Institute for Global Environmental Strategies

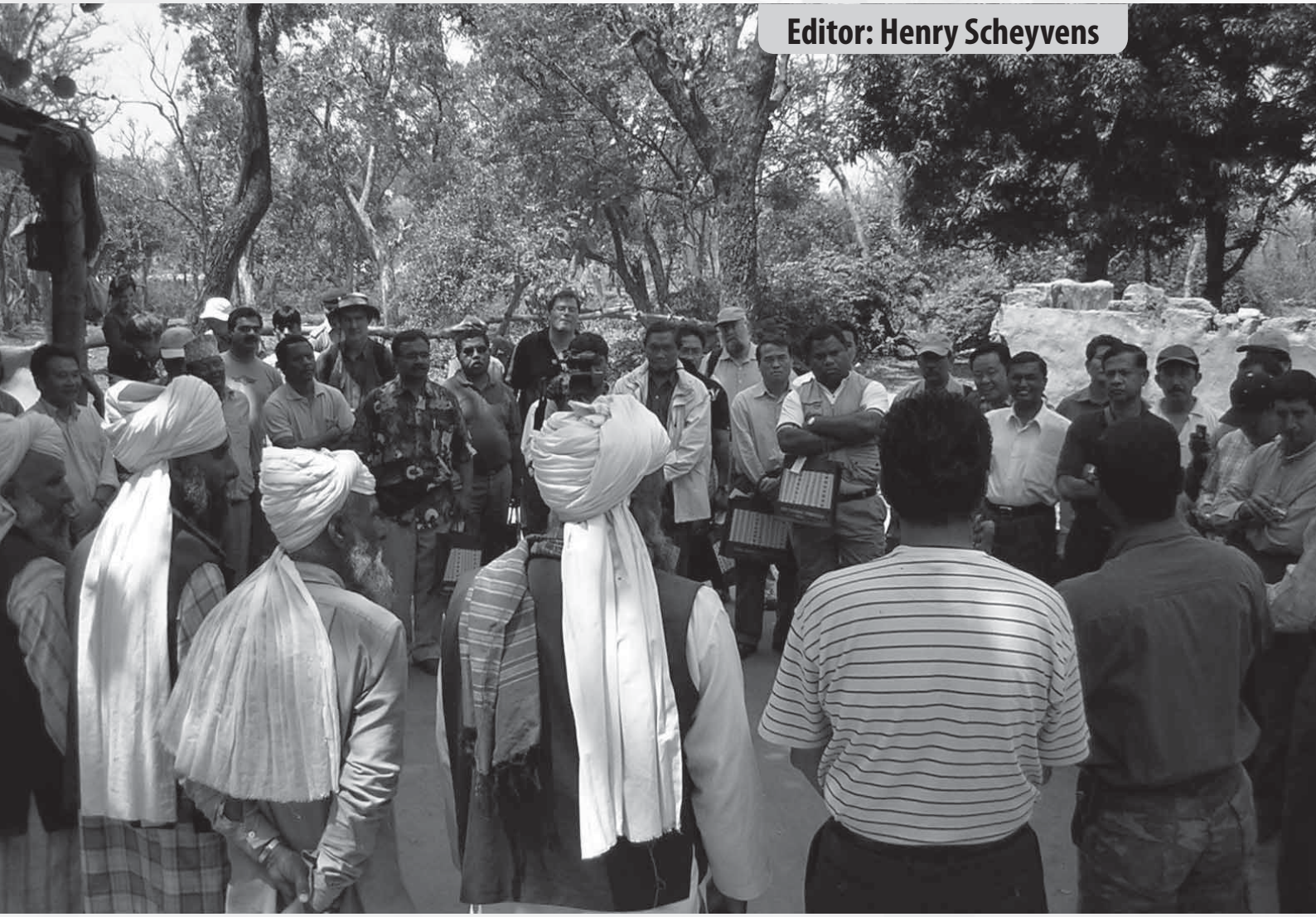
IGES

CRITICAL REVIEW OF SELECTED FOREST-RELATED REGULATORY INITIATIVES:

APPLYING A RIGHTS PERSPECTIVE

INSTITUTE FOR GLOBAL ENVIRONMENTAL STRATEGIES

Editor: Henry Scheyvens



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January 2011

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Cover Photo: Community consultation, Rajiji National Park, India (copyright, Henry Scheyvens).

ISBN: 978-4-88788-072-6

Printed and bound by **WPS**, tel: +977-01-5550289, eMail: printnepal@gmail.com

FOREWORD

This report brings together four studies that evaluate regulatory initiatives with implications for forest-dependent communities from a rights perspective. Since its establishment in 1998, the Institute for Global Environmental Strategies (IGES) has highlighted the rights and wellbeing of forest-dependent people in the Asia Pacific region in its research on forest policy. IGES research has attempted to draw attention to the processes and consequences of the marginalisation of forest-dependent people, as well as the value of their traditional knowledge on forest resources and management.

Another important focus of IGES research is climate change. The studies presented in this report hold important messages for initiatives to link forests with climate change mitigation and adaptation. The current version of the text to assist the negotiations under the United Nations Framework Convention on Climate Change mentions local communities and indigenous peoples as one of the safeguards for implementing REDD+ (reducing emissions from deforestation and forest degradation, as well as activities to conserve and enhance forest carbon stocks). The four studies indicate that this will be a challenging safeguard to implement, especially in contexts where indigenous people's traditional institutions have been eroded. Proper implementation of the principle of free prior informed consent in localities experiencing high rates of unplanned deforestation and degradation will require in-depth analysis of local institutions and in many cases a long-term commitment to institution building. Such issues should be at the forefront of the REDD+ negotiations.

I congratulate the authors for their rich analysis that highlights the complexities of the issues and provides practical recommendations for moving forward, and for the IGES Forest Conservation Project, under the Natural Resources Management Group, for organising and producing this report.

The Editor is grateful to Mr. Teodoro Licarte, Dr. Enrique Ibarra Gene and Dr. Federico Lopez-Casero for reviewing parts of this report, and to Ms. Emma Fushimi for proofreading several of the chapters. Dr. Kimihiko Hyakumura and Dr. Kazuhiro Harada contributed to the analytical framework and the organisation of the study. Needless to say, the responsibility for any errors in fact or omissions is with the authors.

Hideyuki Mori
President
Institute for Global Environmental Strategies

ABBREVIATIONS AND ACRONYMS

A and D	Alienable and Disposable
ADMP	Ancestral Domain Management Plan
ADO	Ancestral Domains Office
ADSDPP	Ancestral Domain Sustainable Development and Protection Plan
Anor	Another
AO	Administrative Order
ARMM	Autonomous Region of Muslim Mindanao
Art	Article
BITO	Bakun Indigenous Tribes Organisation
BJE	Bangsamoro Juridical Entity
CADC	Certificate of Ancestral Domain Claim
CADT	Certificate of Ancestral Domain Title
CAFGU	Civilian Armed Forces Geographical Unit
CALT	Certificate of Ancestral Land Title
Cap	Chapter
CBFM	Community Based Forest Management
CBFMA	Community-Based Forest Management Agreement
CENRO	Community Environment and Natural Resources Officer
CIPRAD	Coalition for Indigenous People's Rights and Ancestral Domains
CLOA	Certificate of Land Ownership Award
CLUP	Comprehensive Land Use Plans
CPA	Cordillera People's Alliance
CSD	Campaign for Survival and Dignity
DAR	Department of Agrarian Reform
DBM	Department of Budget and Management
DENR	Department of Environment and Natural Resources

DOJ	Department of Justice
ECTF	Ecumenical Commission for Tribal Filipinos
Ed	Edition
En	Enactment
ENR	environment and natural resource
ESSC	Environmental Science for Social Change
FAO	Food and Agriculture Organisation of the United Nations
FELCRA	Federal Land Consolidation and Rehabilitation Authority
FLUP	Forest Land Use Plans
FMS	Federated Malay States
FMU	forest management unit
FPC	Forest Protection Committee
FPIC	Free Prior Informed Consent
FRA	Forest Rights Act
FSC	Forest Stewardship Council
GNS & Swk. L.N.	These letters are used in respect of Legal Notifications published in Part II of the Sarawak Government Gazette. The abbreviations "GNS" have since 1964 been replaced by the abbreviations "Swk. L.N.".
ha	hectare
IFAD	International Fund for Agricultural Development
IFMA	Industrial Forest Management Agreement
IGES	Institute for Global Environmental Strategies
IKSP	Indigenous Knowledge and Systems and Practices
ILO	International Labour Organisation
IP	Indigenous people
IPRA	Indigenous Peoples Rights Act 1997, Philippines
IRA	Internal Revenue Allocation
IRDC	Ifugao Research Development Centre
JFM	Joint Forest Management
KAMP	Kalipunan ng mga Katutubong Mamamayan ng Pilipinas
KASAKAV	Katutubong Samahan sa Cagayan Valley
KASAPI	Katutubong Samahan ng Pilipinas
KKK	Koalisyon para sa Karapatan ng mga Katutubo
KPLN	Kapulungan para sa Lupaing Ninuno
LCDA	Land Custody and Development Authority of Sarawak
LGU	Local Government Unit
LRA	Land Registration Authority

MLE	Multi Lingual Education
MOA	memorandum of understanding
MoEF	Ministry of Environment and Forests
MRP	*Muyong* Resources Permit
MTCS	Malaysia Timber Certification Scheme
NCCP-PACT	National Council of Churches in Philippines-People's Action for Cultural Ties
NCIP	National Commission on Indigenous Peoples
NCR	Native Customary Rights to land
NeDA	Barangay Ned Economic Development Association
NGO	non-governmental organisation
NIPAS	National Integrated Protected Areas System
NT	Native Title
NTFP	non-timber forest product
ONCC	Office of Northern Cultural Communities
Ors	Others
OSCC	Office of Southern Cultural Communities
PANAMIN	Presidential Assistant on National Minorities
PD	Presidential Decree
PENRO	Provincial Environment and Natural Resources Officer
PESA	Panchayat (Extension to Scheduled Areas) Act
PhP	Philippine peso
PIL	Public Interest Litigation
PRIs	Panchayati Raj Institutions
Pt	Part
RPS	Rancangan Penempatan Semula
s	section
SALCRA	Sarawak Land Consolidation and Rehabilitation Authority
SBMA	Subic Bay Metropolitan Authority
Sch	Schedule
SILDAP	Silingang-Dapit
SLDB	Sarawak Land Development Board
SPMM	Samahang Pantribu ng mga Mangyan ng Mindoro
ss	sections
TLA	Timber License Agreements
TWG	Technical Working Group
UGAT	Ugnayang Pang-agham Tao

UNDP	United Nations Development Programme
v	versus
VSS	Van Suraksha Samiti
WLPA	Wildlife Protection Act
WWF	World Wide Fund for Nature

Abbreviations used for case law references in Chapter 3

AC	Law Reports: Appeal Cases
CLR	Commonwealth Law Reports
DLR	Dominion Law Reports
MLJ	The Malayan Law Journal
MLJU	The Malayan Law Journal Unreporteds
Peters	Peters' United States Supreme Court Reports
US	Reports of Cases in the Supreme Court of USA

EXECUTIVE SUMMARY

- In the Asia-Pacific region, millions of people live within or dwell near forests. For many of them, their wellbeing is dependent upon access to forest lands and forest resources, yet their customary rights and rights to basic human needs are often denied by national forest regulatory frameworks. The nationalisation of forests and rights allocation that occurred in most countries in the region has taken away from many forest-dependent rural communities important elements of their livelihood base and their cultural, social, political and spiritual subsistence. The consequences of this inattention to customary and basic human rights include not only the undermining of livelihoods, but also conflict between those granted formal forest rights and groups whose customary rights have been denied by forest law, and lack of respect for forest policy and the authority of the state organs responsible for managing forests.

- Forest governance and regulatory frameworks are currently in a state of transition. To varying degrees, governments in the region have implemented policy reforms to recognise customary tenure regimes and to enhance the rights of local communities of forest access, use and management. There is a need for ongoing monitoring and assessment of the development and reform of forest policy from the perspective of rights in terms of law making, content and implementation.

- Rights-based approaches assume the existence of universal human rights – rights that are universal, inalienable, indivisible, and can be realised – and basic freedoms (e.g. the freedom to develop and realise one's human potential), and highlight accountability, participation, non-discrimination, equality, equity, vulnerable groups, and empowerment. The security of rights is an important consideration in rights-based approaches and requires clarity, certainty, sufficient duration, exclusivity, and recognition of the rights holder as a legal individual /entity.

- This report brings together four studies that evaluate regulatory initiatives with implications for forest-dependent communities from a rights-based perspective. These are: The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 – India; Regulatory initiatives and selected outcomes of judicial processes in Malaysia; The Community Forest Act (2007) – Thailand; and The Indigenous People's Rights Act (1997) – Philippines. Each study covers law making, content and implementation.

- In **Chapter 2** Ashish Kothari, Neema Pathak and Arshiya Bose describe the Forest Rights Act (FRA) as one of the most controversial pieces of legislation to emerge since India gained independence. The FRA recognises and grants forest-related rights to scheduled tribes and other communities who have traditionally been living in or depending on forestland for their legitimate livelihood needs. The authors argue that for a large number of forest-dwelling people the FRA is a major opportunity to strengthen economic and social security, and also perhaps to facilitate their political empowerment, but that there is no inevitability of such an outcome. For moving forward, the authors highlight the importance of: government allowing the claims process to take its due course to reflect the social, cultural, ecological, and administrative conditions of each state; civil society groups tracking the implementation of the FRA, helping communities to make legitimate claims and building capacity to handle the processes of recognition and vesting of rights, etc.; certain revisions and additions to the Rules under the Act; lobbying for the inclusion of environmental and social action groups in the committees at sub-divisional, district, and state level; and clarification of how the FRA relates to existing conservation laws.

