge their governments to honour past commitments and speed the titling process. In the meantime, indigenous land issues continue to be treated in a piecemeal way within wider infrastructure and rural development projects. These isolated projects are often at odds with wider macroeconomic and agrarian policies.

Since the 1980s, governments have increasingly adopted market-oriented land policies as part of neoliberal reforms. Land policies have halted agrarian reform and set the goals of establishing efficient land markets, modernizing cadastres and progressive tax revenue structures, and securing private property titles. In Latin America, four countries enacted legislation that removed blanket protections prohibiting the sale of indigenous lands in the 1990s: Nicaragua (1990), Mexico (1992), El Salvador (1992) and Peru (1993). In the Russian Federation, slow progress with legal measures to promote land security is also blamed on government prioritization of

extractive industries. The mining lobby was also responsible for legal challenges to the law for the recognition of indigenous land rights in the Philippines. These market-based policies have so far failed to achieve poverty reduction among indigenous and peasant smallholders, whose small land parcels or legal landlessness constrain their ability to obtain loans from private credit facilities. There is evidence that these market-based approaches have actually increased real landlessness in many rural areas (Mozdzer and Ghimire, 2001).

Land policies continue to apply a narrow productivist focus within strategies geared towards processing and registering individual property titles. The logic here is that more efficient markets will squeeze out unproductive and inefficient farm units and so boost agricultural production. Indigenous tenure is only recognized insofar as the overall policies contain protective clauses to safeguard existing communal titles. A recent survey of land titling in Latin America, carried out for the Inter-American Development Bank, found that land policies have failed to build on customary tenure regimes. Despite protective clauses, land privatization has increased pressure on indigenous lands (Plant and Hvalkof, 2001: p. 55). The survey also revealed that although social scientists working for transnational agencies may promote interventions based on communal tenure and ethnodevelopment, economists design agrarian programmes with no indigenous components. In Kenya, national programmes to promote livestock development have undermined pastoralists' communal tenure systems, privatized land holdings and increased poverty and land scarcity (Davis, 1992).

These conflicting approaches to land issues often occur within the same country and in the same development institution (Davis, 1992: pp. 64–66). As a consequence, indigenous involvement in the formulation of land policies has been of mixed quality. Although there are positive examples, such as the Guatemala Land Administration Project (see the article by Griffiths), other

land administration programmes have failed to ensure adequate indigenous participation. If effective participation does occur, it is often late in the preparation phase or not until the implementation of the policy. Lack of early participation requires reactive measures to correct policy gaps where indigenous land tenure needs have been overlooked. In Peru, the National Indigenous Commission has urged the government to reform its land administration programme in full collaboration with indigenous peoples' organizations to agree improved technical methods and policies for land demarcation and titling (Comisión Especial Multisectorial para las Comunidades Nativas, 2001).

In conjunction with market-based land policies, international financial institutions continue to promote national economic development based on export-based agriculture, the withdrawal of the state and increasing natural resource exploitation. Throughout the region, governments in partnership with the private sector, development agencies and transnational development banks are consolidating resource extraction infrastructure with pipelines, roads and electricity grids (Amazon Watch, 2001; Vidal, 2001; IWGIA, 2001: p. 113). At the same time, transnational energy networks and intergovernmental agreements on energy are laying the foundations for regional integration and intensified resource extraction. Timber, hydrocarbon and mineral concessions continue to advance into forest territories – often affecting isolated indigenous groups. Both indigenous and non-indigenous commentators therefore observe that although decades of indigenous struggle have eliminated cultural and education policies of assimilation, indigenous peoples are now faced with another homogenizing policy based on market integration (e.g. Tresierra, 1999: p. 151; Viteri, 2001: p. 125).

Indigenous peoples therefore criticize transnational agencies and governments for having contradictory policies. Whereas

land titling and ethnodevelopment projects may have positive impacts, these gains are undermined by macroeconomic and structural reforms, which are intensifying pressure on indigenous lands and resources, deepening poverty and limiting the government's capacity to address indigenous issues and regulate natural resource use (Griffiths, 1999). Policy analysts point out that the poverty alleviation impacts of agrarian programmes have been limited owing to wider macroeconomic policies that have degraded the land and resulted in further land concentration (Dorner, 2001: pp. 100–101).

Across the world, subsoil rights are held by the state and so indigenous communities are confronted with mineral and hydrocarbon extraction on their territories with little legal power to object to or control such activities. Natural resource legislation often disregards, supersedes or undermines indigenous land tenure protections. Indigenous peoples complain that forestry, biodiversity, and mineral and water resource laws are drawn up without their participation (Colchester *et al.*, 2003).

Recent surveys by indigenous peoples' organizations, non-governmental organizations (NGOs) and transnational agencies have also found that government departments responsible for developing national forest programmes and national biodiversity action strategies still lack adequate participatory mechanisms to take indigenous peoples' concerns and needs into account in national land-use planning (GEF, 1998: p. 47; FAO, 1999; Verolme *et al.*, 2000).

The regional surveys undertaken for this study reveal a consistent pattern of legal, technical, economic and political impediments to securing indigenous land tenure and livelihood security.

Legal obstacles

- National legal frameworks contain ambiguous and contradictory elements that limit indigenous peoples' rights to own, control and use their traditional lands. This is especially the case

as regards biodiversity, forestry, hydrocarbon and mining legislation.

- Forestry laws, protected area and natural resource legislation are developed and adopted with limited indigenous participation (Gray, Padellada and Newing, 1998; Colchester and Erni, 1999; Nelson and Hossack, 2003).
- National laws to implement constitutional norms on indigenous land tenure and autonomous land administration do not yet exist or are only slowly being adopted.
- Measures to increase indigenous land security and local autonomy are challenged by vested interests in national legislatures and in local government.
- Constitutional gains are reversed and diluted by subsequent counterreforms in both general laws and the detailed provisions and derogation in organic law.
- Country legal frameworks remain inconsistent with international human rights standards and contradict the provisions of ILO Convention 169.

Institutional, technical and policy obstacles

- Administrative procedures for demarcation, titling and registration of ownership remain slow, cumbersome and may even complicate land conflicts.
- Technical rules for determining the spatial extent of indigenous land titles fail to recognize indigenous tenure regimes and their close attachment to ancestral territories, resulting in inadequate titled areas.
- Land demarcation and regularization policies are developed without detailed field baseline studies assessing indigenous land tenure needs and priorities.
- Land policies still tend to have a narrow agricultural and economic focus.
- Roles and duties of different government agencies in adjudicating indigenous lands and regulating resource management are confused or overlapping.

- Government agencies continue to issue timber, oil and mineral concessions on indigenous lands without prior consultation.
- Government environmental, forestry and agricultural departmental staff lack training and understanding in indigenous issues and land tenure regimes.
- Government agencies do not have adequate mechanisms and incentives for participatory policy-making.
- National policies on land administration and natural resource management are developed without meaningful indigenous participation and fail to integrate indigenous land and resource rights properly.
- Agrarian policies are pro-export and pro-agribusiness and fail to support alternative food policy based on indigenous and peasant smallholders.
- Mitigation programmes associated with large infrastructure projects employ external consultants who impose top-down solutions without consultation and with little understanding of indigenous tenure regimes and prior land claims.

Economic obstacles

- Macroeconomic programmes fail to consider indigenous land and resource issues and often exacerbate pressures on indigenous lands.
- Agencies responsible for demarcation and titling lack adequate budgets and staff for processing claims, carrying out field surveys and issuing titles.
- Shortage of funds for purchasing land for land restitution programmes.
- Limited funds to compensate relocating third parties illegally occupying indigenous territories.
- Land speculation by third parties obstructs state land purchase and compensation schemes.
- Insufficient government staff and resources to protect titled indigenous territories from invasions and encroachment.

Political and cultural obstacles

- Lack of will to implement agreed international standards on human rights and indigenous peoples.
- Little interest among provincial government staff and agencies to promote demarcation and titling of indigenous lands.
- Indigenous issues are of low priority for macroeconomic policy-makers.
- Reluctance to title large indigenous territories because of a persistent ethnocentric view that indigenous lands are underutilized.
- Strong opposition by vested interests and local elite who challenge and try to limit indigenous land claims.
- Intimidation of indigenous leaders.
- Lack of political will to remove illegal colonists encroaching on indigenous lands.
- Unfounded fears that indigenous territorial autonomy will weaken national unity and result in secession.

Many of the obstacles listed above derive from deep discrimination stemming from previous policies of the colonial and nation-building periods (Iturralde, 2001; Stavenhagen, 2001; Urteaga, 2001). These structures of discrimination have proven static and difficult to reform. Nonetheless, indigenous peoples themselves are drawing on their new constitutional rights and international law to challenge threats to their land security and cultural integrity. Indigenous peoples' organizations have forged alliances with national and international NGOs to submit land claims to national courts, constitutional tribunals and the public prosecutor. A body of jurisprudence is now growing that demonstrates governments have a duty to "take action" to demarcate indigenous lands and protect their collective rights (MacKay, 1999; CDES, 2001; CPESC-OICH, 2001). Indigenous communities are also gaining experience in making claims to international courts and tribunals through the Organization of American States, the World Bank's Inspection Panel and similar fora. On the ground,

indigenous organizations are seeking formal commitments by government agencies to guarantee the practical protection of indigenous territories from encroachment by outsiders (e.g. Proyecto Serjali, 2001).