- In **Chapter 3** Lim Teck Wyn finds that while many of the customary rights of forest-dependent people are protected by Malaysian law, in practice the boundaries of native customary land are often a matter of dispute. In terms of implementation, there are clearly problems. Over 14,000 Native Title land applications have been made in Sabah, some of which have been pending for many decades. Turning to reforms related to the forest regulatory framework, Teck Wyn notes that these include moves made to safeguard the rights of forest-dependent people but also attempts to restrict their rights (e.g. in Sarawak, the Land Code 1958 and the forest laws have been amended to increase the power of the State to extinguish native rights). Outside of law making there have been a number of landmark cases that have increased the security of indigenous people's rights to native land in general and forest land in particular. Teck Wyn concludes that in Malaysia reform has been achieved through the judiciary rather than the legislative arm of government and that where legislative developments have not expanded the rights of forest dwellers, alternative initiatives, such as forest certification, are of increased importance.

- In **Chapter 4** Robert Fisher provides analysis of the efforts to formulate and enact a Community Forestry Bill in Thailand. After more than 15 years of often acrimonious debate, the Community Forestry Bill was finally passed by the Thai Parliament in late 2007 but was not ratified by the King pending Constitutional challenges and has subsequently effectively lapsed. There is no suggestion in the Bill that people have "natural" rights to community forests and its limitations include: a highly bureaucratised process for approving and regulating community forests; approval of the request is discretionary; people who live outside a protected area and who use resources in it are not eligible to have a community forest approved; and agriculture is not allowed in community forests in protected areas, despite the fact that many people living in protected areas are engaged in agriculture or horticulture. Fisher is particularly concerned with the tendency of the community forestry movement to de-emphasise agriculture and commercial use. He argues that from a rights-based perspective, the focus on community forestry may be misguided and that efforts should be directed towards broader rights associated with citizenship and land titling.

- In the **final chapter** Peter Walpole and Dallay Annawi discuss the history of the marginalisation of indigenous peoples in the Philippines, efforts to have their rights recognised by the State, the process of drafting the Indigenous People's Rights Act (IPRA), salient points of the IPRA, and opportunities, gains and challenges after 10 years of the Act's implementation. The IPRA is the only comprehensive law in the country that recognises the rights of indigenous peoples. As with the FRA in India and the Community Forestry Bill in Thailand, the IPRA has its supporters and opponents. Walpole and Annawi analyse the mechanisms created by the IPRA, namely the National Commission on Indigenous Peoples (NCIP), Certificate of Ancestral Domain Title (CADT), the principle of free prior informed consent (FPIC), and the ancestral domain sustainable development and protection plan (ADSDPP). They conclude that the implementation of the IPRA has focused on titling and that attention must now be directed at strengthening the local cultures, including reviving or strengthening indigenous leadership institutions.

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1 INTRODUCTION

CHAPTER

Henry Scheyvens, Forest Conservation Project, IGES

The Institute for Global Environmental Strategies (IGES) conducts pragmatic and innovative strategic policy research to support sustainable development in the Asia-Pacific region. Under this mandate, the IGES Forest Conservation, Rights and Livelihoods Project set itself the following goal: *Through strategic policy research to contribute to the development and dissemination of policy instruments that promote the appropriate inclusion of conservation, livelihoods and rights in forest management regimes, effective forest law enforcement, and markets for legal and sustainable forest products.*

As part of the IGES 4th Phase three-year programme of research (April 2007 – March 2010) the Forest Conservation, Rights and Livelihoods Project organised a critical review of forest regulatory initiatives and their implementation in selected Asia-Pacific countries. The basic premise of this review was that there is a clear need for independent monitoring and assessment of the development and reform of forest regulatory frameworks from the perspective of rights in terms of law making, content and implementation. This chapter provides the rationale for the review, describes the approach used, and provides summaries of the reviews of the regulatory initiatives that follow.

1.1 Rationale

Despite broad acknowledgment of the critical economic, social and environmental functions provided by forests, global forest loss continues at an alarming rate. The Food and Agriculture Organisation of the United Nations (FAO) estimated global deforestation at 13 million ha annually during the last decade (FAO 2010), with Asia Pacific countries experiencing rates of forest loss amongst the world's highest, in some instances exceeding 1.5%/year (FAO 2006a).

In the Asia Pacific region, in both countries that were colonised and those that were not, the state claimed ownership of forests and centralised forest administration under specialised authorities established to manage the forest estate, with only a few exceptions.[1] A FAO study of forest tenure in 17 countries in Southeast Asia found that over 90% of forests are publicly owned (FAO 2006b), which, particularly in forest-rich countries, places the state in a powerful position as holder and assigner of forest rights.

1. The exceptions include Fiji, Papua New Guinea and Vanuatu where forests are mostly owned under customary forms of tenure.

In the pursuit of strategic national interests, governments claimed ownership of forests and allocated rights to provide state revenues, consolidate state control over their territories and people, to achieve sustainable timber yields and to secure environmental services. This nationalisation of forests and rights allocation took away from many forest-dependent rural communities important elements of their livelihood base and their cultural, social, political, and spiritual subsistence. The World Bank estimates that globally 1.6 billion people depend heavily on forests for their livelihoods and 400 million people depend directly on forest resources (World Bank 2002). The Forestry Sector Outlook Study 2010 found that the highest level of reliance on extensive forests is in hilly zones and tropical forest areas, and that the levels of reliance are greatest in areas with ethnic minorities outside the dominant national culture (cited in APN 2009, 18).

The nationalisation of forests denied legal recognition of what millions of forest-dependent people believed to be their customary rights to forest ownership, management, and use. In a global review of forest law conducted by the World Bank, Christy et al. (2007) note that "while there has often been some legal recognition of limited use, usually for subsistence purposes, most laws provided little scope for local people to play a meaningful part in the planning, management, and allocation of the forest resources on which they may have depended for generations—and which, in some cases, they may have actively managed and protected in accordance with long-standing traditional rules." FAO legal experts made similar observations:

> Throughout history, national legislation has generally been unfriendly to local forest management. Indeed, in many parts of the world, the overall trend has been an inexorable assertion of government legal control over forests at the expense of local practices and local perceptions. . . . Frequently, the state has taken on this role itself through the creation of state forests. In other contexts, national law may have left the tenurial status of forest areas unclear, giving weak or no legal protection to existing community-based systems and providing no alternative mechanisms by which local groups or individuals might assert effective control (Lindsay et al. 2002, 9).

The consequences of this inattention to rights include not only the undermining of livelihoods, but also conflict between those granted formal forest rights and groups whose customary rights have been denied by forest law (Yasmi et al. 2010, 10), and lack of respect for forest policy and the authority of the state organs responsible for managing forests.

Sustainable forest management cannot be achieved by state organs through managerial and technical solutions alone. Space must be created for marginalised people who are heavily dependent upon forests to participate in forest policy formulation and formal forest management, and share in the benefits derived from good forest stewardship. The Rio Forest Principles[2] assert that:

> Governments should promote and provide opportunities for the participation of interested parties, including local communities and indigenous people, industries, labour, non-governmental organisations and individuals, forest dwellers and women, in the development, implementation and planning of national forest policies.
>
> National forest policies should recognise and duly support the identity, culture and the rights of indigenous people, their communities and other communities and forest dwellers. Appropriate conditions should be promoted for these groups to enable them to have an economic

2. Officially, the "United Nations Conference on Environment and Development Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests.

stake in forest use, perform economic activities, and achieve and maintain cultural identity and social organisation, as well as adequate levels of livelihood and wellbeing, through, inter alia, those land tenure arrangements which serve as incentives for the sustainable management of forests.

1.1.1 NEED FOR RIGHTS-BASED APPROACHES

The fate of state-owned natural forests lies in how forest rights are assigned, who they are assigned to, the content of these rights, their attendant obligations, and their limits. Forest management would clearly benefit from the use of rights perspectives to inform policy formulation and implementation. This is increasingly recognised by development agencies and is particularly advocated by forest-dependent people themselves. Principle Five of the Corobici Declaration (2004) of the International Alliance of Indigenous Tribal Peoples of Tropical Forests reads "We endorse a rights-based approach as the most appropriate way of dealing with the theme of forests and traditional knowledge, and also with efforts to eradicate poverty. Such an approach recognises both the collective and individual rights of indigenous peoples, which include our rights to self-determination, our rights to the use and control of our natural resources, to our cultural heritage, to our self-development, to our languages and our traditional ways of life and livelihood."[3]

1.1.2 NEED TO MONITOR AND ASSESS TRANSITIONS IN FOREST POLICY FROM A RIGHTS PERSPECTIVE

Forest governance and regulatory frameworks are currently in a state of transition. To varying degrees, governments in the region have implemented policy reforms to recognise customary tenure regimes and to enhance the rights of forest access, use and management of local communities. The Rights and Resources Initiative observes that "we are witnessing arguably the most important set of policy and market shifts since the end of the colonial era – and these present historic opportunities for, and sometimes threats to, the well-being - livelihoods, rights, freedom and choices, and culture - of forest dependent people" (Rights and Resources Initiative 2007). While this reform provides some reason for cautious optimism, it also entails risks. For example, the Asia Pacific Network notes that in some cases decentralisation of forest management "led to confusion in communities regarding the relationship between traditional leadership institutions and the state-appointed governing body that now exists at the same time in their village" (APN 2009, 24).

Forests remain heavily contested natural resources because of their economic value, their potential to influence political fortunes, their private and public benefits and because of contending stakeholder views of how they should be managed and who has the right to participate in decision making. Within this contested policy landscape there is a need for ongoing monitoring and assessment of the development and reform of forest policy from the perspective of rights in terms of law making, content and implementation.

Law making

If a law is to be honoured, to reflect reality, and thus "to create a realistic foundation for its own implementation," all stakeholders should ideally be genuinely involved in the drafting of legislation (Christy et al. 2007). Based on its Development Law Service experience in providing legal technical assistance, the FAO has suggested several legislative design principles in the forestry sector. One of these is "The drafting of law needs to be a broadly

3. The Declaration can be accessed at http://archive.forestpeoples.org/documents/sust_livehds/corobici_decl_dec04_eng.shtml. For further discussion on rights-based approaches to forest management see Colchester (2009) and Campese et al. (2009).

participatory approach" (Lindsay et al. 2002, 11). The FAO explains this principle as follows:

> The drafting of sound and workable law requires genuine involvement of all categories of stakeholders – government and non-governmental institutions, central and local institutions, communities and local forest-dependent people, private sector organisations, etc. This is not a recommendation that flows only from a belief that people should have the right to be involved. Instead, we are making a practical point here – without this involvement, there is simply little hope of passing laws that reflect reality and are capable of being used and implemented.
>
> It is important to stress that this recommendation goes beyond simply holding a few seminars or workshops at the end of the drafting process. It requires a true commitment to listening to and understanding the needs, objectives, insights and capacities of the intended users of the law, and finding ways to accommodate the multiple interests at stake. It requires a determination to avoid letting the process be driven by the preconceptions of lawyers, donors and other outsiders, however well intentioned. This is time consuming work, that ideally should entail patient consultations in the field with people directly affected, not simply in a distant capital city. And these consultations should start early, not only when a first draft has already been completed (Lindsay et al. 2002, 11).

A rights perspective can be used to assess whether forest-dependent people were adequately represented in the process of law making.

Law content

The development of forest-related laws in recent decades has not all been towards greater recognition of the rights of forest-dependent people. Some legal amendments have further limited their rights to forest ownership and management. Other reforms have provided local communities with certain rights, but these may be insecure or too limited for the communities to realise a significant economic benefit from forest management. Applying a rights perspective to the analysis of the content of forest-related law can help identify gaps in legislating the customary and basic human rights of forest-dependent people.

Law implementation

To have meaning, laws must be both implemented and implemented through mechanisms that enable the law to achieve its basic objectives. For regulatory initiatives that provide rights to local communities, the implementing mechanisms may be deficient in various ways, e.g. lack of awareness raising and capacity building for local communities to realise their legislated rights, or processes that are overly complex. A rights perspective can be used to identify some of the shortcomings in implementation mechanisms.

1.2 APPROACH, SCOPE AND CONCEPTS

Experts were commissioned to write reviews of selected regulatory initiatives. The range of methods employed for data gathering included reviews of existing documentation and literature, media reviews, and interviews with key informants. Feedback was provided by IGES before finalisation of each study.

The term "regulatory initiative" was used broadly to include the amendment of legislation, the passing of new legalisation, and the drafting of new subordinate regulations. The review was open to regulatory initiatives specifically aiming to give legal recognition to the rights of forest-dependent people as well as regulatory initiatives not specifically targeting forest-dependent people, but with significant implications for them. The review was open to not only the primary legislation for forest management, but also other laws

with implications for forests and subordinate regulations such as codes of harvesting.

The review aimed to capture not only diversity in the types of regulatory initiatives that impact forest-dependent people, but also diversity in the history of forest management and the current approaches to forest management that can be found in different parts of the region. The countries included in the review were India, Malaysia, Thailand, and the Philippines. The following four regulatory initiatives were initially selected for the study:

- The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 – India
- Revisions to the Land Code (1958) which recognises the existence of 'Native Customary Rights' - Sarawak
- The Community Forest Act (2007) - Thailand
- The Indigenous People's Rights Act (1997) - Philippines

The review of these regulatory initiatives proceeded as planned, with the exception of the study in Sarawak that was broadened to cover selected aspects of the forest regulatory framework and the use of the judicial system by indigenous groups throughout Malaysia.