COMMUNAL TENURE, LEGAL PERSONALITY AND SELF-GOVERNANCE

Collective land ownership offers many advantages to administrators. By recognizing relatively large areas of land as collective tenures, administrators are freed from the burden of surveying, registering and compiling cadastres of a multitude of smallholdings and then keeping track of them as they change hands. By also recognizing a measure of self-governance within collective tenures, the burden on the administration is further reduced, as adjudication of disputes, land inheritance and land management can be left to customary authorities and dispute resolution mechanisms. The advantages of such "indirect rule" have been recognized since early Roman times. These "economies of scale" for administrators vary hugely from one locale to another depending on the way states recognize collective tenures and the degree to which they recognize customary institutions and self-governance. This survey has not managed to identify detailed studies that have appraised collective tenurial regimes from this point of view.

Collective tenures do, however, also present quite distinctive problems of their own. Lack of clarity in the law about which institutions own land and who is authorized to negotiate on behalf of the collective with third parties have led to misunderstandings, have facilitated manipulation by outside interests and have also allowed the mismanagement of communal resources by indigenous factions, individuals and elites, who may take advantage of the mismatch between market opportunities and indigenous land management systems to advance their personal interests at the expense of the wider group. Our survey has encountered this problem even where lands are effectively inalienable. In Papua New Guinea this has occurred because lease-

lease-back arrangements have allowed factions to dominate land use for personal gain, and in the Philippines and Brazil because customary centralized chieftaincies were not adapted to market conditions and have thus permitted chiefs to enter into contracts with outsiders without community mechanisms to achieve broad consensus. National laws and local customs may prohibit land alienation but not provide comparable controls over sales of timber and minerals. In Africa, interethnic customary regimes have also led to marginal social groups being excluded from access to land and resources as populations increase and market pressures intensify competition for land.

COMMUNAL TENURE AND GENDER IMPLICATIONS

Generalizing about the relationships between indigenous tenure regimes and the rights and interests of indigenous women is highly problematic because customary systems are so diverse and afford such different rights to women in different circumstances. Many Amazonian peoples provide very secure rights to women, for example, and commonly consider shifting cultivation plots, even though they have been cleared by men, to be women's property once they have planted the area with crops. Many Dayak groups in Borneo consider descent and inheritance cognatically, giving equal rights to men and women in securing rights to communal lands. By contrast, some tribal groups in India and Africa consider fields that are ploughed by men to be the property of men, to which women gain access through marriage or male kin. Commonly, indigenous women do play central roles in food production, preparation and distribution and tend to make decisions about crop choice and cultivation methods, which favour food security and self-sufficiency over cash production (Maxwell and Wiebe, 1998: p. 23).

Government programmes aimed at transforming indigenous livelihoods have had a severe impact on indigenous women. United States policy towards indigenous

peoples in the second half of the nineteenth century, for example, dismantled collective land systems and parcelled out allotments to indigenous households with titles being granted to male heads of families. Indigenous women were disenfranchised by the process and expected to become subordinate housewives (Debo, 1940; Carter, 1999). Lack of understanding of customary systems of land tenure and traditional systems of inheritance, land rights and residence have undermined development projects. For example, in the Republic of the Congo, efforts by the United Nations Development Programme (UNDP) and the International Labour Organization (ILO) to promote agricultural development and rural cooperatives actually led to decline in farm income, the marginalization of women and the replacement of matrilineal forms of inheritance with patrilineal ones, echoing the social changes that were also induced by the slave trade in eighteenth and nineteenth centuries (Harms, 1981; Desjeux, 1987).

Laws establishing indigenous peoples have been found to discriminate unfairly against women, such that whereas indigenous men in mixed marriages retain their legal entitlements, indigenous women do not. The Indian Act in Canada was amended in the 1980s to remove this discrimination but, for example, in Guyana, indigenous women in mixed marriages lose their rights of access and use of natural resources on state lands.

Insofar as it is true that indigenous men tend to produce more for the market whereas indigenous women prioritize production of subsistence and self-sufficiency, the monetization of indigenous economies, and the shift in values towards cash, leads to women losing prestige and authority in these communities. In general, in Africa, women enjoy less secure access to land and resources than men and therefore tend to suffer disproportionately from land pressures and market-driven changes. These tendencies are exacerbated in those areas where indigenous women are given less formal education, are therefore

less literate and so are marginalized from market transactions and administrative procedures. By contrast, the decline in the importance of hunting in the denuded hills of northern Thailand has also negatively affected male self-esteem and contributed to the high rates of drug addiction and anomie found in indigenous communities (Von Geusau, 1986).

Given these very different situations, the generalized call by the Convention on the Elimination of Discrimination Against Women to afford women individual land titles to avoid them being kept in dependency seems inappropriate. Some customary tenure regimes afford considerable security to indigenous women and individual titling may worsen rather than better their lot. A case-by-case approach, in which the pros and cons of tenurial reforms are carefully weighed up by the communities concerned, with the full participation of indigenous women, would seem to be the safest route forward (cf. DfID/ODI, 1999).

SELF-DEMARCATON AND MAPPING

One of the most significant developments of the past 30 years has been the proactive initiatives undertaken by indigenous peoples with supportive NGOs to map and demarcate their own lands. Using a wide variety of technologies and methods, indigenous communities from the Arctic to the Amazon and from the Americas to Papua New Guinea have been making their own maps of their lands as a way of confronting the imposed land-use plans of government and establishing the complexity and validity of their own visions of land. Techniques used have varied widely, from simple sketch mapping and community-level discussion groups, to highly technical surveys involving qualified cartographers and registered surveyors. Some of the most progressive techniques involve training community members in the use of global positioning system devices so that they are able precisely to “waymark” locations of cultural, economic and historical significance. Importing such georeferenced

data into simple global information system grids along with scanned-in base maps allows indigenous communities to own and control the content of maps without compromising on technical quality. Community experiences with these techniques have proven their value not just for validating indigenous knowledge and securing indigenous rights but also as mechanisms for overcoming interethnic rivalry, promoting intergenerational transmission of customary law (and lore) and promoting land-use planning.

Choice of the techniques has varied depending mainly on national laws and political contexts as well as the degree of autonomy sought by the mappers. In some countries, such as Peru and the Philippines, independent surveys, verified by government surveyors, are accepted as a basis for land claims and the registration of land titles. In other countries, such as Guyana and Sarawak, governments have refused to survey indigenous lands, leaving the communities no choice but to carry out independent surveys themselves. Such maps have proved crucial in the subsequent assertion of land claims through the courts or, where government agencies have proved open to discussion, have provided a sound basis for the renegotiation of indigenous land claims, as in South Africa (Poole, 1995a,b, 2004; Colchester, 2000; Eghenter, 2000).

Although some governments have proved hostile to these initiatives, even going so far in the case of Sarawak to make such mapping illegal, in general there has been a widespread appreciation that “social mapping” techniques provide an important means by which indigenous people can enter into dialogue with decision-makers and land-use planners on a more equal basis (UNFF, 2001).

COMMUNAL TENURE AND SUSTAINABLE NATURAL RESOURCE MANAGEMENT

Since the 1978 Jakarta Forestry Congress, an appreciation of the need for a people-centred approach to natural resource management has steadily gained ground.

Forest management systems that give rights to communities have been widely promoted but only recently has the realization grown that effective community-based management requires tenure reforms and not just shared or devolved management (Colchester, 1992; Wily and Mbaya, 2001; Sarin, 2001).

Conservation agencies have also begun to accept the value of community-based conservation. In 1994, the International Union for Conservation of Nature and Natural Resources (IUCN) revised its protected area categories to accept that protected areas could be owned and managed by, *inter alia*, indigenous peoples and since then new policies and guidelines advocating a respect for indigenous peoples' rights. In 1996, following several years of intensive engagement with indigenous peoples' organizations, the World Wide Fund for Nature-International adopted a "Statement of Principles on Indigenous Peoples and Conservation", which endorsed the UN Draft Declaration on the Rights of Indigenous Peoples, accepts that constructive engagement with indigenous peoples must start with a recognition of their rights, upholds the rights of indigenous peoples to own, manage and control their lands and territories, and to benefit from the application of their knowledge (WWF, 1996). In the same year, the World Conservation Congress, the paramount body of the World Conservation Union, adopted seven different resolutions on indigenous peoples that, *inter alia*, recognize indigenous peoples' land rights (IUCN, 1997). In 1999, the World Commission on Protected Areas adopted guidelines for putting these principles into practice (Beltrán and Phillips, 2000).