The experts were requested to:

- Provide a brief overview of the characteristics of indigenous forest-dependent groups;
- Describe the history and political economy of the evolution of the forest regulatory framework;
- Describe the regulatory initiative to be analysed and its position within the national forest policy, and to consider whether it complements or contradicts other elements of the forest policy;
- Identify the driving forces for, and any opposition to, the regulatory initiative;
- Analyse whether forest-dependent people participated meaningfully in drafting the regulatory initiative, and consider the implications of their degree of participation;
- Identify the strengths and/or weaknesses of the regulatory initiative from a rights perspective, paying particular attention to:
  - The rights claims of forest dependent people and human rights more generally,
  - Empowerment of forest dependent people.
  - Rights security of forest dependent people.
- Identify opportunities or threats to the well-being of forest-dependent people created by the regulatory initiative and suggest pragmatic and effective ways of responding to these.

The experts were given the freedom to decide on the finer points of the conceptual and analytical frameworks they employed. The concept note shared with them before they began their reviews provided a discussion on rights-based approaches to support a common understanding on basic issues.

1.2.1 UNIVERSAL HUMAN RIGHTS, FREEDOMS AND ELEMENTS OF HUMAN RIGHTS

One fundamental issue is that rights-based approaches assume the existence of universal human rights. This claim is recognised in the Universal Declaration of Human Rights, adopted in 1948, and the six core covenants and conventions on civil, political, economic, social and cultural rights. The notion of universal human rights is based on the assertion that all people, everywhere have claims to social arrangements that provide them with protection from abuses and deprivations and that secure the freedom necessary for them to enjoy a dignified life (UNDP 2000).

The United Nations Development Programme (UNDP) identifies seven freedoms shared by both human rights and human development and four elements of human rights. The seven freedoms are:

- Freedom from discrimination—by gender, race, ethnicity, national origin or religion
- Freedom from want—to enjoy a decent standard of living
- Freedom to develop and realise one's human potential
- Freedom from fear—of threats to personal security, from torture, arbitrary arrest and other violent acts
- Freedom from injustice and violations of the rule of law
- Freedom of thought and speech and to participate in decision-making and form associations
- Freedom for decent work—without exploitation (ibid.)

The four elements of human rights are:

Universality of human rights

Human rights belong to all people, and all people have equal status with respect to these rights.

Inalienability of human rights

Human rights are inalienable: they cannot be taken away by others, nor can one give them up voluntarily.

Indivisibility of human rights

Human rights are indivisible in two senses. First, there is no hierarchy among different kinds of rights. Civil, political, economic, social and cultural rights are all equally necessary for a life of dignity. Second, some rights cannot be suppressed in order to promote others. Civil and political rights may not be violated to promote economic, social and cultural rights. Nor can economic, social and cultural rights be suppressed to promote civil and political rights.

Realisation of human rights

A human right is realised when individuals enjoy the freedoms covered by that right and their enjoyment of the right is secure. A person's human rights are realised if and only if social arrangements are in place sufficient to protect her against standard threats to her enjoyment of the freedoms covered by those rights.

Human rights represent the claims that individuals have on the conduct of individual and collective agents and on the design of social arrangements to facilitate or secure these capabilities and freedoms. To have a particular right is to have a claim on other people or institutions that they should help or collaborate in ensuring access to some freedom.

Human rights are moral claims on the behaviour of individual and collective agents, and on the design of social arrangements. Human rights are fulfilled when the persons involved enjoy secure access to the freedom or resource (adequate health protection, protection, freedom of speech) covered by the right (UNDP 2000).

1.2.2 ELEMENTS OF A RIGHTS-BASED APPROACH

The UN Office of the High Commissioner for Human Rights describes a set of elements of a rights-based approach which could be used as part of a framework to analyse forest regulatory initiatives from a rights perspective. These elements are:

Express linkage to rights

Rights-based approaches are comprehensive in their consideration of the full range of indivisible, interdependent and interrelated rights: civil, cultural, economic, political and social. This calls for a development framework with sectors that mirror internationally guaranteed rights, thus covering, for example, health, education, housing, justice administration, personal security and political participation.

Accountability

Rights-based approaches focus on raising levels of accountability in the development process by identifying claim-holders (and their entitlements) and corresponding duty-holders (and their obligations). In this regard, they look both at the positive obligations of duty-holders (to protect, promote and provide) and at their negative obligations (to abstain from violations). Such

approaches also provide for the development of adequate laws, policies, institutions, administrative procedures and practices, and mechanisms of redress and accountability that can deliver on entitlements, respond to denial and violations, and ensure accountability.

Empowerment

Rights-based approaches also give preference to strategies for empowerment over charitable responses. They focus on beneficiaries as the owners of rights and the directors of development, and emphasise the human person as the centre of the development process (directly, through their advocates and through organisations of civil society). The goal is to give people the power, capacities, capabilities and access needed to change their own lives, improve their own communities and influence their own destinies.

Participation

Rights-based approaches require a high degree of participation, including from communities, civil society, minorities, indigenous peoples, women and others. According to the UN Declaration on the Right to Development, such participation must be "active, free and meaningful" so that mere formal or "ceremonial" contacts with beneficiaries are not sufficient.

Non-discrimination and attention to vulnerable groups

The human rights imperative of such approaches means that particular attention is given to discrimination, equality, equity and vulnerable groups. These groups include women, minorities, indigenous peoples and prisoners (UN Office of the High Commissioner for Human Rights (http://www.unhchr.ch/development/approaches-04.html, 10/12/2007)

1.3 WHAT THE REVIEWS FOUND

1.3.1 SCHEDULED TRIBES AND OTHER TRADITIONAL FOREST DWELLERS (RECOGNITION OF FOREST RIGHTS) ACT 2006

In Chapter 2 Ashish Kothari, Neema Pathak and Arshiya Bose describe the Forest Rights Act (FRA) as one of the most controversial pieces of legislation to emerge since India gained independence. They trace the context of its emergence over the history of centralised forest management, noting that the enactment of forest and conservation related laws in pre- and post-independent India dispossessed millions of people of the land and natural resources that they depended upon. That the roots of most of the forest laws in India lie in appropriating resources for commercial use of the colonial government or the elitist views on conservation explains why amendments of these laws could never take into account "people's issues." Grassroots organisations began to feel a strong need for a separate legislation. The authors also attribute the origin of the FRA to the growing movements of *adivasis* (original inhabitants / indigenous peoples) demanding rights to the lands they were occupying and the forest resources they were using. As a result of lobbying, the Prime Minister's Office decided that a bill for the recognition of forest rights would be drafted. Many months of debate based on divergent ideologies on *how* should forests be managed or conservation be achieved and by *whom*, followed. After significant changes were made to the text, the Act was finally passed by the Parliament of India in December 2006 and came into force on 1 January 2008. Ashish, Pathak and Bose neatly summarise views of the FRA: "Many grassroots organisations and social action or conservation groups viewed it as historic, the culmination of a 200 year old struggle of the tribal and forest-dependent communities. In contrast, several other conservationist groups see it as a law that would be 'the last straw' for already dwindling forests and wildlife in India."

The aim of the FRA is to address the historical injustice done to those communities whose forest rights have so far not been legally recorded and thereby were denied their traditional rights to forestlands and resources. It recognises and grants forest-related rights to scheduled tribes and other communities who have traditionally been living in or depending on forestland for their legitimate livelihood needs. Ashish, Pathak and Bose describe and assess the rights it provides, noting some important distinctions, e.g. members of scheduled tribes can claim rights under this Act if they have been residing in or were dependent on forests prior to 13 December 2005, while other traditional forest dwellers can only claim rights if they have been in occupation for at least three generations. The rights the FRA provides include holding and living in forest land; community rights; rights to own, collect, use and dispose of minor forest products; community tenure of habitat for particularly vulnerable tribal groups and pre-agricultural communities; rights to developmental facilities; and others. The FRA sets out the limitations on these rights and the processes and institutions for the Act's implementation.

Based on "part-predictive, part-factual" analysis, Ashish, Pathak and Bose consider whether the FRA will provide security to the livelihoods of forest-dependent communities and at the same time achieve forest conservation. They argue that for a large number of forest-dwelling people the FRA is a major opportunity to strengthen economic and social security, and also perhaps to facilitate their political empowerment, but that there is no inevitability of such an outcome. Factors that will determine whether and how many forest-dwellers benefit from the FRA include: their knowledge of the law; their organisation and evidence to support their claims; the effectiveness and fairness of *gram sabhas* (village assembly comprising of all adult members of the community) to register all legitimate claims; and the fairness of the subcommittees who hold the power to reject or accept the claims.

Key concerns that the authors raise include: claims could remain pending for years as there is no time prescription for their processing; possible lack of seriousness of the central and many state governments in implementing the FRA; evictions before the claims processes is completed; interference of the state in the election of *gram sabhas* and claims verification; potential for more recent settlers to assert their claims more forcibly than the original residents; potential for conflict between *adivasis* and non-*adivasis* (or even between *adivasis*) where the latter have recently encroached on the formers' lands; how nomadic populations will fare making their claims through *gram sabhas* controlled by settled populations; and attempts to capture land once claims are settled. Ashish, Pathak and Bose provide a detailed discussion on potential conservation impacts, concluding that they are difficult to predict; provisions empowering communities to protect forests and wildlife could be a major positive force, but fresh encroachment in some places where political or other forces incite it is also a real possibility.

For moving forward, the authors highlight the importance of: government allowing the claims process to take its due course to reflect the social, cultural, ecological, and administrative conditions of each state; civil society groups tracking the implementation of the FRA, helping communities to make legitimate claims and building capacity to handle the processes of recognition and vesting of rights, etc.; certain revisions and additions to the Rules under the Act; lobbying for the inclusion of environmental and social action groups in the committees at sub-divisional, district, and state level; and clarification of how the FRA relates to existing conservation laws.

1.3.2 CRITICAL REVIEW OF THE FOREST REGULATORY FRAMEWORK AND ITS IMPLEMENTATION IN MALAYSIA

In Chapter 3 Lim Teck Wyn begins his discussion with a review of how Malaysian law

defines the terms "indigenous peoples," "aborigine," "native," and "Malay," and explains that the common term "bumiputra" (figuratively "Son of the Soil") is not mentioned in the Federal Constitution. He describes the subject matter set out by the Federal Constitution that can be legislated upon by the federal Parliament and the States. Both the federal Parliament and the States of Sarawak and Sabah may make laws on native law and custom. Turning to statutes, Teck Wyn finds that many Acts of Parliament have been passed that make reference to native customary rights. Further, numerous State enactments deal with customary rights to land, native custom, and native law. Reference to the rights of forest-dependent people can also be found in State forestry enactments and enactments more generally related to land matters. On native customary law, Teck Wyn discusses *adat*, defined by Sarawak law as "a way of life, basic values, culture, accepted code of conduct, manners, conventions and customary laws" and notes that while *adat* is mostly conveyed through oral tradition, there are a number of instances where it has been codified on a formal basis.

While many of the customary rights of forest-dependent people are protected by Malaysian law, the author explains that in practice the boundaries of native customary land are often a matter of dispute. That no comprehensive exercise to map the extent of native boundaries has been carried is of concern throughout Malaysia. Moreover, while long-houses and *temuda* fields (arable land, usually in the valleys) belonging to individual families fit relatively well into the regulatory framework provided by the statutes, in Sarawak the State government has been active in curbing attempts of natives to assert property rights over the often extensive area of higher forest that surrounds their villages (*pulau galau*).

In terms of implementation, there are clearly problems. Over 14,000 Native Title land applications have been made in Sabah, some of which have been pending for many decades. In Sarawak, the State has also faced a mass of individual land applications. Teck Wyn explains that the recognition of the land rights of Penan people is a particularly difficult case as most Penan were nomadic before the enactment of the State's Land Code in 1958 and therefore did not have established permanent long-houses or continuously cultivated *temuda*.

Turning to reforms related to the forest regulatory framework, the author notes that these include moves made to safeguard the rights of forest-dependent people but also attempts to restrict their rights. In Sarawak, the Land Code 1958 and the forest laws have been amended to increase the power of the State to extinguish native rights. For example, amendments shifted the burden of proof of ownership of native land from the government to the claimant and removed the possibility for native customary rights to be created by any lawful methods other than those specified. Teck Wyn explains that it is an explicit policy of both the Federal and State governments to reduce dependence on the forest in the name of "development"; consequently, "the rural population has become the minority and the predominant paradigm sees urban migration as the solution to people's dependence on the forest, rather than safeguarding the rights of such people *in situ*."

Teck Wyn also explains that the opportunity for forest-dependent people to assert and defend their rights is compromised by a general lack of free, prior and informed consent prior to extinguishment. He notes that government is reluctant to conduct full and meaningful consultation and disclosure of the statutory provisions to the affected people because of the complexities this involves, such as dealing with disparate communities living in remote and inaccessible areas, communications barriers due to culture and language, and the relative power and patronage of the timber and plantation proponents competing for the land.

Outside of law making there have been a number of landmark cases that have increased the security of indigenous people's rights to native land in general and forest land in particular. Teck Wyn takes us through four of these cases and explains the precedents they set. These include the extension of *adat* to include the rights to foraging, hunting and fishing on land that was not being cultivated, and further extension of these rights to include the proprietary rights to the land itself in the case of aborigines' cultivated land.