A series of regional conferences organized by the Forest Peoples Programme and the International Work Group for Indigenous Affairs, in collaboration with regional indigenous peoples' organizations, have revealed only a few cases where these principles are already being applied. More often, especially in Asia and Africa, application of these principles is still a long way off, some of the main obstacles being:

- national conservation policies and laws are still framed by the "classical model" of *in situ* conservation, and these deny the rights of resident peoples;
- lack of training and awareness in national and international conservation agencies in social issues, participatory approaches and joint management;
- national policies and laws that deny indigenous peoples' rights;
- lack of secure tenure;
- mutual mistrust between conservation agents and indigenous people.

By contrast, the conferences revealed a genuine wish on the part of both indigenous peoples and conservationists to find mutually acceptable solutions that accept their different but complementary priorities and goals (Gray, Padellada and Newing, 1998; Colchester and Erni, 1999; Nelson and Hossack, 2003).

Responding to such findings, the 5th World Parks Congress in 2003 announced a "new paradigm" of protected areas that would respect indigenous peoples' rights, halt forced relocation and restitute indigenous peoples' lands expropriated in the past without consent to make way for protected area. The 7th Conference of Parties to the Convention on Biological Diversity endorsed such an approach in early 2004 (www.forestpeoples.org).

COMMUNAL TENURE AND COMMUNITY DEVELOPMENT

As noted, a widely held but little substantiated prejudice among development specialists is that collective land ownership acts as a brake on development by discouraging individual entrepreneurship, investment in more productive land use, the use of land as collateral for loans and active land markets. From this point of view, the dismantling of collective tenures is seen as a necessary step towards the promotion of modern agriculture and land use. Community-level studies in Guatemala have shown that collective land management systems tend to be more conservative in terms of crop-choice and to prioritize self-sufficiency and food security

above immediate profits. Individualized land ownership, by contrast, has been favoured by those prepared to take more risks and who also eschew customary patterns of sharing wealth and surplus. However, good data are lacking on which systems most benefit people as whole in the longer term (Annis, 1987).

In Africa, research on communal tenure undertaken by the World Bank has revealed that communal tenure systems are dynamic and flexible, allocating individual, household and family rights within communal properties. These systems have shown that they are able to balance demands, take into account the welfare of less well-off members of the community and cushion farmers against poverty (Migot-Adholla *et al.*, 1991; Blarel *et al.*, 1992; Place and Hazell, 1992). Summarizing this research, the World Bank concluded in its 1992 *World Development Report*:

... indigenous systems of communal tenure appear flexible enough to evolve with the increasing scarcity of land and the commensurate need for greater security of land rights. At the same time, the retention of some community control over landownership helps prevent the emergence of landlessness

(World Bank, 1992: p. 144).

Moreover, what those who advocate the dismantling of collective tenures so often fail to take into account is that politically marginal groups, such as indigenous peoples, often fare particularly badly in “free” land markets of individualized holdings, because cultural differences, social marginalization and discrimination prevent them having equal access to information, technical assistance, the administration, capital, justice and markets. Not all indigenous peoples do seek to maintain their collective land ownership systems, but development specialists need to accept that those who wish to maintain their customary regimes may have good reasons for so choosing.

The process of ethnic reaffirmation among indigenous peoples during the 1970s and 1980s was accompanied by their rejection of top-down integrationist

development projects. Indigenous peoples’ organizations and grassroots NGOs began to advocate an alternative development concept, based on indigenous territorial autonomy, self-determination and “self-development” (Bonfil Battalla, 1981). Self-development or “ethnodevelopment” is about indigenous peoples themselves controlling the development process to recuperate, maintain or enhance livelihood security and quality of life according to their own priorities (Gray, 1997: pp. 252–254). This bottom-up approach is based on the assertion that development interventions can only be effective if they build on existing social strengths and are consistent with local cultural values and aspirations (see also Bebbington and Thiele, 1993: pp. 36–37). For indigenous peoples, the first precondition for effective ethnodevelopment is security of land tenure and local jurisdiction over natural resources within an ethnic territory. Once the resource base is secured, indigenous communities use their understanding of their needs, strengths and weaknesses to design and implement grassroots development projects.

AID AGENCY EXPERIENCES

In the 1990s, in response to their own empirical surveys in Latin America that revealed a strong correlation between ethnicity and poverty (Psacharopoulos and Patrinos, 1994a,b), the World Bank began to explore possible strategies to tackle indigenous poverty. In rethinking its approach to indigenous peoples, the Bank has sought to move away from reactive “mitigation” and damage control towards a proactive “do good” development targeting indigenous peoples. Following an initial study that recognized the value of “ethnodevelopment”, the Bank commissioned a survey of 28 “successful” indigenous development cases in Latin America. The study identified ten preconditions for effective indigenous development (Partridge, Uquillas and Johns, 1996; Roper, Frechione and De Walt, 1996: pp. 4–5):

- respect for human rights;
- food security;
- secure land and resource rights;
- indigenous participation in project planning and implementation;
- intercultural education and social capital building;
- strengthening of indigenous civil organizations;
- diversification of production;
- appropriate financial assistance;
- technical assistance and training;
- state support for indigenous self-development.

In 1997, the Bank put these principles into practice in Ecuador in its first ever national-level poverty reduction project targeting indigenous and Afro-Ecuadorian peoples. The project was developed directly with indigenous peoples' organizations and the government and contains land titling components for lowland areas and land restitution for land-hungry communities in the uplands. Field projects are supported on the basis of local development plans elaborated by base communities. Based on the aspirations of local communities, the project has sought to combine land tenure, food security, natural resource and water regularization, education, institutional strengthening and support for cultural events (van Nieuwkoop and Uquillas, 1999; Griffiths, 1999).

The ethnodevelopment approach is being used in World Bank and Global Environment Facility (GEF) natural resource management projects including, among others, the Peru–Sierra Natural Resources Project, the Paraguay–Natural Resource Management Project and the Panama Atlantic Biological Corridor Project.

The Bank is now extending its ethnodevelopment portfolio via learning and innovation loans (LILs) targeting indigenous poverty in Argentina, Bolivia and Peru. The main goal of these projects is to build up indigenous and government capacity to administer development projects. These pilot projects may be followed by larger long-term national-level projects (World Bank, 2000, 2001). The willingness of

governments to take on these dedicated loans for indigenous peoples indicates that they are beginning to show some interest in the cultural and social aspects of development and poverty reduction. This is a major departure from past government policies that sought to apply western technological solutions to alleviate poverty among “backward” indigenous communities.

Other transnational agencies such as the International Fund for Agricultural Development (IFAD) have also adopted the ethnodevelopment model in their field projects with indigenous communities in Bolivia, Brazil and Colombia. Several of these projects combine land tenure, food security and sustainable income components (IFAD-CAF, 1998; Iturri and Schulze, 1998).

The regional development banks are also beginning to develop similar approaches. The Inter-American Development Bank (IDB) has followed the World Bank's lead and recently carried out a detailed survey of land titling and indigenous peoples in Latin America with the aim of developing a programme to address the economic and cultural needs of indigenous peoples, within the framework of its agricultural and poverty alleviation programmes. The review found that hitherto the IDB had paid only limited attention to indigenous peoples in its land administration and land titling projects. Projects directly targeting indigenous peoples and aimed at securing their rights are only now being contemplated by the IDB, but previous land titling projects have shied away from addressing collective tenures. The review is critical of new IDB land titling projects in Ecuador and Peru, which aim to provide individual titles to peasants and indigenous highlanders, in order to promote more vigorous land markets:

The programs were not designed on the basis of careful baseline studies in those communities, nor does the available project documentation point to detailed knowledge of communal land tenure systems or their degree of market interaction.

(Plant and Hvalkof, 2001: p. 4)

The report stresses the lack of knowledge about the connections between poverty and land tenure patterns and recommends a much more engaged policy interaction with indigenous peoples. It warns against imposed visions that assume *a priori* that individualized land holdings and vigorous land markets provide the best options for indigenous peoples.

The Asian Development Bank adopted a policy on indigenous peoples in 1998 and is currently in the process of developing a poverty alleviation strategy targeting indigenous peoples. Entitled “Technical assistance for capacity-building for indigenous peoples/ethnic minority issues and poverty reduction”, the programme has commenced with poverty assessments of indigenous peoples in four countries, as well as a general overview of indigenous tenure regimes in Asia-Pacific. These studies have yet to be released, but a preliminary finding of the Indonesian country study is that insecure tenure of indigenous peoples is a major contributor to poverty (Safitri and Bosko, 2001).

The African Development Bank stands out as the one regional development bank yet to develop a policy on indigenous peoples or a culturally tuned approach to dealing with land tenure.

RECOMMENDATIONS

The cases of participatory and collaborative demarcation, titling and joint management initiatives identified in this article provide examples of best practice that need to be mainstreamed in legal frameworks and replicated in practice at the country level. Similarly, the multiple obstacles to the effective implementation of progressive constitutional reforms need to be eliminated. Together, the lessons from the positive and negative findings generate a number of recommendations for strategies to improve indigenous land tenure and livelihood security:

- Support governments to undertake institutional and legal reforms to implement relevant international standards relating to land and

indigenous peoples (e.g. American Convention on Human Rights, ILO 169).

- Assist governments to fulfil commitments on land tenure and indigenous peoples made under international agreements on forests, biodiversity conservation and sustainable development (e.g. Agenda 21, Article 10c of the CBD, IPF/IFF proposals for action).
- Address indigenous land tenure issues in the formulation of National Forest Programmes, National Biodiversity Action Plans, National Sustainable Development Strategies and Poverty Reduction Strategy Papers.
- Guarantee compliance with the principle of prior consultation and free, prior and informed consent in relation to policies and activities affecting indigenous lands.
- Ensure land administration policies and legal frameworks are developed and adopted with the full and effective participation and consent of indigenous peoples and their representative organizations.
- Adopt a broad cross-sectoral approach to national land policy that takes account of the sociocultural, political, economic and environmental aspects of land tenure.
- Train government agricultural, forestry and conservation staff in indigenous issues.
- Build capacity of government staff to work directly in collaboration with indigenous organizations and base communities.
- Train and recruit indigenous professionals in relevant government departments.
- Treat indigenous land tenure as a cross-cutting theme in drafting general and organic law relating to natural resources, agrarian development and the extractive industries.
- Ensure the active participation of indigenous peoples’ representatives in the drafting of national plans and laws on natural resources, biodiversity and economic development.

- Remove legal ambiguities and contradictions in laws and civil codes that weaken or supersede legal protections for indigenous land tenure.
- Support the participatory development and adoption of national laws to enable community and collaborative demarcation of indigenous lands.
- Recognize and protect indigenous territorial models of land tenure.
- Promote land policies that consolidate indigenous land and title “maximum territorial units” in order to meet livelihood and cultural integrity criteria and establish areas large enough for sustainable land use and conservation.
- Process indigenous titles as a priority in land regularization programmes (i.e. process indigenous claims prior to “third parties” encroaching on indigenous lands).
- Prohibit the involuntary displacement or resettlement of indigenous peoples.
- Penalize people occupying indigenous territories illegally.
- Annul resource concessions superimposed on indigenous territories without prior consultation.
- Annul illegal contracts affecting indigenous lands.
- Support efforts to process applications for extension to titled lands.
- Develop the technical rules and field methods for land demarcation through collaborative field studies with indigenous peoples to assess customary land tenure regimes, livelihood strategies, and local priorities and aspirations.
- Involve indigenous surveyors in intersectoral teams for the delineation of boundaries.
- Support partnerships between indigenous peoples, NGOs and government agencies for baseline studies of land demarcation and regularization activities.
- Build up indigenous capacity to demarcate and administer their own territories.
- Streamline and simplify the administrative procedures for land demarcation, titling and registration.
- Establish permanent spaces for the participation of indigenous peoples in land titling programmes at the local, regional and national levels.
- Combine titling programmes with capacity building for local beneficiaries on national and international legal aspects of land regularization.
- Agree benchmarks for evaluating titling programmes and establish participatory monitoring mechanisms with base communities.
- Establish participatory land conflict resolution procedures, giving space to customary law and conflict resolution mechanisms.
- Make land title documentation accessible in cadastres at both the local and the national level to enable indigenous communities to access titles to defend their territories.
- Clarify the legal standing of landowner collectives.
- Recognize ownership of traditional lands superimposed by protected areas.
- Promote indigenous territories and traditional authorities as effective entities for land administration and natural resource management.
- Support national-level programmes for the co-management of protected areas and forest reserves through joint management agreements between indigenous landowners and government agencies.
- Remove duplication and ambiguity regarding the roles of different state agencies in land and natural resource administration.
- Support government agencies charged with land regularization duties with funds dedicated for indigenous land tenure work.
- Ensure budgets for land regularization are developed according to detailed baseline studies.
- Provide long-term funding and streamlined disbursement procedures for land restitution programmes.
- Support budgets for the resolution of

land conflicts and removal of people encroaching on indigenous lands.

- Acknowledge and support indigenous plans for sustainable food production and community development.
- Support indigenous community-based natural resource management initiatives.

Although there is a need to support positive joint management and self-development initiatives, there is general agreement that there is also a need to rethink wider macroeconomic policies that create pressures on indigenous lands and undermine their livelihood (Dorner, 2001). Devising these alternative sustainable development strategies will require effective and meaningful dialogue with indigenous peoples' own representatives. In many countries, indigenous peoples' organizations have developed alternative agrarian and development policies that are not acted on by the government. Progress towards developing new cross-sectoral and sustainable land-use policies will require policy-makers to take indigenous development proposals seriously.

All these recommendations point to the need to improve the participation of indigenous organizations in national development planning and democratic processes. As well as the specific recommendations listed above, one key strategy for improving land policies over the medium to long term must therefore be to increase support for the institutional strengthening of indigenous peoples' representative community-based and political organizations.

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Populations autochtones et tenures communales en Asie

Par le passé, les autorités asiatiques ont soutenu résolument l'idée selon laquelle le concept de population autochtone ne s'appliquait pas au continent. Toutefois, la diffusion de cette notion et une meilleure compréhension de ses implications juridiques ont permis d'assouplir cette position. Les droits fonciers collectifs sont maintenant reconnus dans certains États d'Asie, en général au titre d'une possession ancestrale. Dans les îles du Pacifique et aux Philippines, les droits fonciers coutumiers permettent d'obtenir des droits équivalant à la propriété, mais en Indonésie et en Malaisie, leur valeur est moindre et s'apparente à l'usufruit. En raison de l'aliénabilité des terres et des ressources naturelles, la gestion des terres communales en Asie a donné lieu à des irrégularités, car la responsabilité des décisions prises au nom d'un groupe n'est pas clairement attribuée. Paradoxalement, les progrès réalisés en Asie en vue d'encourager les régimes participatifs de gestion des ressources naturelles ont été supérieurs à ceux accomplis dans la plupart des pays d'Afrique et d'Amérique latine, mais cela a rarement permis aux communautés de renforcer la sécurité de leurs droits fonciers.

Pueblos indígenas y tenencia comunal en Asia

En el pasado, los gobiernos asiáticos han defendido con fuerza la tesis de que el concepto de pueblos indígenas no era de aplicación en su continente. Sin embargo, a medida que el término ha ganado aceptación y se han comprendido mejor sus implicaciones jurídicas, esta argumentación se ha debilitado. Los derechos colectivos a la tierra se reconocen ahora en algunos Estados asiáticos, generalmente sobre la base de la posesión inmemorial. En las islas del Pacífico y en Filipinas, se considera que los derechos consuetudinarios a la tierra confieren derechos equivalentes a la propiedad, pero en Indonesia y Malasia se estima que la tenencia consuetudinaria otorga derechos más débiles similares al usufructo. Dado que la tierra y los recursos naturales se consideran enajenables, la tenencia comunal de Asia ha presentado una tendencia a la mala ordenación debido a una falta de claridad sobre quién toma las decisiones en nombre del grupo mayor. Paradójicamente, los países asiáticos han ido mucho más lejos que la mayoría de los africanos y latinoamericanos a la hora de fomentar regímenes cooperativos de ordenación de los recursos naturales, pero tales regímenes rara vez han otorgado derechos fuertes de tenencia a las comunidades.

Indigenous peoples and communal tenures in Asia

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In the past, Asian governments have argued strongly that the concept of indigenous peoples does not apply to the continent. However, as the term has gained currency and the legal implications have become better understood, this argument has weakened. Collective land rights are now recognized in some Asian states, usually on the basis of immemorial possession. In the Pacific islands and the Philippines, customary land rights are considered to confer rights equivalent to ownership, but in Indonesia and Malaysia customary tenures are considered to confer weaker rights similar to usufructs. Because land and natural resources are considered alienable, communal tenures in Asia have been prone to mismanagement, owing to a lack of clarity regarding who makes decisions in the name of the larger group. Paradoxically, Asian countries have gone much further than most African and Latin America countries in promoting collaborative natural resource management regimes, but these have rarely conferred strong tenure rights on communities.

INTRODUCTION

Stretching from the Urals and the Bosphorus in the west to Papua New Guinea in the east, the Asian continent contains a vast diversity of “indigenous peoples”. This article can only touch on some of the salient issues that arise in the region. It omits detailed consideration of indigenous peoples in the Near East and Central Asian Republics, although legal and administrative provisions for “tribal” self-government and relatively autonomous systems of land administration are prevalent in countries such as Iran, Pakistan and many Arab countries. Likewise, this article mentions only cursorily those indigenous peoples in China and Indochina.