In terms of ways of moving forward on the issues he raises, Teck Wyn suggests that with *adat* becoming more deeply entrenched in the legal framework further study into the current practices of the many and varied groups of indigenous peoples throughout Malaysia is required. He concludes that in Malaysia reform has been achieved through the judiciary rather than the legislative arm of government: "The failure of parliamentary democracy to provide adequate assurances to forest-dependent minorities has been somewhat assuaged by the relatively consistent rulings that may find application in other common law countries." He concludes that where legislative developments have not expanded the rights of forest dwellers, alternative initiatives, such as forest certification, are of increased importance.

1.3.3 THAILAND'S FOREST REGULATORY FRAMEWORK IN RELATION TO THE RIGHTS AND LIVELIHOODS OF FOREST DEPENDENT PEOPLE

In Chapter 4 Robert Fisher provides analysis of the efforts to formulate and enact a Community Forestry Bill in Thailand. The experience in Thailand provides an interesting comparison with India, which was successful in passing legislation (the FRA) that Kothari, Pathak and Bose describe as "the first central legislation that recognises injustice towards forest-dependent communities that was committed during the state's appropriation of forest resources towards commercial use or conservation." In contrast, as Fisher explains, after more than 15 years of often acrimonious debate, the Community Forestry Bill was finally passed by the Thai Parliament in late 2007 but was not ratified by the King pending Constitutional High challenges and has subsequently effectively lapsed.

Fisher notes that while shifting cultivation is commonly blamed for deforestation, the drivers are more complex and include post World War II policies to "colonise" the highlands by encouraging ethnic Thais from Central Thailand to migrate to heavily forested areas and clear the land for agriculture. The people who comprise the "hill tribes" impacted by this migration and the industrial-scale logging sanctioned by the State were marginalised through not being officially recognised as Thai citizens, a problem that exists for many to this day. Other policies that impacted people in forest areas were driven by national security concerns and include the army's programme to move six million people away from forest areas, its support of the settlement of remnants of the Chinese Nationalist Forces, and its involvement in various types of "community forestry" programmes.

Legislative developments were also not conducive to the rights and livelihoods of people dependent on forests and forest lands. Under the National Forest Reserve Act 1964 large numbers of people found the areas they were living in and cultivating had been declared as reserve forests. His Majesty the King described this process as "encroachment by the authorities." While some rights have been granted through later initiatives, the issue of tenure remains to be fully resolved for people dwelling in reserved forests.

Fisher describes the drafting of the Community Forestry Bill and its various formulations. Thailand shares a similar experience to India where the bills were supported by groups advocating for the rights of forest-dependent

people but opposed by many of the conservation groups. However, Fisher warns against viewing the supporters and opponents of the Bill in terms of "dark green" and "light green" groups, suggesting that a more accurate categorisation is national-centred, community-centred and government-centred.

Fisher takes us through elements of the Bill and notes that there is no suggestion in the Bill that people have "natural" rights to community forests. The limitations he highlights include: a highly bureaucratised process for approving and regulating community forests; approval of the request is discretionary; people who live outside a protected area and who use resources in it are not eligible to have a community forest approved, although their ongoing connections and traditional claims are not fundamentally different from people living in the protected area; and agriculture is not allowed in community forests in protected areas, despite the fact that many people living in protected areas are engaged in agriculture or horticulture.

Fisher is particularly concerned with the tendency of the community forestry movement to de-emphasise agriculture and commercial use. He find it a paradox that "agriculture has been so ignored by the proponents of people's versions of community forestry, given that agriculture has traditionally been an essential basis of subsistence for the people living in the upland forests." His analysis suggests that the community forestry movement needs to move from framing forest dwellers as forest people living traditional sustainable livelihoods, to a perspective that captures the reality that many forest dwellers are increasingly responding to urban and even international markets for products.

Without the Community Forestry Bill being enacted, Fisher informs us that Thailand is left with various government initiatives that provide a legal basis for types of "participatory forestry" and that "recognition of community forests and other forms of participatory forest management is discretionary rather than based on any recognition of broad human or citizenship rights." He concludes that from a rights-based perspective, the focus on community forestry may be misguided and that efforts should be directed towards broader rights associated with citizenship and land titling.

1.3.4 THE INDIGENOUS PEOPLES RIGHTS ACT 1997, PHILIPPINES

In the final chapter Peter Walpole and Dallay Annawi discuss the history of the marginalisation of indigenous peoples in the Philippines, efforts to have their rights recognised by the State, the process of drafting the Indigenous Peoples Rights Act (IPRA), salient points of the IPRA, and opportunities, gains and challenges after 10 years of the Act's implementation.

The authors explain that the marginalisation of indigenous peoples after independence was driven by the State's disregard for their ownership and rights to their territories and resources. Marginalising forces included widespread logging, mining, and crop plantations, the development that these and other infrastructure projects such as roads and dams brought, and the increasing landless labour force that sought land in post logging areas.

Through advocacy, armed struggle, social organising and mobilisation, legal battles, and the activities of formal and informal indigenous people's fora, the rights of indigenous peoples received some recognition in the 1987 Philippine Constitution and subsequent environmental policies and laws. These efforts culminated in the enacting of the IPRA in 1997, which legislates the rights of indigenous peoples to their territories, indigenous culture and self-determination, and puts in place mechanisms for the exercise of these rights. Limitations to indigenous people's rights include the recognition of property rights that predate the IPRA.

Reactions to the IPRA were mixed, with some considering it a landmark in the legislation of indigenous people's rights and others rejecting it altogether. Not all indigenous people's groups participated in the consultation process behind the legislation.

Walpole and Annawi analyse the mechanisms created by the IPRA, namely the National Commission on Indigenous Peoples (NCIP), Certificate of Ancestral Domain Title (CADT), the principle of free prior informed consent (FPIC), and the ancestral domain sustainable development and protection plan (ADSDPP). The National Commission on Indigenous Peoples (NCIP) is the government agency mandated to ensure that the IPRA is understood. It has been troubled by a lack of budget and technical capacity, and struggles with its contradictory roles as representative of both the state and indigenous peoples. The CADT provides indigenous peoples with tenurial security, and this recognition of ancestral claims is encouraging some indigenous communities to regain control over their lands and forest areas. Both positive and perverse outcomes have been observed, with the latter often arising because of a lack of capacity building support for ancestral domain management. The principle of FPIC has proved challenging to implement for many reasons including: inadequacy of customary laws and practices to deal with demands and threats on traditional leaders; weakening of traditional leadership by government and companies who "install" new leaders that favour their interests; and a lack of transparency and participation in some traditional decision-making processes. The ADSDPP provides indigenous peoples with the opportunity to engage in a planning process to negotiate their rights and interests in their resources and territories. However, the authors explain that the guidelines are elaborate and arduous, and indeed disempowering to indigenous communities with low levels of literacy. They call for the NCIP to show flexibility in how indigenous communities put forward their plans.

The authors point out that the implementation of the IPRA has focused on titling and less attention has been paid to strengthening the local cultures of CADT applicants. They explain that reviving or strengthening indigenous leadership institutions is one of the areas where assisting organisations are helping indigenous communities toward building or revitalising their capacity for self-governance.

1.4 CONCLUSION

The four reviews provide analysis of strikingly different laws and contexts. In India, the Forest Rights Act 2006 (FRA) provides a broad range of forest and development rights for scheduled tribes and other communities who have traditionally been living in or depending on forestland for their legitimate livelihood needs. The scope of rights covered by the Indigenous Peoples Rights Act 1997 (IPRA) is broader still, extending, for example, to self-determination, and concerns ancestral domains, rather than the narrower scope of forestlands. The draft Community Forestry Bill in Thailand provides other contrasts. The rights prescribed by the Bill are restricted and, as its title suggests, the Bill is concerned specifically with the recognition of community forestry – both within and outside protected areas. Whereas the FRA and IPRA were both enacted, the Community Forestry Bill was not. Malaysia provides yet further contrast. The main progress on rights appears to have been made through recognition by the Judiciary of usufruct and property rights created under customary law, rather than through an attempt at any new legislation. Why are there such great differences between these four countries? The reviews suggest possible answers but these are not entirely convincing; e.g. strong opposition from elements of government and "dark green" NGOs in Thailand, but similar

opposition also existed in India. Further comparative analysis is required to fully understand the differences in the progress these countries have made on legislating the rights of forest-dependent people.

Table 1.1 categorises the major developments, challenges and recommendations discussed by the experts. Their discussion shows that despite significant differences, there are many similarities in terms of experiences and messages with respect to marginalisation processes; the diversities of forest-dependent peoples; movements to place their rights on the political agenda and the challenges they have faced; the rapidly changing economic and social contexts that they are both part of and attempting to come to grips with; as well as the challenges of implementing laws that assign rights to them.

One striking message from these reviews is that when progress has been made in legislating the rights of forest-dependent people to forest land and resources, *time*, *flexibility*, and *resources* are then needed for them to claim and effectively utilise these rights. Learning, capacity building and in some cases the strengthening of local institutions is required before forest-dependent local communities can engage in an empowered manner in formal processes to claim their rights and to plan for utilising these rights. When time and resources are inadequate, or the approach is rigid, local communities are vulnerable to manipulation by external actors and there is potential for internal and external conflict, none of which is conducive to the wise stewardship of forest resources.

TABLE 1.1 **Comparison of regulatory initiatives**

COUNTRY	INDIA	MALAYSIA	THAILAND	PHILIPPINES
	Forest Rights Act 2006	No specific initiative, but rights found in Constitution and existing laws	Draft Community Forestry Bill 2007	Indigenous Peoples Rights Act
ENTRY INTO FORCE	1 January 2008	-	Effectively lapsed	22 Nov. 1997
MARGINALISATION PROCESSES	*Colonial period* ◎ "survey and settlement" process (shifting cultivation not recognised) ◎ Forest protection and land development laws/policies (land tax) ◎ Hunting rules favouring elites *Independence period* ◎ Wild Life (Protection) Act 1972 ◎ Forest Conservation Act 1980 ◎ Displacement by development projects ◎ Use of judiciary to increase forest protection	◎ No comprehensive exercise to map extent of native boundaries carried out = boundaries of native customary land often matter of dispute ◎ Inadequate recognition of land rights of nomadic people ◎ Paradigm of reducing dependence of forests in the name of development, etc.	◎ "highland colonisation" ◎ Logging ◎ Failure to recognise citizenship ◎ National Forest Reserve Act 1964 declaring all land "without occupation" reserved forest	*Colonial period* ◎ "Regalian Doctrine" ◎ Land registration *Independence period* ◎ Presidential Decree 705 ◎ Philippine Mining Act 1995 ◎ Policies allowing commercial logging, mining & crop plantations & the in-migration of landless lowlanders
FORERUNNERS	◎ Social forestry (1970s) ◎ Joint Forest Management (stemming from 1988 Forest Policy) ◎ Panchayat (Extension to Scheduled Areas) Act 1996 ◎ Legislative interventions	*Examples of Acts of Parliament legislating rights of indigenous peoples* ◎ Aboriginal Peoples Act 1954 ◎ Schedules of the National Land Code ◎ Protection of Wild Life Act 1972 ◎ National Forestry Act 1984 *Examples of State enactments legislating rights of indigenous peoples* ◎ Customary Tenure (Lengkongan Lands) Enactment (N.S. 4/1960) ◎ Customary Tenure (Negeri Sembilan) Enactment (F.M.S. Cap. 215), etc. Note: Others for Sabah and Sarawak	◎ *Sithi Tham Kin* certificates providing usufructuary rights ◎ *Sor Por Kor* certificates allowing farming in reserved forests ◎ Legislation enabling "participatory forestry", e.g. Cabinet Resolution providing for the Royal New Forest Village Project	◎ 1909 ruling on the case filed by Mateo Cariño ◎ 1987 Philippine Constitution ◎ Local Government Code 1991 ◎ National Integrated Protected Areas System ◎ Community-Based Forest Management ◎ Special Task Force on Ancestral Lands created in 1990 ◎ Various Administrative Orders
MOVEMENT BEHIND LEGISLATION	◎ History of popular struggle opposing forest-related legislation ◎ Lobbying of Parliamentarians and Prime Minister's Office	◎ No amendment of statutes, but progress made through recognition by Judiciary of usufruct & property rights under customary law ◎ Precedents include: *adat* provides rights to foraging, hunting & fishing on land that was not being cultivated; Rights extend to proprietary rights to the land for aborigines' cultivated land	◎ National-centred (conservation orientation), community-centred and government-centred groups involved	◎ Decades of armed struggle, advocacy, social organising & networking, legal cases and dialogues in encounters among indigenous peoples, civil society, government & private corporations ◎ Lobbying by indigenous peoples representatives, NGOs & church-based groups, along with Dept. of Environment & Natural Resources

COUNTRY	INDIA	MALAYSIA	THAILAND	PHILIPPINES
ASPECTS OF LAW MAKING	◎ Efforts by Ministry of Tribal Affairs, Ministry of Environment & others to dilute Bill ◎ Various changes introduced after review by Joint Parliamentary Committee ◎ 9 writ provisions challenging the Act	◎ General failure of parliamentary democracy to provide adequate assurances to forest-dependent minorities ◎ Changes to existing legislation constrained rather than expanded rights of forest dwellers ◎ Reforms have generally not occurred through the political process	◎ 1st draft approved in principle by Cabinet in 1992 ◎ New draft demanded by "dark green" NGOs & forestry officials ◎ Various drafts of bill produced over subsequent years ◎ Passed by interim Parliament, 2007, but subsequently effectively lapsed	◎ Consultations limited by time & resources ◎ Lawmakers inserted contentious points that watered down the bill, resulting in "an acceptable compromised version"
TARGET GROUP	◎ Schedule tribes (STs) and other communities traditionally living in or depending on forestland ◎ Rights assigned on individual or community basis	◎ "aborigines", "natives", etc.	◎ Communities outside protected areas ◎ Communities residing inside a protected area before it was declared	Indigenous Cultural Communities/ Indigenous Peoples
RIGHTS ASSIGNED	Inalienable legal titles, deeds and entitlement *Examples* ◎ Hold and live in forest land ◎ Community rights such as *nistar*, fishing, grazing, etc.; protect, regenerate, conserve, or manage any community forest reserves ◎ Collection, use disposal of minor forest products ◎ Right of access to biodiversity, & community rights to intellectual property ◎ Rights to rehabilitation in case of illegal eviction ◎ Rights to development facilities –schools, hospitals, etc. ◎ Free prior informed consent before development or resettlement	Rights in Constitution & various acts ◎ E.g. Special provisions provided in the Constitution for indigenous peoples, e.g. provision for protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula. Constitution allows for persons to be appointed to the Senate who are "capable of representing the interests of aborigines"	◎ Limited logging rights outside protected areas (PAs) ◎ Use of non-timber forest products	◎ Rights to ancestral domains covering ownership, access control over the lands water bodies & the natural resources therein ◎ Priority rights in the harvesting of benefits of natural resources ◎ Rights to determine & pursue economic, social and cultural development priorities, etc.
RESTRICTIONS/ QUALIFICATIONS	*Examples* ◎ Rights cannot be transferred, bought or sold ◎ Potential to restrict of modify rights in "critical wildlife habitats" ◎ STs have been residing in or dependent on forests prior to 13 Dec. 2005; 3 generations rule for other forest dwellers ◎ No more than 4 hectares per claim ◎ Claims restricted to land under occupation	-	◎ In PAs, communities must have settled before declaration of PA, etc. ◎ PA must not be specially reserved for protection, etc. ◎ Logging in PAs prohibited ◎ Logging outside PAs only on needs basis	◎ Recognition of property rights that predate IPRA or approved prior to IPRA effectivity

COUNTRY	INDIA	MALAYSIA	THAILAND	PHILIPPINES
IMPLEMENTATION MECHANISM	◎ "multi-layered process of various authorities": *gram sabha* as well as committees at the sub-district, district, and state level	-	◎ Community Forest Policy Committee, Provincial Community Forest Committees, Community Forest Management Committee	◎ National Commission on Indigenous Peoples (NCIP), Certificate of Ancestral Domain Title (CADT), the principle of free prior informed consent (FPIC), & the ancestral domain sustainable development and protection plan (ADSDPP)
IMPLEMENTATION CHALLENGES	◎ Deadlines for claims too short ◎ Interference of the state in the election of *gram sabhas* and verification of claims ◎ Inadequate review of claims ◎ Varying capacity of groups to lodge claims ◎ Claims by nomadic populations ◎ Takeover of land once claims settled ◎ Realisation of development rights ◎ New encroachment by people expecting regularisation under the Act ◎ Most claims filed for individual rather than community rights		◎ Highly bureaucratised process for approving & regulating community forests ◎ Powers of Community Forest Management Committees inadequate ◎ Highly restrictive in terms of the residency qualifications as well as rights to harvest timber & agriculture	◎ Divisions within & between indigenous groups ◎ Influence of claimant process by powerful individuals ◎ Overlapping / conflicting laws ◎ Delineation process fraught with bottlenecks in bureaucratic & legal hold-ups ◎ NCIP shortage in budget and technical capacity; inadequate trust of NCIP ◎ Strategy of defining ancestral domains along political-administrative units in the Cordillera ◎ Level of understanding of local government units ◎ Lack of indigenous people's capacity to participate in formal processes ◎ Erosion of traditional leadership ◎ Lack of incorporation of ADSDPPs into local land use plans ◎ Lack of mechanism to ensure meaningful free prior informed consent processing
RECOMMENDATIONS	◎ Civil society to track implementation & build capacity ◎ Amendments needed ◎ Additions & revisions to the implementation rules needed ◎ Independent monitoring mechanism ◎ Inclusion of environmental & social groups in sub-divisional, district and state committees ◎ Clarification on relationship with conservation laws	◎ Further study on *adat* as part of Malaysia's legal framework	◎ Replace narrow focus on community forest with a more comprehensive landscape approach ◎ Consider forest rights in the context of claims for wider citizenship rights	◎ Simplification and streamlining of permit system ◎ Revisit complicated ADSDPP guidelines ◎ Strengthen local cultures of CADT applicants & revitalise indigenous leadership institutions ◎ Support for livelihoods beyond forest management ◎ Create incentive & financing schemes for forest's ecological services ◎ Review & harmonise environment & natural resource laws ◎ Capacity building of NCIP ◎ Partnerships with civil society and with local government units

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FORESTS, RIGHTS AND CONSERVATION: FRA ACT 2006, INDIA

CHAPTER 2

Ashish Kothari, Neema Pathak and Arshiya Bose, Kalpavriksh, Pune/Delhi, July 2009

2.1 Introduction

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 (hereafter called the Forest Rights Act or FRA) is one of the most controversial pieces of legislation to emerge since India gained independence. Born out of popular struggles of tribal (indigenous) peoples and their supporters, the FRA has caused considerable and often violent debate amongst activists, academics, government officials and others. This paper attempts to assess:

- the implications of the FRA for conservation and people's rights and livelihoods,
- the ways in which different actors have shaped the FRA, including the extent to which tribal peoples have been involved, and
- the problems and prospects of the FRA's implementation.

This paper first describes the extent and types of dependence that communities have on India's forests. It then provides a brief history of policy and legislation relating to forest and wildlife. The discussion next turns to the key provisions of the FRA and its history and background. How the FRA has changed from its first version as a Bill up to its final version as an Act is also assessed. The final section considers the implications of the FRA on livelihoods and conservation.

2.2 FOREST-BASED LIVELIHOOD DEPENDENCE IN INDIA

Forest biodiversity and resources have supported the livelihoods and lives of forest-dependent people in India for thousands of years. Animals and plants have been worshipped and play a central role in various cultures and traditions. Forests, rivers, mountains and lakes have been seen as the abode of gods. Many Indian communities have protected forest patches dedicated to deities and ancestral spirits as sacred groves. Even today many sacred groves still provide a refuge to several endangered and threatened species of flora and fauna (Malhotra et. al. 2001).

As much as 72% of the total population of India lives in rural areas (Bose 2001) and is directly dependent on terrestrial and aquatic natural resources for its food, health, shelter, and diverse livelihood systems. This population includes both *adivasi*[4] (tribal) and non-*adivasi*

4. The term *adivasi* means "original inhabitant" and is used in reference to what can broadly be called India's indigenous or tribal peoples. The more specific term "scheduled tribes" is used for those who have been listed in the Constitution of India, using broad cultural and political criteria, and being accorded special privileges. To put the amount of money pledged to FCPF and UN-REDD in perspective, the Eliasch Review (2008) estimated that capacity building in 40 forest nations could cost up to US$4 billion over five years.

communities, comprised of settled farmers (mostly small and marginal), shifting cultivators, pastoralists, fishers or artisans. The economic and occupational profile of the country is predominantly agrarian – 58.4% of the employed population works in agriculture, animal husbandry, forestry, fisheries, and related occupations. In particular, produce from forests such as fuel wood and non-timber forest products (NTFPs) contributes significantly to household subsistence and income for people living in or adjacent to forests. An estimated 147 million villagers live in and around forests and another 275 million villagers depend heavily on forests for their livelihoods. Additionally, 170,000 villages with a total population of 147 million have forestland within their village boundaries (FSI 2002). Livelihood security for this segment of the population is critically linked to both ecological security and the security of access to, and control over, natural resources. The sustainability of such livelihoods requires a sustainable natural resource base, since land, water and biodiversity are their very foundation (Kocherry 2001 in TPCG and Kalpavriksh 2005).

Despite these realities, a lack of tenurial security over forestland and access to forestland for gathering, pasture, shifting cultivation and pastoralism remains a major source of livelihood insecurity (Kothari 2001). Since independence in 1947 well over 60 million people have been displaced by large development projects (such as hydroelectric dams, mines and other industrial projects) and wildlife protected areas (Mathur 2008). Comprehensive figures for displacement from protected areas are not available; some social activists claim that in the past five years, 300,000 families have been evicted from protected areas alone (NFFPFW 2007), while other estimates are more in the range of 100,000 families displaced over the last three or four decades (Lasgorceix and Kothari 2007). More critical than physical displacement however, is the heavy restriction on access to forestland and resources, resulting in at least three million forest-dependent people becoming amongst the most marginalised in the country (Wani and Kothari 2007).

2.3 HISTORY OF FOREST AND WILDLIFE LEGISLATION, AND RESOURCE ALIENATION OF FOREST-DEPENDENT COMMUNITIES

2.3.1 BACKGROUND

The history of forest-dependent, tribal and non-tribal communities in India is rife with experiences of exploitation by "invading" communities. This has been in the form of pre-colonial rulers and their representatives, traders, colonial government agents, or the post-independence state agencies and corporations.

Prior to the early 19th century in most parts of India the land and natural resources were more or less the property of big landlords (*zamindars*/*jagirdars*) or local rulers. Simply put, these rulers were mainly interested in the taxes that could be collected from these areas and the day-to-day management was largely left to the people who lived and depended upon these locations. Their deep cultural, economic and political relationships with the surrounding resources led to the development of intricate systems of management, including the development of rules, regulations and institutions. Private ownership of land was much less important than community use and management of resources. In fact there were many tribal communities, particularly

practicing shifting cultivation or hunting gathering, who had nearly no concept of individual land ownership.

British colonisation of India in the early 19th century is seen as a period of sea-change in the way land, resources and people were viewed by the state. The colonial government's primary interest was to generate as much revenue as possible through collection of taxes on privately owned resources and state extraction of resources from lands which were not privately owned. The most organised and catastrophic waves of dispossession that millions of people in India had to face were the enactment of forest and conservation related laws in pre- and post-independent India. Management of natural resources that excluded local people was endorsed by the colonial government in the 19th century. In the 1800s, the colonial government started the process of "survey and settlement," which essentially meant documenting the land that was under the private ownership of individuals and state takeover of the rest of the land and resources (Rangarajan 2000). This process completely ignored the world view of the communities who managed land and resources largely as common resources belonging to the entire community rather than individuals.

A centralised bureaucracy in the form of the Forest Department was established for the administration of forest resources. The Indian Forest Act was enacted first in 1865 (revised subsequently in 1878 and 1927; the latter revision remains current). It provided for conversion of forests into reserved forests, protected forests and village forests. Reserved forests and protected forests were both controlled by the state. The laws and their implementers clearly exhibited a distrust of the local people who they mostly viewed as encroachers or the primary destroyers of government forests. The forests were to be protected from the people for state use and commercial exploitation (Apte and Pathak 2003). It was during this period that regions such as Kumaon and Central India saw "uprisings as huge tracts of forests were declared "reserved" for use by the colonial regime" (Nagarwalla and Agrawal 2009). Most such uprisings were either brutally suppressed or pacified through piecemeal solutions.

Once the reserved forests were declared, the colonial government claimed that they had settled all the rights that existed in those forests. This meant that the communities that lived in and around these forests had severely regulated rights (those that the government found acceptable, which varied from province to province), or no rights at all, to use and manage these resources. Communities, however, continued to exist in these areas (unless forcefully removed) and remained dependent on forest resources. A substantial part of this resource use continues to be technically illegal.

Forest clearance was also aggressively encouraged by the colonial government to extract as high a tax return from cultivated land as possible and for counter-insurgency in order that the Indian revolutionaries would not have cover to hide (Rangarajan 2000). It was even suggested that landlords not clearing jungles and sheltering "destructive wild animals" should be punished (Datta 1957). The large-scale denudation was to have serious implications for both the ecology and livelihoods of the forest-dependent people. Although the British rulers had a grudging respect for the tribal communities in India, particularly their hunting and gathering skills, they were opposed to shifting cultivation mainly because it had an impact on tax collection (i.e. tax could not be collected because the exclusive ownership of land could not be attributed to individuals) (Rangarajan 2000). As this kind of agriculture was not officially recognised, in many areas communities practicing shifting cultivation were never entered in the settlement records and were (and still are) considered illegal occupants of their traditional lands.

Another practice that had implications for forest-dependent communities was the hunting of wild animals by elites. This existed prior to colonial rule but gained further momentum through the policies of the British. Towards the end of the 19th century hunting was one of the predominant sports for the Indian elites and British military and civil men. Although hunting for food was common among the peasants and hunter gatherer communities, it was the impact of the sport hunting by the elites that eliminated the last of the Indian cheetahs and reduced the populations of numerous wild birds and mammals to the status of threatened.

From the 1880s onwards attention began to be paid towards the decreasing numbers of wild animals. Official circles began to discuss ways in which some wild animals could be protected. However, this attention reflected the same attitude as was shown towards other natural resources. Answers to what needed to be protected, how and from what, were formulated from the point of view of the colonial government and its royal allies. There was a strong condemnation of local hunters and trappers as their entry was linked with forest fires that endangered valuable trees. Forest rules were put in place which provided penalties for illegal access, limited the time and amount of hunting, and prohibited the use of snares, traps, bows and arrows, and spears which the local inhabitants relied upon. If any animal was declared a vermin, it was only the license holders who could hunt the animal (ibid.). More and more areas were declared game reserves, restricting the access of communities such as *pardhis*[5] and other tribes so that elites could hunt during the hunting season. Game rights were put up on auction as was access to fish in ponds and streams in the state forests. Restrictions on entry into shooting blocks affected those who gathered twigs and branches for fuel, herbs for medicine, grass, and bamboo for baskets or small articles for sale.