DEFINITIONS

In the past, Asian governments have been the most outspoken in denying that the concept of “indigenous peoples” as

used by the United Nations (UN) applies to their countries, with such statements being recorded at the Working Group on Indigenous Populations by delegates from Bangladesh, China, India, Indonesia, Japan and Malaysia. Some governments, such as that of Bangladesh, which have protested to the United Nations that the term “indigenous” has no place in their national context, have been wrong-footed when indigenous peoples have pointed out that the term “indigenous” is already used in national laws. A landmark case in Japan, decided on 28 March 1997 in a local court in Sapporo, recognized the Ainu as an indigenous and minority people (cf. Siddle, 1996).

Nevertheless, exemplifying the view of many Asian countries, the Chinese Government continues to deny that the concept of “indigenous peoples” applies to their national situation, arguing that the term only applies to those peoples

who have been dispossessed of their ancestral homes by European colonial policies (Kingsbury, 1995). The statement, which is designed to deny the right to self-determination to China's "minority nationalities", conveniently ignores the fact that in its early years the Chinese Communist Party itself had explicitly recognized exactly this right (Grunfield, 1987: p. 228; Mackerras, 1994; Shakya, 1999). A 1998 report by Cuban Special Rapporteur, Alfonso Martinez, presented to the Working Group on Indigenous Populations of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities also argued that the term "indigenous peoples" does not apply in Africa and Asia, but only in countries that have suffered European colonization and where the settlers have remained to become the politically dominant population (Alfonso Martinez, 1999). However, the African Commission on Human and Peoples' Rights of the Organisation of African Unity has ignored this suggestion and set up a Working Group on Indigenous Peoples and Communities in 2000.

Moreover, other Asian governments, such as that of the Philippines, have readily accepted that the international legal concept of "indigenous" does apply to their own politically marginalized ethnic groups, which are now officially referred to as "indigenous peoples" or "indigenous cultural communities". In Nepal, too, the term indigenous is commonly applied to the distinctive ethnic groups in the Terai by forestry officials. In recognition that there are indigenous peoples in Nepal, in 1993 the national government formed a National Committee on the International Year of Indigenous Peoples. In mid-1999, the Nepalese Government explicitly recognized the existence of 61 indigenous peoples in Nepal, who make up some 60 percent of the population (and see Tamang, 1996).

In Indonesia, too, the reformist governments of the post-Suharto era have accepted that the term "indigenous peoples" applies to *masyarakat adat*, groups who claim collective land rights

under customary law (Colchester, Sirait and Wijardjo, 2003). The Cambodian legislature has likewise discussed the rights of indigenous peoples in Ratanakiri in the northeast. In 1998, the Asian Development Bank (ADB) adopted a policy on indigenous peoples very similar to the World Bank's 1992 policy. The ADB policy calls for a strong commitment to recognize the sociocultural rights of indigenous peoples. Development interventions, it argues, should be compatible in substance and structure with the affected people's culture and socio-economic institutions. The ADB calls for a poverty alleviation approach that addresses "intangibles such as feelings of powerlessness and lack of freedom to participate".

In short, once it is accepted that the situation of "indigenous peoples" cannot be considered independently of national contexts and histories, the term "indigenous peoples" will gain increasing acceptance in Asia. It is widely used by self-identified peoples throughout the region (Nicholas, 1989; Nicholas and Singh, 1996).

FORMS OF TENURE, EQUITY AND LEGAL PERSONALITY

Generalizing about trends in the administration of indigenous lands over such a vast area is problematic. By and large, Asian countries have been reluctant to admit collective forms of land ownership or possession, preferring instead to promote individual land titling according to the Torrens system, thereby undermining traditional economies (e.g. Brewer, 1988). Even in communist countries, the denial of land rights to indigenous peoples has often led them into abject poverty, obliging them to live outside the law in order to make a living (Jager, 2001). However, where governments recognize indigenous collective tenures, these rights have in almost all cases been recognized on the basis of immemorial possession or customary use.

Two broad tendencies can be identified. In one set of countries, such as most of the Pacific islands (Lundsgaarde, 1974; Crocombe, 1987, 1994; Van Trease, 1987;

Crocombe and Meleisea, 1994; Damas, 1994) and, recently, the Philippines, the laws recognize indigenous collective tenures as providing the equivalent of strong rights of ownership. In other countries, such as Indonesia and Malaysia, the laws grant what administrators understand to be much more limited usufructory or possessory rights, considered to be much weaker than full ownership. As noted below, these interpretations are now being contested in the courts and indigenous spokespeople have argued that the downgrading of indigenous property rights in comparison with those of other citizens constitutes a violation of the International Convention on the Elimination of All Forms of Racial Discrimination.

In contrast to Latin America, where most collective tenures are deemed inalienable, and although in India and Bangladesh administrative measures exist (on paper) to prevent the sale of tribal lands to non-tribals, in general most collective tenures in Asia allow land sales and other transfers of rights. Land markets and markets in timber are thus prevalent in indigenous areas but, contrary to the expectations of those who have favoured land markets as an engine for “development”, there is widespread evidence that land and resource mobilization have actually increased poverty, landlessness and environmental damage in indigenous areas (e.g. India: Von Furer-Haimendorf, 1982; Viegas, 1991; Bangladesh: Colchester, 1984; Indonesia: Simbolon, 1999; general: Colchester, 1992; Colchester and Lohmann, 1993).

The provision of alienable collective tenures presents particular challenges. If lands, and/or resources on these lands, can be sold or negotiated with outsiders not bound by customary laws, then legal clarity on just who has the right to enter into such contracts becomes essential. Unfortunately, legal imprecisions regarding in which indigenous institutions lands are vested and, thus, who has legal personality in negotiating contracts are widespread and have prompted the emergence of entrepreneurial indigenous elites who

have profited at the expense of the wider group. This has exacerbated the process of impoverishment in indigenous areas (Colchester, 2001).

THE ISSUE OF SHIFTING CULTIVATION

South and southeast Asia are remarkable in the extent to which widespread prejudices against the practice of shifting cultivation have been used as a basis for denying indigenous rights. The prejudice has deep roots, dating back to precolonial times, but was considerably reinforced in the colonial era with the introduction of “scientific forestry” (Ghurye, 1980; Dove, 1985; Colchester, 1990; Bryant, 1994). The need to “eradicate” shifting cultivation has since been used to justify the forced resettlement of indigenous peoples throughout the region, including in Bangladesh, Burma, Cambodia, India, Indonesia, Lao People’s Democratic Republic, Malaysia, the Philippines, Thailand and Viet Nam (Evans, 1995; Thrupp *et al.*, 1997). The result has only been to fuel land conflicts, increase poverty and open up forests to competing interests, which have been no less reckless in their use of resources. A detailed re-appraisal of shifting cultivation is outside the scope of this article but it needs to be recognized that national policies towards indigenous land rights and those towards shifting cultivation and forest management are intimately related. They need to be addressed together.

GENDER ISSUES AND INDIGENOUS TENURE IN ASIA

Customary forms of land ownership in many parts of Asia have recognized women as having equal rights to land as men and in some areas matrilineal inheritance is common. However, many interventions in indigenous peoples’ lives have not dealt with men and women even-handedly. Processes such as the introduction of individualized land holding in indigenous areas, forced resettlement, compensation, registration of heads of households for taxation or benefit-sharing purposes, and the provision of jobs in extractive industries

have all tended to select males over females. The result has been a marked erosion of indigenous women's rights and resulting poverty and loss of status (Kelvar and Dev, 1991; Wickramasinghe, 1994; Heyzer, 1996; Griffen, 2001).

COMMUNITY-BASED NATURAL RESOURCE MANAGEMENT

Notwithstanding the widespread reluctance of many Asian governments to recognize and regularize indigenous land rights, Asian countries have gone further than many in promoting various forms of community-based watershed, forest and fisheries management. Pilot experiments in community-based wildlife and protected area management have also been tried, with sufficient success to encourage their more widespread application.

Reviews of these experiences reveal a continuing reluctance of state officials to relinquish authority over resources to local users, even though the most successful examples of community-based natural resource management in the region are those that have transferred rights to local communities, built on customary institutions and given scope for indigenous peoples' knowledge and traditional skills. Recognition of rights of tenure in community-based natural resource management regimes is now being increasingly strongly advocated but is still widely resisted by forestry and fishery departments (Poffenberger, 1990; Colchester, 1992, 2000; Lynch, 1992; Holey, 1996; Apte and Kothari, 2000; Colchester and Erni, 1999; Kothari, Pathak and Vania, 2000; Kalpavriksh, 2000; Sarin, 2001).

India

Adivasi ("aboriginal people") are estimated to make up some 7 percent of the population of India. These 70 million people speak some 200 distinct languages and are concentrated in the "tribal belt" of central India, with a second concentration in the northeast. These areas also contain the majority of the remaining primary forests of

the country. Historically treated as exotic beings outside the caste system and Hindu pollution laws, they continue to suffer severe discrimination and socio-economic marginalization. British efforts to abolish village autonomy and introduce *zamindari* (tax-gathering landlords) into tribal areas in the eighteenth and early nineteenth centuries led to tribal rebellions in West Bengal, Bihar and Jharkhand. The British responded by removing *zamindari* and passing Land Settlements aimed at securing tribal tenure in these areas.