Carnivores were extensively killed as they impacted the populations of deer, which the elites wanted to hunt. With populations of carnivores declining, herbivore populations increased causing serious crop damage. In many places, bamboo, vital for livelihoods and cultural activities, was eliminated in favour of economically valuable species and restrictions were imposed on shifting agriculture. Forest fires, which were used for keeping away wild animals or for agriculture, were heavily controlled since they were perceived as causing damage to commercially valuable crops. As a result, by the end of the 19th century the landscapes which held tremendous cultural, economic and political value to forest-dwelling communities were appropriated by a select group of society (ibid.).

By the early 20th century another interest group was emerging from amongst the government officials and the Indian elites. This group was concerned about the depletion of populations of wild animals, such as rhinoceros. These emerging conservationists[6] were most critical of sport hunting. Some threatened species were declared protected while others could still be hunted. The declaration of areas protected for wildlife conservation began during this period. In 1935, Hailey (now Corbett) National Park became the first protected area to be declared in India. Declaring protected areas, while understandable from a purely conservationist point of view, meant no presence of, or use of resources by, local communities, thus further dispossessing thousands of peasants and tribal communities who lived in these areas. In this sense, while differing from earlier game reserves that allowed rulers and those they favoured to hunt, modern protected areas were a continuation of the ideology of exclusion of local communities.

From this period on, the legislation and policies related to forests evolved mainly in two

5. Mobile hunting community.
6. The term 'conservationist' has been used in this document to include those individuals and groups who explicitly prioritise wildlife protection. This is not to imply that those advocating *adivasi* rights, or development rights, are necessarily unconcerned about or averse to wildlife protection.

streams, one dealing with forests outside of protected areas and the other with areas protected for wildlife. In the following section we examine these two streams separately.

2.3.2 FORESTS OUTSIDE PROTECTED AREAS

Apte and Pathak (2003) explain the two trends described above as follows:

> (a) the take-over of forests by the state for commercial use and (b) an exclusionary model of natural resource management – were reflected in the legislation of the time, and a similar mindset carried on after Indian independence. The first and much quoted national forest policy of 1952 revealed what was to be the government's stance on the rights of forest-dependent communities over the next three decades, stating that "The accident of a village being situated close to a forest does not prejudice the right of a country as a whole to receive benefits of a national asset." In 1976, the National Commission on Agriculture stated that "Production of industrial wood would have to be the *raison d'etre* for the existence of forests."
>
> From the 1950s to the 1970s India's industrial expansion relied heavily on commercial timber exploitation. Natural forests were replaced with commercial plantations and forest land was also diverted to development projects and agriculture. By the 1970s deforestation was occurring at a rate of 1.3 million ha per annum. According to government statistics this rate has slowed since then, [due to a number of measures including the enactment of the Forest Conservation Act 1980, which required state governments to seek central government permission before allowing any diversion of forests.] However, the quality of natural forest ecosystems continues to deteriorate. It is estimated that 45% of India's land is "wasteland,"[7] half of which includes degraded state forestlands. This amounts to about 61 million ha of degraded forests. Meanwhile, plantations have expanded at a rapid pace, rising from three million ha in 1980 to 13 million ha in 1990 (Poffenberger 2000). Wood-based industries such as packaging, paper mills, agricultural implements, and railway construction expanded rapidly, and by the 1970s and 1980s there was a perceptible shortage of raw material (Apte and Pathak 2003).

Facing a severe shortage of raw material for the wood-based industry, the Forest Department started a "social forestry" scheme in the 1970s. The adoption of social forestry was also to a certain extent an outcome of the struggle for alternative forms of natural resource management and community control over resources by a number of local level and voluntary organisations (Asher and Agrawal 2007). Social forestry focused extensively on large-scale plantations of fast growing, mostly exotic species. The intention was to facilitate private-industry relationships by encouraging farmers to grow fast-growing species for industrial use. Similar plantations were also established on public and common lands to meet the fodder and fuel subsistence needs of village communities (Apte and Pathak 2003). It was expected that this would reduce pressure from local needs on the government forests which could then supply industrial needs. Social forestry in different states was supported by a large amount of foreign funding from donors such as the World Bank, Swedish International Development Agency, Canadian International Development Agency, United States Agency for International Development, Danish International Development Agency, and the Overseas Development Administration. Sundar et al. (2001) report that during the 1980s there were 14 social forestry projects across 14 states, costing INR 994 million. They argue that "while social forestry was particularly successful in achieving the target number of trees planted and meeting industrial demand, it did not satisfy local requirements of fuel and fodder" as the focus was on "quick growing timber for commercial purposes" (ibid.). Eventually the

7. This is a problematic and often deceptive term originating from the colonial regime labelling non-private lands that did not yield any revenue as the "wastes."

scheme collapsed as many donors, faced with the criticism that social forestry subsidised industry and caused a fall in timber prices due to increased supply and badly planned marketing strategies, withdrew support (Apte and Pathak 2003). Another criticism was that social forestry focused heavily on land owners while the people most dependent on forests were the marginalised communities, particularly the landless.

Apte and Pathak (2003) describe two outcomes of the "colonial approach to managing forests, carried on by the Indian state," as follows:

> First, it severely restricted the access of locals to resources on which their livelihoods were based, and second, it effectively removed all responsibility of communities to look after their natural surrounds. Thus, local people have often become hostile to official management and protection of forests because the law has excluded them from their own surroundings. While communities have never stopped using forests unofficially, since their livelihoods depend on this, they have suffered much hardship, for example having to bribe forest staff in order to collect fuel wood, and facing harassment from guards who threaten action against them. In many cases, they viewed forests as the property of an insensitive government, something to be used and exploited, often with great hostility towards FD [Forest Department] officials. A lack of dialogue and trust between the two sides has exacerbated the problem. Local hostility has manifested itself in many ways, including non-cooperation, deliberate destruction of forests and violence against [people by the] officials and against officials by people. Such instances, along with the alarming degradation of India's forests, led to the government becoming increasingly aware that it was not possible to protect millions of hectares of forest without the co-operation of local communities.

Numerous national level grassroots struggles demanding rights over forests, environmental NGOs seeking forest protection, and some amount of donor-driven international pressure resulted in a change in the government's stance towards forestry by the 1980s. The idea of greater devolution of powers to local communities began to seep into debates related to forest management and into the thinking of the decision-makers. For the first time, the 1988 Forest Policy noted that "domestic requirements (of forest dwellers) of fuel wood, fodder, minor forest produce and construction timber should be the first charge on forest produce… A primary task of all agencies responsible for forest management… should be to associate the tribal people closely in the protection, regeneration and development of forests" (Poffenberger 2000).

Apte and Pathak (2003) describe the emergence of Joint Forest Management during this period:

> The 1988 Forest Policy formed the basis of Joint Forest Management (JFM), a government programme designed to share benefits with local communities in exchange for helping to protect forests near their villages. It was announced in 1990, and over the next few years almost every state in India passed JFM resolutions. In a nutshell, JFM is the [regeneration], management and conservation of a forest by local communities and FD [Forest Department] officials, through appropriate joint committees. Under JFM, village communities are entitled to a share in usufructs, but the extent and conditions of the sharing arrangements is left to individual state governments to prescribe. If forests are successfully protected, a portion of the sale proceeds [supposedly] goes to the communities as well. . . . All adult voters in a village make up the [general assembly of the Forest Protection Committee] FPC[8] [or the *Van Suraksha Samiti* (VSS)], while decisions and management are carried out by an executive committee made up of a few elected villagers and a forest official as the secretary. . . . As JFM has progressed, many state level JFM resolutions

8. In some cases the Forest Protection Committee includes only one representative per household, and a minimum participation of 50-60% of households can suffice.

have undergone continuous evolution in order to fine-tune the programme (Apte and Pathak 2003).

Satellite imagery from the past few years shows that JFM has been a success in "regenerating and conserving forest areas in several parts of India" (Apte and Pathak 2003). As of 2007, 22.09 million ha spread over 27 states were being managed through 106,479 JFM committees (MoEF 2008). However, many groups working on JFM have expressed concerns about "the lack of real sharing of decision-making powers with the local communities" (Apte and Pathak 2003), including the fact that the member-secretary continues to be a Forest Department staff member. Additionally, even after 20 years JFM remains under-prioritised as a participatory method of forest management in the country. JFM continues to be dealt with as a project heavily dependent on external funds for its execution and hence the force with which it is implemented depends on the availability of these funds. Among many other criticisms of JFM has been that the JFM committees are still not legal entities so in case of conflicts they have no legal support. JFM also does not grant any legal rights or long-term tenurial security on common resources to the communities. The communities in many states, even after decades of protection, have not received their promised share of profits and there is little that they can do to force the government to keep its promises.

Overall, it can be said that in some states where people's rights over resources were totally extinguished through earlier state actions, JFM did provide an opportunity for them to be part of the system of forest utilisation and management. However, in the states where indigenous systems of forest use and management had survived, JFM led to more conflict as it proved detrimental to community interests because it has been imposed upon the existing community management institutions, which sometimes have better legal status than the JFM committees (Sarin 2001a).

Despite the new forest policy and an increased awareness of the state of forest degradation, in the zeal to develop in the post-independent India, the forests continued to be overexploited. According to the Forest Survey of India, between 1951 and 1981 4.238 million ha of forest land was diverted to non-forest use. Increasing demand on forest resources for industrial and local use, breakdown of local systems, lack of tenure security for the users of the resources, and corruption within the Forest Department resulted in further degradation of the remaining forests. This situation led to the enactment of the Forest Conservation Act in 1980, which restricted forest use rights for non-forestry purposes. Under this legislation it became mandatory for private as well as government parties wishing to divert forest land for any large or small development project to obtain "forest clearance" from the Ministry of Environment and Forests. This requirement slowed the pace of diversion of forestlands for environmentally destructive projects. The Act also further curtailed access to forests for NTFPs, fuel and fodder by local communities and also halted the regularisation of existing "forest lands" that were already under occupation (Asher and Agrawal 2007). The centralising nature of the Forest Conservation Act has remained a point of debate; while some favour it for having slowed down the pace of deforestation (though, as we point out below, this is being reversed in the current phase of economic globalisation), others criticise it for causing further alienation of local communities.

Albeit at a slower speed, forests continued to be cleared for large projects such as dams, mines, industries and highways. These projects also caused the eviction of thousands of people, many of whom were compelled to settle in forests in the absence of adequate (or often any) rehabilitation.

2.3.3 AREAS PROTECTED FOR WILDLIFE AND EMERGENCE OF WILD LIFE (PROTECTION) ACT

The history of wildlife protection after independence featured the following events. In 1948, the then Prime Minister, Shri Jawaharlal Nehru, wrote to authorities in Junagadh to take steps to protect lions, which had until then been protected by the Nawab of Junagadh, who had fled to Pakistan post-partition. One of the better known provincial acts on wildlife, the Bombay Wild Birds and Animals Protection Act, was passed in 1951. Also in 1951, the advisory committee for coordinating scientific work in India appointed a committee of leading sportsmen and wildlife enthusiasts "to examine and suggest ways and means of setting up National Parks and sanctuaries for the conservation of the rich and varied fauna in India." This led to the setting up of the Indian Board for Wildlife in 1952. Despite these measures, the 1950s and 1960s continued to see a decline in Indian wildlife. Consequently, in a process starting from the late 1960s, under the patronage of India's then Prime Minister, Mrs. Indira Gandhi, a process for drafting a comprehensive wildlife legislation was undertaken. This resulted in the promulgation of the Wild Life (Protection) Act 1972 (WLPA).

India currently has over 600 protected areas covering about 4.6% of the country's total landmass. The WLPA has served to protect vital ecological habitat and threatened species of plants and animals, particularly from development projects. However, this Act is based on a number of assumptions that are a continuation of colonial attitudes: that any local community use is detrimental to wildlife, that only a centrally-trained bureaucracy can protect forests, and that local knowledge and practices of ecosystem management are of no use in "modern" wildlife conservation. As a result, the WLPA also led to land and resource alienation for many communities. National parks (which by law do not allow for the continuation of rights or settlements within them) and some sanctuaries physically displaced villagers. With no provisions for people to participate in their conception and declaration, protected areas were created without information delivery or consultation. People often found out about the changed status of their area indirectly as a threat of being evicted by the local forestry staff, or because they were suddenly stopped from accessing local resources.

The WLPA was amended in 1991 when Section 24(2)(c)[9] was added, which specified that rights can continue in wildlife sanctuaries, if specifically allowed to do so in the process of settlement of rights. Despite this provision, there has been considerable conflict between protected area administrators and local communities. This is primarily because of selective and often arbitrary stoppage of rights, long delays in settlement of rights, non-provision of alternatives while stopping or curtailing rights, and the assumption that eventually all rights have to be extinguished in a protected area, irrespective of their impact on the area.

In another amendment section 26A(b) of the Act specified that the settlement of the rights process would not be required for a reserved forest to be declared a protected area. The assumption here is that settlement was carried out when the area was designated a reserved forest (the procedures for which, under the Indian Forest Act, are the same as those under the WLPA). In reality, as explained above, rights continued to exist either in recorded or unrecorded (and therefore "illegal") form within reserved forests; these were ignored in the automatic transformation of reserved forests into sanctuaries. Because of its exclusionary clauses, the WLPA has come to be seen as an anti-people Act and has evoked an aggressive reaction from local people. An

9. Sec 24(2)(c): "If such claim is admitted in whole or in part, the collector may allow in consultation of any right of any person in or over any land within limits of the sanctuary."

increasing number of state governments are finding it difficult to declare protected areas, while the denotification of protected areas often has popular support.