The 1901 Land Revenue Code similarly prevented the sale of tribal land without permission of the Collector. Later, the administration classified most *adivasi* as "Schedule Tribes" and established "Scheduled Areas" to protect them from incursions. Land outside these "areas" was alienable. The policy continued after independence coupled with measures towards positive discrimination. Two separate "Schedules" were elaborated: the 5th Schedule for tribes in Peninsular India and the 6th Schedule for tribes in the northeast. A number of higher educational places and positions in the legislatures are reserved for *adivasi* in proportion to their numbers in each state. Although India has also ratified the International Labour Organization's (ILO) Convention 107, which recognizes *adivasi* rights to the collective ownership of their traditional lands, no legal measures have been taken to promote collective titling in Peninsular India.

In the mid-nineteenth century, the British reclassified large areas of India as "forests" subject to new Forest Acts and under the control of Forest Departments. "Forests" now encompass some 22 percent of the country and include the traditional lands of millions of tribal people. Nineteenth century British administrators argued about whether to recognize tribal peoples as having "rights" or "privileges" in forests. The later Forest Acts recognized only privileges and subsequent regulations and administrative decisions progressively eroded these privileges – effectively rendering these people landless. Since

independence, an estimated 600 000 tribal people have also been displaced by protected areas. Recent programmes of the Joint Forest Management do not modify tenure and have been criticized for further impoverishing *adivasi*.

In central India, British administration promoted registers of individual land title (*patta*), with all other lands being considered “wastelands” and thus crown lands. Collective land ownership was not recognized, except in Chota Nagpur, and “wasteful” forms of land use – such as hunting and shifting cultivation – were not considered a basis for land ownership. Since independence, protection of tribal farmlands has been limited to “Scheduled Areas” and only unevenly extended to other tribal landholdings. Market pressures, usury, bureaucratic obstacles and lack of education have combined to deprive many tribal peoples of their lands. *Benami* transfers – in which lands are informally passed to non-tribals by indebted tribals – have effectively alienated much land even in protected blocks. The 1996 Panchayats (Extension to Scheduled Areas) Act now recognizes “tribal self-rule” at the local level, giving greater authority to *adivasi* themselves to control future land transfers. The Act does not provide for recognition of common property regimes, however.

In northeast India, where formal systems of administration were extended only towards the end of British rule and then only lightly and indirectly, the 6th Schedule recognizes Autonomous District Councils, gives them authority over land and recognizes collective land ownership. Similar provisions have been applied in Nagaland and Mizoram where the 6th Schedule does not apply. Most of these institutions can be seen as modified versions of earlier customary governance systems, with modified leadership systems such that heritable chieftainships have been made subject to election by assemblies of all adult males. Women, however, are excluded from participation in such assemblies. Customary laws are respected within the jurisdictions of these

councils and relatively small areas in these states are subject to the Forest Acts. Legal imprecisions regarding who has legal personality together with vigorous land and timber markets have led to rapid deforestation, rising concern about soil erosion, the emergence of village elites and growing social inequalities. Increasingly, communal lands are being claimed and held by individual families and some are using the land laws to register private titles. Intracommunity land conflicts are now becoming a problem (Ghurye, 1980; Moser, 1972; Fuchs, 1973; Morris, 1982; Von Furer-Haimendorf, 1982; Sharma, 1990; Viegas, 1991; Fernandes, 1992; Bhanage, 1993; Mahapatra, 1994; Rao, 1994; Lynch and Talbott, 1995; Erni, 1996; Poffenberger and McGean, 1996; Joshi, 1998; Griffiths and Colchester, 2000).

Thailand

There are an estimated 700 000¹ members of so-called *chao khao* (“hill tribes”) in Thailand, distributed in some 20 provinces, mainly in the upland areas in the north of the country. The government officially recognizes nine ethnic groups as hill tribes subject to its “tribal welfare” policy. Two other ethnic groups, the Mrabri and Palaung, are also treated as “hill tribes” by government researchers, who actually count as many as 23 tribal groups in Thailand. Some of these ethnic groups have been in the region now known as Thailand longer than the majority Thais. Other groups have migrated into the region more recently, some prior to and others since the incorporation of the northern provinces into the modern Kingdom of Thailand.

Prior to 1959, the hill tribes enjoyed considerable autonomy and were administered by local principalities through indirect rule, leaving scope for traditional leaders to exercise their authority and for

¹ In 1988 the Tribal Research Institute in Chiang Mai counted some 550 000. Higher estimates allow for natural increases since that date.

land and natural resources to be managed in accordance with customary law. However, since 1959, the state has sought to sedentarize tribal villages and integrate them into the national mainstream with the aims of curbing rotational farming, halting cultivation of the opium poppy and promoting national security. Whereas the armed forces and Royal Forestry Department (RFD) have preferred a policy of forced resettlement, the King has personally promoted a programme of sedentarizing and developing tribal villages in the uplands, in combination with crop substitution and marketing projects, in which opium poppies have been replaced as cash crops with vegetables and wild flowers. Financial support has come from the World Bank, UN agencies and bilateral donors. Although donor agencies admit that regularizing tenure is necessary to make these projects sustainable, no concerted effort to overcome government resistance to providing tenure to "hill tribes" has been made.

Property rights, including possessory rights, are protected by the Thai Constitution. However, the land laws of Thailand do not make provisions for collective land ownership and indeed lowland peasants encounter many difficulties securing even individual rights to land. Hill tribes face particular obstacles to regularizing tenure. First, all land above 600 m is designated as Crown Land and is administered as Royal Forest by the RFD. Second, many members of the hill tribes lack citizenship papers and have difficulties obtaining them because they lack birth certificates and owing to discriminatory behaviour by public officials. Without identification cards they are denied the normal rights and protections of Thai citizens. As pressure on land has increased as a result of population increase, expansion of commercial farming and plantations, and migration of lowland Thais into the northern provinces, members of the hill tribes have faced increasing landlessness and poverty. Land security is vital to communities trying to break out of this downward spiral.

Since the mid-1990s, hill tribes' organizations have allied with peasant groups and social justice non-governmental organizations (NGOs) to press for usufructory rights to use, manage and control community forests in the uplands. However, a Community Forestry Act adopted in 1997 was fiercely denounced by national conservation groups before it could be applied. The "green NGOs" instigated riots and violent protests by lowland farmers in order to limit application of the law in upland forests. Consequently, the law was amended in June 1998 to prevent the recognition of communal forests in areas zoned as watershed protection and priority conservation zones. The movement for a recognition of communal forests and a revalidation of rotational farming continues but meanwhile conflicts between lowlanders and hill tribes have become more bitter (McKinnon and Bhruksasri, 1986; Tapp, 1986; Von Geusau, 1986; McKinnon and Vienne, 1989; Colchester, 2000; Colchester and Lohmann, 1990, 1993; Lynch and Talbott, 1995; Carrere and Lohmann, 1996; Nicholas and Singh, 1996; Hirsch, 1997; Poffenberger, 2000).

Indonesia

According to official government figures, between 1.2 and 6 million people are classified as *suku suku terasing* (isolated and alien tribes) or *masyarakat terasing* (isolated and alien people) by the Department of Social Affairs (Depsos) and the Department of Agriculture. These groups are officially considered to be "underdeveloped" and in need of "modernization" and have been the subjects of programmes of forced resettlement, re-education and the extirpation of so-called backward cultural practices – including the torching of longhouses, the burning of ceremonial goods and the banning of communal rituals. Although the more brutal aspects of this programme ceased with the ending of the Suharto dictatorship, the government has yet to revise its underlying assimilationist policy. Since the fall of Suharto, a vigorous social movement

has emerged claiming to represent some 60–120 million Indonesians who consider themselves to be *masyarakat adat* (people governed by custom) and who refer to themselves as “indigenous peoples” in international discourse. These are the speakers of most of the 600 languages in the country. They claim rights to the collective ownership of their lands, a form of tenure ambiguously recognized in Indonesian law.

The concept of *adat* (custom) as a unifying marker of Indonesian identity provided a powerful rallying point in the struggle for Indonesian independence. Accordingly, the 1945 Constitution recognizes *adat* and, somewhat rhetorically, establishes it as the basis for national law, thus abandoning the legal dualism that had been practised by the Dutch. Notwithstanding, during the 1950s and 1960s, *adat* courts and other *adat* legal procedures were progressively abolished and a body of “positive law” (*hukum positif*) evolved to replace it. In the same way, although the Basic Agrarian Law (BAL) of 1960 apparently makes provision for the recognition of customary rights to land as usufructs (*hak ulayat*), the law has been interpreted and applied in ways that deny collective land rights. Recent assessments under the World Bank Land Administration Project show that the government entirely lacks the capacity to recognize or administer collective tenures.