In a third amendment in 2002 the WLPA specified that, between the time a state government notifies its intention to declare a sanctuary and the settlement of people's rights, it "shall make alternative arrangements required for making available fuel, fodder and other forest produce to the persons affected in terms of their rights as per the Government records." This implied that such rights were to be stopped as soon as a sanctuary is *intended* to be declared and that they would not continue after settlement. This is in contradiction to Section 24(2)(c) which specifically allows continuation of rights. This was a completely unrealistic provision and understandably could not be implemented anywhere. The 2002 amendment also banned commercial use of any of the forest produce.

As the situation in the affected areas became more complex and the management of protected areas more difficult, the government resorted to a solution for protected areas similar to JFM in forests outside protected areas. A scheme labelled "eco-development" was initiated in 1990 which aimed at eliminating the dependence of people on forests by creating alternative sources of income. In 1997-2002, with World Bank funding, an eco-development programme was implemented in seven protected areas across the country. However, there are few examples where eco-develoment has been successful in reducing pressure or conflicts. Periyar Tiger Reserve in Kerala is one of the few (Kothari and Pathak 2004), but its success has depended on the innovative way in which local staff have used the project, rather than something inherent in the project design. Indeed, the eco-development approach has remained largely within the conventional bounds of top-down conservation, with little or no involvement of local people in protected area management, no reinforcement or granting of traditional resource rights, and little encouragement of traditional resource conservation practices or knowledge.

In 1992, a radical legislation was enacted, namely the 73rd Amendment to the Constitution. This Act gave greater decision-making powers to the Panchayati Raj Institutions (PRIs) (i.e. urban and rural local self-governing bodies). One of the strong recommendations of the Act was that the management of social forestry, fuel wood plantations and NTFPs needs to be decentralised to PRIs. The Act was extended to scheduled (i.e. tribal dominated) areas by the Panchayat (Extension to Scheduled Areas) Act 1996 (PESA) (Sarin 2001b). This Act states, "every *gram sabha* (village assembly comprising of all adult members of the community) shall approve the plans, programmes and projects for social and economic development before such plans . . . are taken up for implementation by the Panchayat at the village level." The PESA also mandated that through *panchayats* and *gram sabhas* local communities are given ownership of NTFPs and are consulted before any developmental projects are approved for the area.

Considering that the PESA was meant for scheduled areas, which are mainly inhabited by forest-dependent tribal and non-tribal communities, this legislation could have been significant in shaping the management of natural resources by communities. However, there was nearly no political will to implement it. Most states in their legal adaptations of the Act went against its spirit by excluding community ownership over the most valuable NTFPs, such as tendu patta (leaves of *Diospyros melanoxylon*) and bamboo. Nationalised forests and protected areas were also excluded from the jurisdiction of the Act by most states. It also contradicted other policies and laws, e.g. in areas where both JFM and PESA applied, it was unclear what the relationship between the two should be (Pathak 2002). Apte and Pathak (2003) note that "while PESA allowed for community based forest management by *gram sabhas* in tribal areas, JFM established village Forest Protection Committees under the

supervision and control of the Forest Department."

2.3.4 EMERGENCE OF THE JUDICIARY

The judiciary in recent times has become one of the main tools to deal with the ineffectiveness of the executive, or the lack of implementation of laws and policies related to conservation.

One of the significant cases dealing with protected areas has been WWF (World Wide Fund for Nature) India Vs Union of India (WP 337 of 1995). Given the complex nature of land tenure it is not surprising that by the mid-1990s (more than twenty years after the enactment of the WLPA) the process of settlement of rights had not been completed in the majority of protected areas. Seeing this as one of the major reasons for ineffective management of protected areas, WWF-India filed a case in the Supreme Court urging it to direct states to implement the WLPA in full spirit and letter. The resulting orders had tremendous impact on the forests and protected area management across the country. In 1997, the Court passed an order directing the "concerned State Governments/ Union territories to issue proclamation under Section 21 (related to settlement of rights) in respect of the sanctuaries/ national parks within two months and complete the process of determination of rights and acquisition of land or rights as contemplated by the Act within a period of one year." States, in their hurry to finish the process, either ignored a huge number of existing rights or accepted all human uses without any process. Most states, of course, never managed to complete procedures in this time frame and indeed many are still struggling to complete them.

Legislative interventions have also been significant in forests outside protected areas. Based on a set of recommendations by the then Scheduled Castes and Scheduled Tribes Commissioner, B.D. Sharma, the Ministry of Environment and Forests (MoEF) issued a set of six circulars in September 1990 under the National Forest Policy. These circulars were progressive as they distinguished between encroachments and disputed claims; they also recommended that the *gram sabhas* could play an important role in the verification of claims. They provided that any state orders for regularisation of encroachments could be implemented (which had been stayed because of Forest Conservation Act 1980) and dealt with conversion of forest villages[10] to revenue villages[11] and settlement of old habitation.

The only states which took any significant steps towards the implementation of these circulars were Madhya Pradesh and Maharashtra (Asher and Agrawal 2007). This was largely because of very strong grassroots movements and court cases. In 1995, the Supreme Court directed that competent authorities must enquire into land claims and hear evidence from claimants, and that meanwhile, occupants should not be dispossessed of their lands.

Despite these efforts and orders, the state governments failed to implement the guidelines. Most states found the guidelines and verification processes difficult and the distinction between encroachments and disputed claims and unrecorded rights persisted. The complex situation of unrecorded rights, unregularised new encroachments, and encroachments augmented by the development projects remained.

In 1995, a petition was filed by T.N. Godavarman regarding deforestation in private forests in Tamil Nadu. This petition was heard in the Supreme Court, which, recognising the seriousness of the deforestation and ecological

10. Forest villages are villages established by the Forest Department as labour camps for forestry operations, or existing settlements within forest areas designated as such; in both cases, the village is/was entirely under the jurisdiction of the Forest Department and many government schemes or privileges accorded to revenue villages were not available to residents.
11. Revenue villages are villages under the jurisdiction of the Revenue Department, and entitled to all the government benefits, schemes, and privileges normally to be accrued to an Indian citizen.For further discussion see UNFCCC (2009).

degradation happening across the country, caused it to pass a number of orders. The first order was of tremendous consequence throughout the country. As an immediate measure, the Supreme Court stayed all forestry activities being undertaken without the prior approval of the Central government; it also directed that the "dictionary" definition of forests should be used, which considerably expanded the scope of the judgment (and consequently also the areas over which the Forest Department had some jurisdiction). Further, each state was required to form an expert committee to identify areas that were forests. A Centrally Empowered Committee was instituted to advise the Supreme Court on violations of forest-related laws. The amicus curiae filed a petition in 2001 seeking to restrain regularisation of any encroachments and further encroachments, and requested steps to clear post-1980 encroachments in all forests. The Supreme Court registered the petition and passed an interim order to stay all processes towards regularisation. In 2002, the Supreme Court directed the chief secretaries of Orissa, Maharashtra, West Bengal, Karnataka, Tamil Nadu, Assam, Madhya Pradesh, Chhattisharh and Kerala to respond within four weeks as to what steps has been taken to control further encroachment of forests and clear the existing encroachments from the forests, particularly in hilly areas, national parks and sanctuaries. In 2002, the Inspector General of Forests instructed the state governments, citing the 2001 interim order of the Supreme Court, to clear ineligible and post-1980 encroachers from forest areas, starting a wave of brutal evictions. The brutalities reportedly included trampling of crops and houses with the help of elephants and burning homesteads in many parts of the country. At the same time, based on sustained groundwork by many grassroots organisations, particularly Kashtakari Sangathana, the Maharashtra government towards the end of 2002 issued an order laying down a comprehensive procedure for verification of claims by a village level committee in consultation with the gram sabha. In another turn of events, the MoEF on 03 February 2004 issued supplementary guidelines for speeding up the process of conversion of forest villages into revenue villages. Three days later the MoEF issued supplementary guidelines to encourage the state governments to carry out settlement of rights of the tribal people and forest dwellers. The Supreme Court, however, stayed these guidelines on 23 February 2004.

Another Public Interest Litigation (PIL) filed in 1995 (merged into the ongoing Godavarman case mentioned above) had a significant impact on the lives and livelihoods of those residing in protected areas. The case was filed against the Karnataka government as it was found that some felling activities were being proposed inside national parks and sanctuaries in the name of removal of dead and decaying wood. The court passed an order dated 14 February 2000 restraining all state governments from ordering the removal of dead, diseased, dying, or wind fallen trees, drift wood, and grasses, etc. from any national park, game sanctuary, or forest (on 28 February 2000 the order was modified to remove the word "forest"). This order was subsequently interpreted by the MoEF (reinforced by the Centrally Empowered Committee) in a circular directing all state governments to cease rights within protected areas. The fact that this was a grossly erroneous interpretation has been pointed out by NGOs such as Kalpavriksh and Vasundhara, but a legal intervention filed by them requesting the Supreme Court to strike down the MoEF circular has not come up for hearing for over three years.

The result of the above order and MoEF's circular, along with relevant WLPA provisions, is a complete ban on removal of NTFPs from national parks and sanctuaries for commercial purposes (including small-scale sale) and, due to progressive curtailment of their access to forest produce for subsistence and survival income, many forest dwellers are reportedly dying of starvation or suffering from acute malnutrition (Barik 2006; Wani and Kothari 2007). The order completely ignored the fact that several million people living in and around

protected areas derive livelihood support from collecting and marketing NTFPs, which provide subsistence and farm inputs, such as fuel, food, medicines, fruits, manure, and fodder. The collection of NTFPs is a source of cash income, especially during the slack seasons, because of their increasing commercial importance. The issue of rights and access to NTFPs and incomes from NTFPs is basic to the sustenance and livelihoods of the forest dwellers.

2.3.5 PEOPLE'S STRUGGLES AND ACTIONS

In contrast to this story of deforestation and loss of community livelihoods, throughout history and today there are numerous vibrant examples of communities who have independently taken the initiative to protect forests for religious, cultural, political, economic, and other needs. Apte and Kothari (2000) provide the following description:

> The federations of forest users in Orissa are probably among the most impressive examples of large-scale community mobilisation for forest protection, with 400,000 ha of forest land being protected and managed by village communities living in an estimated 5,000 villages. Hundreds of villages in Alwar district, Rajasthan, have established a secure water regime, regenerated forests and helped to control poaching. Several of them have declared an Arvari Parliament [informal decision-making and conflict-resolution body based on traditional customs of the small Arvari River in Rajasthan] over a water catchment of 400 sq. km., with the aim of moving towards sustainable land, water and forest use. A couple of villages have declared a "public" wildlife sanctuary over a thousand hectares of forest. The villagers of Mendha (Lekha), Gadchiroli district, Maharashtra, have protected 1,800 ha of deciduous forest by warding off a paper mill, stopping forest fires and moving towards sustainable extraction of non timber forest products. In Kailadevi Sanctuary, Rajasthan, the villagers have established "no axe committees", which fine anyone caught cutting a live tree, over a large part of the sanctuary. In Jardhargaon (Tehri Garhwal, Uttar Pradesh), villagers have regenerated and protected a large stretch of forest, which now harbours leopards, bears, over a hundred species of birds and an itinerant tiger.

Despite their prevalence, conservation laws and policies or even discourses do not recognise these as important areas for conservation. Not surprisingly therefore many of these areas are critically threatened by internal and external factors including development projects, government policies, and market forces. For example the process of forest clearance for development activities does not take into account such community protected areas (Pathak 2009). Lack of recognition leads to imposition of schemes like JFM and ecodevelopment, which often end up disrupting community initiatives, as in the case of Kailadevi in Rajasthan (Das 2007).

While some areas are being cordoned off for wildlife protection, others are facing tremendous development pressures. The resource base of forest-dependent communities has been shrinking in both instances. The state's model of conservation and development has largely rejected the role of natural ecosystems in sustaining local economies. Aggressive development at the expense of nature and centralised conservation at the expense of local people has forced more and more people to share resources from even smaller areas. This has seriously impacted people's traditional systems of resource management and use, often causing inter-community conflicts. Traditional systems of management have also suffered from the takeover of land and resources by the government, negating people's rights and responsibilities towards managing resources.

The opening up of the Indian economy in 1991 and the processes of urbanisation and modernisation have put increasing pressure on forest resources, threatening ecosystems as well as the existence and livelihoods of millions

of forest dwelling communities. Laws related to environmental clearances have been systematically diluted, and in the last few years processes such as public hearings (meant to take into account the opinions of the local people) have been held in ways that are doctored to suit the project proponents. The Forest Conservation Act, once held up to be a revolutionary law for substantially reducing diversion of forest land, is now hardly an impediment to the increasing diversion of forestlands for mining, industries, and other purposes. In Jharkhand, Orissa, Chhattisgarh, Maharashtra, and other states, many *adivasis* and non-*adivasis* have lost their lives, or been repressed, imprisoned, or harassed in struggles against development projects.

Throughout the history of forest-related legislation there have been uprising and struggles of local communities opposing the legalisation. Depending on the degree of marginalisation and support received, these struggles have ranged from organised networks lobbying for change, *dharnas* (a fast), and *andolans* (group protest) to silent, unorganised non-compliance with the laws. There have been movements and agitations against the forest policy, WLPA (or protected areas set up under it), Forest Conservation Act, JFM, and the Ecodevelopment Programme. Grassroots movements have opposed loans that the government has taken from the World Bank and others for these programmes. The net result of these movements has been occasional changes in the policies or slight amendments in the existing laws to accommodate people's issues. As stated by Shankar Gopalakrishnan of the Campaign for Survival and Dignity (CSD), "amendments in the existing laws would never have taken into account people's issues as the laws are based on very different fundamentals."[12] The roots of most of the forest laws in India lie in appropriating resources for commercial use of the colonial government or the elitist views on conservation. These laws, the system put in place to implement them, and the attitudes of the decision-makers, would have to fundamentally change for the demands of grassroots groups to be accepted. Within this context, grassroots groups began to feel a strong need for a separate legislation, particularly to handle the issues of settlement of encroachments and forest rights.