Further limitations on customary land ownership were imposed by the 1970 Forestry Act, by which some 70 percent of the national territory was handed over to the jurisdiction of the Forestry Department and treated as state-owned lands. In practice, procedures for consultation with resident communities prior to the delineation of state forests were often omitted. In effect, if not in law, the Forest Act extinguished the rights of some 30–60 million people. Indigenous institutions were further eroded by the Village Government Act of 1979, which imposed a single model of local government, based on Javanese administrative traditions, on the whole country. The result was that *adat* systems

of self-government were denied and lost legal standing.

Since the fall of Suharto, a period of legal and institutional reform has begun. The 1999 Human Rights Act provides for the protection and recognition of *adat* communities, including *ulayat* land. Authority over land and forest issues has passed to the district administrations and a new Local Government Act of 1999 – which has yet to be widely applied – provides a legal basis for the re-empowerment of *adat* institutions. However, a revised Forestry Act, widely expected to recognize community rights in forests, disappointed many by only recognizing the possibility of cooperatives securing forestry concessions. A decree from the Agrarian Ministry does now admit the possibility of collective usufructs, and district-level decrees (*perda*) have begun to recognize a diverse range of community forest tenures. Many lawyers argue that a fundamental revision of the BAL is necessary before collective tenures can be legally secured. A 2001 national assembly legislative act stipulating the need for revision of tenure laws has yet to be implemented (Ter Haar, 1948; Hooker, 1978; Holleman, 1981; Colchester, 1986a, 1986b, 2001; Barber and Churchill, 1987; Brewer, 1988; Burns, 1989; Lynch and Talbott, 1995; Murray Li, 1999; van Meijl and von Benda-Beckmann, 1999; Eghenter, 2000; Fay, Sirait and Kusworo, 2000; Lev, 2000; Colchester, Sirait and Wijardjo, 2003).

Malaysia

Malaysia has a Federal System in which land and forest issues fall under the jurisdiction of state authorities. Although a single Constitution applies to the whole Federation and recognizes custom and customary law, the indigenous situation and the related legislation is best understood in three parts – Peninsular Malaysia, Sabah and Sarawak.

Peninsular Malaysia

There are some 100 000 aboriginal people (*orang asli*) from 18 different ethnic groups

in Peninsular Malaysia, the descendants of hunter-gatherers who have inhabited the interior forests for millennia. Under the British colonial administration, these peoples were confined to “Reserves”, which were considered to be crown lands temporarily set aside for the communities but which could be annulled at the stroke of a pen. Both the legislation and this interpretation of the law were adopted almost without modification by Malaysia at independence. Reserves encompass only 15 percent of the settled village areas occupied by *orang asli*, leaving the remainder with even less land security and no secure rights in their wider territories. During the 1950s and 1960s, many of the widely dispersed *orang asli* communities were forcibly relocated into larger, supervised settlements as part of a counter-insurgency programme and this has continued as part of a national policy of integration. A 1961 policy to seek indigenous peoples’ consent prior to resettlement has not been adhered to strictly. *Orang asli* have since suffered an almost continuous erosion of their land base as a result of logging, road-building, resort development, hydropower projects, and the extension of plantations and protected areas. A 1997 court case in Johor, by *orang asli* who had been dispossessed to make way for a dam, effectively challenged the administration’s interpretation of the law and upheld the principle of aboriginal rights as unextinguished traditional rights of occupation and use. The judgment was upheld on appeal. Since then, other *orang asli* have filed further suits arguing for recognition of the principle of aboriginal title.

Sabah

In Sabah, there are some 1 350 000 indigenous people drawn from 39 indigenous groups, referred to collectively as *Dusun* and *Kadazan*. Partly as a result of a long history of colonially and then state-imposed land annexation and plantation development, partly because the indigenous groups are numerically strong and partly

because pressure on land is not so intense, indigenous land conflicts have not been as serious in Sabah as elsewhere in Malaysia. Notwithstanding, collective rights to land are relatively weak in Sabah. The legislation creates “Native Reserves” on state lands and recognizes Native Customary Rights (NCRs), interpreted as rights of usufruct, but which are extinguished in areas declared to be forests, areas of state projects or protected areas. Few NCR areas are demarcated. The majority of indigenous communities lack any legalized rights and are merely tolerated as tenants-at-will on state lands. Although the Land Ordinance is meant to give priority to those claiming customary rights on “unalienated country land”, in practice lands are allocated to other claimants without native peoples having a chance to object. Official procedures require customary rights-holders with unregistered lands to make their claims known within a specified time when others make claims to state lands but notices of such claims are rarely distributed to local villages. In urban and peri-urban settings, indigenous people have secured individual titles to secure their presence and participate in the vigorous land markets. Where plantation smallholder schemes have been promoted, individual land holdings have been provided to indigenous participants.

Sarawak

In Sarawak, where there are currently some 800 000 indigenous people from 28 ethnic groups, land issues have been a cause of international controversy since the 1980s. The state was administered as a private *raj* by a British subject until the Second World War and land tenure legislation evolved idiosyncratically to accommodate two contradictory tendencies, on the one hand affirming and recognizing NCRs, the authority of native chiefs and the jurisdiction of native courts, while on the other hand discouraging shifting cultivation and mobile villages. Since the Second World War, colonial and independence administrations have all pursued the second objective while progressively limiting

native rights and institutions. Native systems of land use have been officially criticized as wasteful, backward and as obstacles to modernization. Extension of NCRs without permit has been officially frozen since 1955, and an administrative decision not to grant any further such permits was passed in secret in 1974. Maps of NCR areas, which the administration has admitted cover 22 percent of the state, have since been suppressed, native courts discouraged and native chiefs gradually co-opted into supporting the National Front coalition, which dominates both the State Parliament and the political economy, based on logging, plantations and, more recently, rapid industrialization. Community forests, conceived as state lands leased to communities, have been reduced in extent. Forestry laws have the effect of curtailing NCRs but logging concessionaires are encouraged to negotiate with customary rights-holders to secure unimpeded access.

State promotion of extractive industries on native lands has led to frequent blockades on access roads since the 1970s. Although laws have been amended to make such blockades illegal, they persist. Since the 1990s, the state has amended land laws to grant companies legal personality as “natives” and thus facilitate their access to areas zoned as native land. The promotion of oil-palm and paper-pulp plantations on native lands has further intensified native protests. Increasingly, communities have sought redress through the courts, seeking injunctions to halt proposed development schemes pending clarification of their land rights. Because official maps of the extent of NCR lands have been suppressed, communities have begun to carry out their own mapping projects to demonstrate their traditional areas. Legal argument has focused on whether NCRs extend to include areas of “tall forest” where community members hunt, fish and gather forest products and which they use as a reserve for extending their rotational farming, and whether the “aboriginal rights” of native groups have been extinguished by subsequent legislation.

In a recent case in the High Court at Kuching, the judge ruled in favour of Iban communities seeking the removal of the Borneo Paper and Pulp company from their lands. The ruling implies that natives in Sarawak enjoy radical collective rights to their customary land, and that these rights extend over all the lands they have customarily used and occupied (including “tall forest” and not just their areas of permanent cultivation). Moreover, their rights do not depend on an affirmative act of recognition by the state. Further cases are now expected contesting the extension of logging concessions over native lands and questioning the constitutional validity of forest laws, which extinguish native rights in areas unilaterally deemed to be Permanent Forest Estate.

The Sarawak State Government has clearly been alarmed by these legal developments. In November 2001, the Sarawak legislature passed the Land Surveyors Act 2001, which criminalizes community mapping. The act seeks to make it illegal for any except licensed surveyors to make maps that delimit “the boundaries of any land, including state land and any land lawfully held under native customary rights”. The move has been denounced by local NGOs, who have called for the restrictive sections of the law to be struck from the Act (Porter, 1968; Hong, 1987; Colchester, 1989; Lim Teck Ghee and Gomes, 1990; Erni, 1996; WRM and Forests Monitor, 1998; Colchester and Erni, 1999, Lim Heng Seng, 2000; Nicholas, 2000; Jomo, Chang and Khoo, 2004; Nor Anak Nyawai *et al.* vs Borneo Pulp and Paper Sdn. Bhd. 12 May, 2001; Press Release *Sahabat Alam Malaysia* 31 October 2001).

Philippines

The 6–7 million indigenous people in the Philippines belong to some 40 self-defined ethnic groups. Although a 1909 legal case during American colonial rule recognized indigenous ownership based on immemorial possession, in practice indigenous rights in land were denied after independence.

This denial, coupled with imposed large-scale development schemes under the Marcos regime, provoked serious conflicts and contributed to insurgency and then counter-insurgency in many indigenous areas. Since the fall of Marcos, Philippine law has been overhauled to promote a recognition of indigenous peoples' rights to "ancestral domain".

The 1992 Constitution recognizes indigenous peoples' rights to ancestral domain. A 1993 Administrative Order allowed the Department of Environment and Natural Resources (DENR) to give interim recognition of these rights by the issuance of Certificates of Ancestral Domain Claims (CADC), to afford protection against unilateral expropriation or exploitation until ownership could be determined. The 1997 Indigenous Peoples' Rights Act (IPRA) establishes procedures for recognition of individual and communal ownership of "ancestral domains" and "ancestral lands". Three million hectares now enjoy some protection under CADC and IPRA. IPRA:

- clearly recognizes the principal of indigenous peoples' ownership and control of their territories;
- accepts the exercise of customary law in the adjudication of disputes and for community decisions regarding resource management and land allocations;
- establishes the principal of "free and informed consent" before lands can be alienated or communities relocated;
- places certain bureaucratic trammels and defences in the way of third parties wishing to exploit indigenous lands;
- insists on the "full participation" of indigenous peoples in the establishment of protected areas and watershed management regimes on their lands.

The law has also been criticized for:

- making a problematic distinction between "ancestral lands" and "ancestral domains", which may encourage the fragmentation of indigenous territories;
- bureaucratizing the administration of lands and thus weakening community control and unity;

- facilitating legalized access to indigenous lands by third parties, especially mining interests;
- permitting the alienation of lands under two of the three types of title allowable under IPRA;
- failing to make clear how the right of consent should be exercised.

Critics say that the law has commoditized lands and given power to outsiders to re-allocate indigenous resources, at the same time encouraging the emergence of indigenous entrepreneurs bent on privatizing indigenous common lands. Under the IPRA, communities' legal defences against expropriation lie in provisions for free and informed consent and the exercise of customary law. However, where community organization is weak and awareness of the law insufficient, it has proved all too easy for the unscrupulous to manipulate these provisions to their advantage. The lessons from this experience are that indigenous land titling should come with unbiased institutional support, legal training and capacity building to enable communities to select the appropriate title, manage their lands and make decisions in ways that ensure genuine consent. A legal challenge by the mining lobby to the constitutionality of the IPRA was successfully defeated in 2000. The defence also challenged the "Regalian Doctrine", whereby the state claimed ownership of all untitled lands on the basis of the sixteenth century Spanish conquest (*Cariño v Insular Government* – 41 Phil. 935, 212 U.S. 449 [1909]; Bello, Kinley and Elinson, 1982; ASS, 1983; Drucker, 1985; Fay, 1987; Fiagoy, 1987; TABAK, 1990; Dorall, 1990; Lynch and Talbott, 1995: p. 90; Nicholas and Singh, 1996; Leonen, 1998; Colchester, 2000).

Papua New Guinea

The four million people of Papua New Guinea are among the most linguistically diverse in the world, speaking some 700 languages. Although natives comprise the great majority of the population, no one group is in a majority. In an

effort to overcome a prevailing sense of marginalization from the state power, the country has adopted a highly decentralized administrative structure with many provincial ministries. The elaborate bureaucracy that has resulted absorbs some 40 percent of the state budget. It has created what has been described as a national “super-tribe” – the executive and legislature – that acts in its own interest and has exacerbated a community sense of alienation from government.

Under the law, some 97 percent of land in Papua New Guinea is owned by the indigenous peoples under customary law, considered the equivalent of collective freeholds, in which legally ill-defined clans are the landowners. Only about 1 percent of these lands have been legally registered. The small portions of alienated lands include the few coastal coconut and palm-oil plantations established during the colonial era. Lack of precision in the law about who exactly owns and controls customary lands, coupled with the fact that legal personality can be acquired by landowner groups under a number of different laws, has contributed to serious land conflicts in some areas.

Although clan lands are technically alienable under national law, they can only be sold or leased to the state in the first instance. Development agencies have thus argued that collective land ownership and traditions of consensual decision-making have impeded the evolution of land markets. The World Bank has attempted to circumvent this perceived constraint by promoting “lease-lease-back” arrangements, whereby a clan leases a portion of its lands to the state and the state then leases the land back to an entrepreneurial individual or subgroup of the clan for development. Armed with this lease as collateral, the entrepreneur can secure bank loans to develop the lands. Highland coffee estates and ranches, established by these means, have proved quite lucrative, but have led to growing disparities in wealth and power. In some cases, resentment against those who have thus grown rich has led to re-emergence of “tribal” warfare.

Notwithstanding clan ownership of the land, forests, rivers and subsurface minerals remain under the jurisdiction of the state, which also reserves to itself the power of eminent domain. Where enforced land alienation is not resorted to, access to and development of these resources by outsiders is subject to negotiation with landowners, who may demand benefit-sharing and compensation or mining royalty equivalents. Lack of clarity in the law about negotiation processes and the legal personality of landowner groups, coupled with the fact that many groups have little experience with the cash economy, have allowed developers to manipulate landowners, by bribery, creating non-representative associations and to make unfulfilled promises regarding careful land management and the provision of services.

Foreign logging companies, mainly from Malaysia, have thus secured access to the majority of the forested areas of Papua New Guinea. Investigative commissions have exposed persistent malpractice by logging companies, which have also been accused of bribery and the manipulation of parliament to modify laws to facilitate their access to the resource. Church-based organizations and environmental groups have protested against this situation and have sought to promote small-scale community logging using portable petrol-driven mills, *wokabaut somils*. Large-scale open-cast mines have also been established on clan lands and have been found to have very serious impacts on rivers and the livelihoods of downstream riparian groups. Unresolved conflicts between mining companies and aggrieved landowners are now clogging up the courts (Brown, 1978; James, 1985; Good, 1986; Marshall, 1990; Renner, 1990; Donigi, 1994; Wanek, 1996; Filer, 1997; FAO, 1998; WRM and Forests Monitor, 1998).

Russian Federation

There are currently some 250 000 people in the Russian Federation officially classified by the Constitution as “small-in-numbers peoples of the North and Far

East". They include the Saami people on the Archangel Peninsula in the west, the Aleuts in the Pacific and Turkic groups in the south on the border with China and Mongolia. Several million people from larger "nationalities", such as the Buryat Mongols and Yakuts (Sakha), who have their own named republics, sometimes refer to themselves as "indigenous peoples" but are not dealt with further below.

During the early period of Russian expansion, the land rights of native peoples were almost totally ignored. Feudal notions of control of land and peasants by overlords (*boyars*), were extended by conquest, spearheaded by Cossack armies loyal to the Tsar. The Speransky reforms of the nineteenth century, later criticized for their paternalist intent, did give recognition to customary rights to land and advocated measures to determine these areas and secure them from settlement. Application of these reforms was ineffective, but the extortionate system of taxation (*yasak*), by which native peoples had to yield tribute in furs, was imposed with great brutality.

After the Russian revolution, all land was considered property of the state and although administrative units were created, as autonomous districts, provinces, territories and regions, designed to protect national minorities, these were also guided by the centralized administration. Under the Soviet system, traditional systems of land use were modified and "modernized". Wealthier individuals and shamans were targeted as *kulaks* and reactionaries. Native resistance to state expropriations and imposed administrative regimes was put down by force of arms. Traditional systems of fishing, trapping and reindeer-herding were collectivized, which implied the forced resettlement of dispersed peoples into collective farms (*kolkhoz*). In the 1960s, most collective farms were nationalized as state farms (*sovkhoz*), creating further concentration of settlements and the imposition of strict bureaucratic controls on community life. In the last year of the Soviet era, the USSR subscribed to ILO Convention 169, although the ILO itself

was not informed of this decision. The transition to a market economy has brought further disruptions. State farms have been dismantled and collective farms and centralized settlements have been thrown on to the market. Serious poverty and ill-health have resulted.

Land tenure legislation is now in a process of reform to accommodate these changes. The new Constitution recognizes international principles of human rights and Article 69 specifically guarantees the rights of "small-in-numbers" indigenous peoples. Decrees passed in 1992 propose the creation of official bodies of self-government in areas traditionally inhabited by indigenous peoples and delegate responsibility for allocating lands to regional authorities. A 1999 Federal law states that indigenous peoples "have rights to protection by the courts of indigenous lands, ways of life, economies and trades ...". A 2000 Federal law recognizes that clan communities (*obshchina*) can obtain collective land rights but does not explain how. Finally, in early 2001, a Federal Law was passed recognizing indigenous peoples' rights to "Territories of Traditional Nature Use" (TTPs), intended to provide them with secure areas where they can carry out "traditional" economic activities. Alienation of land from TTPs would only be allowed subject to a referendum of all constituent communities. However, none of these Decrees and Federal Laws has been followed up with clear regulations that would allow federal or regional authorities to put them into effect in an agreed way. Thus, although the prospects for securing indigenous land rights in the Russian Federation continue to brighten, no such land rights have yet been properly secured, but some regions and republics have moved ahead unilaterally to allocate *obshchina* lands (Vakhtin, 1992; Forsyth, 1994; IWGIA, 1996; Fondahl, 1998; Pika, 1999; Anderson, 2000; Phipps and Colchester, 2001).

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