2.4 DESCRIPTION OF THE FOREST RIGHTS ACT

The FRA aims to address the historical injustice done to those communities whose forest rights have so far not been legally recorded and thereby were denied their traditional rights to forestlands and resources. The Act recognises and grants forest-related rights to scheduled tribes and other communities, both who have traditionally been living in or depending on forestland for their legitimate livelihood needs. Members of scheduled tribes (in states where they are scheduled)[13] can claim rights under this Act if they have been residing in or dependent on forests prior to 13 December 2005. However, other traditional forest dwellers can only claim rights if they have been in occupation for at least three generations, i.e. seventy-five years prior to 13 December 2005. The Act extends to all of India except the state of Jammu and Kashmir (Kalpavriksh 2008 and FRA 2006).[14]

Forest rights can be claimed by forest-dwellers on an individual or community basis or both. The various rights that can be claimed are as follows:

12. Shankar Gopalakrishnan, personal interview, 14 August 2008.
13. Some scheduled tribes listed in the Indian Constitution are accorded differential status in different states, being scheduled tribes in one state but not in another.
14. Some states have declared that the Act will not be implemented in their state since all forestland is already privately owned (Nagaland) or because there are no resident traditional forest-dwellers (Haryana).

- Right to hold and live in forest land under individual or common occupation providing that
  - » the land must be for the purpose of habitation or cultivation to provide for livelihoods needs
  - » the land should be under occupation prior to 13 December 2005
  - » the land claimed is restricted to the area under actual occupation
  - » the land cannot be more than four hectares.
- Community rights such as nistar (user rights) or those used in erstwhile princely states, zamindari or such intermediary regimes.
- Right to own, collect, use and dispose of minor forest produce which has been traditionally collected within or outside the village. Minor forest produce includes all NTFP of plant origin (including bamboo, brushwood, stumps cane, honey, wax, tussar, cocoon, lac, tendu or kendu leaves, medicinal plants, herbs, roots, tubers and the like).
- Other community rights of use or entitlement, such as rights to fish and other products of water bodies, grazing or traditional seasonal access to natural resources by nomadic or pastoralist communities.
- Community tenure of habitat for particularly vulnerable tribal groups and pre-agricultural communities.
- Rights in or over lands under any categorisation in any state where there are any disputes regarding claims to such lands.
- Rights to convert leases or grants issued by any local authority or any state Government on forest lands to titles (ownership deeds).
- Rights to convert the following types of habitation into revenue villages: forest villages, old habitations, un-surveyed villages and other villages in forests.
- Rights to protect, regenerate, conserve, or manage any community forest reserves which the individual or community has been traditionally protecting and conserving for sustainable use.
- Rights that are recognised under any of the following kinds of law: State laws, laws of any autonomous district council, rights of tribals as accepted under any traditional or customary law.
- Right of access to biodiversity, and community rights to intellectual property in traditional knowledge related to biodiversity and cultural diversity.
- Any other traditional rights enjoyed which are not mentioned above. However, this excludes the traditional right of hunting or trapping or extracting a part of the body from any species of wild animal.
- Rights to rehabilitation on the individual's or community's currently occupied land or alternative land, in cases where they have been illegally evicted or displaced from forest land without receiving their legal entitlement to rehabilitation.
- Rights to development facilities. The Central Government will use forest land to provide for the following facilities to be managed by the Government, and these lands and facilities will be exempted from the operation of the Forest Conservation Act: schools, dispensary or hospital, fair price shops, electric and telecommunication lines, tanks and other minor water bodies, drinking water supply and water pipelines, minor irrigation canals, water or rainwater harvesting structures, non-conventional source of energy, skill up-gradation and vocational training courses, anganwadis, roads, community centres.

However, the use of forest land can be allowed only if the forest land to be used is less than one hectare in each case, not more than seventy-five trees are felled per hectare and the clearance of such developmental projects is recommended by the *gram sabha*.

While eligible forest-dwellers are given legal titles, deeds and entitlement, there is some debate about whether these rights are equivalent to ownership rights since they are not alienable. Although the rights can be inherited, they cannot be transferred to another

person, nor can they be bought or sold.

The FRA also has special provisions for sanctuaries and national parks. Areas inside such protected areas can be declared "critical wildlife habitats." These are important wildlife areas that are to be kept inviolate, i.e. no human activity that is scientifically and objectively shown to damage wildlife is permissible in these areas. Although this implies that some livelihood activities of forest-dwellers could be modified or restricted in these areas, the process through which this is to occur is transparent and consultative. Even the identification of the critical wildlife habitat is consultative, involving an Expert Committee that includes "experts from the locality." However, one of the most crucial elements of this Act is that even in protected areas from where forest-dwellers are to be resettled, absolutely no resettlement can occur without prior, informed consent of the affected persons.

Additionally, the Act states that the critical wildlife areas cannot be subsequently used for purposes other than wildlife conservation. Many environmentalists have enthusiastically supported this provision since it is a strong legislative measure to protect wildlife and forest areas from take-over by industry.

The actual implementation of the FRA, or more specifically the recognition of rights via claims, is to occur through a multi-layered process of various authorities. These authorities range from the *gram sabha* to committees at the sub-district, district, and state level. The *gram sabha's* primary role is to consolidate and physically verify the claims of each individual in the village. The role of the sub-district and district committees is to verify and maintain records of the claims, while the state-level committee is responsible for monitoring of implementation at a state level. Implementation of the FRA is a unique step towards decentralisation of governance. The Act relies heavily on the *gram sabha* to drive the claims process forward. Although the power of final decision on the validity of a claim lies with the district committee, it is the *gram sabha* that starts the process to determine the nature and extend of individual or community forest rights (Kalpavriksh 2008 and FRA 2006).

The FRA was passed by the Parliament of India in December 2006 and came into force on 1 January 2008. It is a landmark forest and forest rights legislation in India. It is the first central legislation that recognises injustice towards forest-dependent communities that was committed during the state's appropriation of forest resources towards commercial use or conservation. Some activists consider that the provisions are rather weak and miss out on some essential rights such as that of prior, informed consent for development projects on lands being used by forest-dwellers. Nevertheless, this legislation goes further than any before it in providing a range of crucial rights.

2.5 HISTORY OF THE FOREST RIGHTS ACT

In 2004, after the Supreme Court stayed the MoEF guidelines on settlement of rights of the tribal and forest dwelling communities, a few grassroots and social groups came together and began lobbying with the members of Parliament and the Prime Minister's Office. This was the year of elections and one of the election manifestos of the United Progressive Alliance government (which the two main communist parties of India were a part of) had been that the FRA would be enacted. Once the government came to power this issue was taken up by the National Advisory Committee, which was set up to advise the Prime Minister. This led to a decision by the Prime Minister's Office in January 2005 that the Ministry of Tribal Affairs (MoTA) with the help of a Technical Support Group would draft a bill for

recognition of forest rights. The Technical Support Group included some members who had been associated with movements lobbying for recognition of *adivasi* rights. These members belonged to the CSD.

The formation of the CSD had been catalysed by the mass evictions across the country. The CSD consisted of grassroots groups and village members from different parts of the country, all with a diversity of visions and ideologies but connected through a shared history of exploitation by the state and desire to bring justice to those who have been marginalised. The CSD has preferred to have grassroots networks and organisations that are a part of local movements and struggles rather than NGOs working with funded projects. It continues to be involved with monitoring and implementation of the FRA and wishes to continue until they can mobilise people politically (Asher and Agrawal 2007).

There may have been other possible motivations (unconfirmed by the authors) within the central government, such as providing forest rights to quell the growing discontent amongst forest-dwelling communities in central India related to lack of livelihoods access, which was believed to be directly fuelling extreme Leftist ("Naxalite") activities. It can also be speculated that the potentially enormous electoral gains to be made by governments that hand out what could be considered economic sops to a large population may have been another motivation.

In March 2005, the Technical Support Group submitted the first draft of the Bill. At this time, news media published letters that the MoEF was reported to have written to the Prime Minister's Office (reportedly "leaked" by MoEF itself). These letters expressed the MoEF's displeasure about the intent of the Bill and the possible loss of forests that the new Act might lead to. The first draft was substantially changed by the government (such as dropping of the Other Traditional Forest Dwellers category, time specifications of the first *gram sabha* meeting, rights to shifting cultivation, 1980 cut-off date, etc.).[15] Although a number of movement leaders may have been aware of the fact that the FRA was being drafted, the apparent "suddenness" with which the first draft came out was widely criticised by a number of groups. There followed many months of dramatic debates, discussions, controversies, agitations, and movements, dividing activists, academics, and government officials sharply between the Bill's supporters and opponents, with a largely marginalised section trying to advocate a balanced view. Though the debate was often characterised as one of conservation vs. human rights, in actuality it was more about the divergent ideologies on *how* should forests be managed or conservation be achieved and by *whom*, with one section favouring the status quo of a centralised bureaucracy aided by formally trained "experts," another arguing for complete decentralisation to local communities, and yet another advocating some kind of balance between the two.

In all this, one question that arose was: How much was the Act a result of the voices of the intended beneficiaries themselves? Opponents derided it, saying it was the brainchild of politicians and contractors who were conjuring up easy ways to take control of forestlands. Proponents countered that it was an outcome of popular *adivasi* struggles over many years. According to Shankar Gopalakrishnan of the CSD "the first draft was taken to the people and discussed and debated; in fact five – six main points came from the people themselves. The debate was democratised on the ground and not through dominant circles/media. This law actually emerged from the local struggles; it is unique in that way."[16] According to Meena Gupta, ex-secretary, MoTA and MoEF, the Act is an outcome of local struggles and demands: "If politicians took it up, it was because they felt heat from the ground."[17] She believes that if earlier processes had taken into account the

15. Shankar Gopalakrishnan, personal interview, 14 August 2008; M. Rajshekhar, personal communication, 20 June 2009.
16. Shankar Gopalakrishnan, personal interview, 14 August 2008.
17. Meena Gupta, personal interview, 13 August 2008.

long-standing demand of resolving the rights issues, a need for a new act would probably not have been felt.

In the meanwhile the eviction drive in many states continued, as did efforts by MoEF and MoTA to dilute various provisions of the Bill. Because of a series of internal political lobbying by those opposing and those supporting the Act, the process of tabling the Bill in Parliament was delayed. Finally, after much vacillation, the Bill was tabled on 13 December 2005 in a significantly changed and in many ways diluted form. The Bill was referred to a Joint Parliamentary Committee (constituted by the Parliament by including members of various political parties) to review it, invite comments, anpd advise the Parliament. After many discussions and review of submissions the Joint Parliamentary Committee presented its recommendations on 23 May 2006. The period between June and December 2006 was again one of struggle from the CSD and its member communities to push for acceptance of the Joint Parliamentary Committee report and those concerned about the outcome of the Act (primarily some conservation groups) to try and dilute some provisions. The law was finally passed on 18 December 2006. Most of the Joint Parliamentary Committee recommendations were accepted while some crucial points were dropped by the government. This was followed by another year of much debate on the rules under the Act, which were framed and finally notified in January 2008 (Asher and Agrawal 2007).

2.6 COMPARISON OF THE BILL AND THE ACT

The FRA was first introduced to the Lok Sabha[18] on 13 December 2005. The drafting of the legislation occurred ten months after the Prime Minister had officially mandated the MoTA to "draft a central legislation to redress historical injustice done to tribal communities" (PIB 2006). Soon after its introduction in the Lok Sabha, the Bill was referred to a Joint Parliamentary Committee consisting of over thirty members of Parliament across various political parties. During this time several hundred people and organisations submitted written statements expressing their views and concerns on the Bill. Based on these comments the Joint Parliamentary Committee presented a revised version of the Bill on 23 May 2006.

The final version of the Act varies considerably from the original Bill. Highlighted below are some of the key differences and key commonalities between the versions that still remain as concerns (Kalpavriksh 2005, 2006).

- The Scheduled Tribes (Recognition of Forest Rights) Bill 2005 applied only to scheduled tribes and, unlike the FRA, did not extend to "other traditional forest dwellers." This provision was recommended by the Joint Parliamentary Committee.
- The Bill stipulates that all eligible forest-dwellers must have been in occupation of forestland in 1980 in order to claim land rights. The Joint Parliamentary Committee recommended that this cut-off date be changed to 2005. The Act has retained this recommendation.
- The Bill referred to "core areas" of National Parks and Wildlife Sanctuaries, which were to be kept inviolate for conservation. Based on recommendations by Kalpavriksh, the Joint Parliamentary Committee recommended the term "critical wildlife habitats." This was inserted to avoid confusion with the existing use of the term "core areas" in wildlife management. This term prevails in the Act as well.
- The Bill required "core areas" to be identified centrally by the MoEF. The Joint Parliamentary Committee recommended

18. The Lok Sabha is the Lower House of the Parliament of India.

that independent scientists be involved. The Act further requires an Expert Committee in determining critical wildlife habitats, which includes independent scientists, Forest Department officials, protected area managers and a representative from the MoTA.

- The Bill stipulated that provisional forest rights in "core areas" would be permanent only if holders of such rights were not relocated from the area within a period of five years. The Joint Parliamentary Committee recommended that relocation would occur only if independent scientists concluded that harmonious coexistence was not possible. The Act is similar to the Joint Parliamentary Committee version but requires an Expert Committee to also scientifically prove that the activities of forest-dwellers are causing irreversible damage to wildlife and wildlife habitat. Crucially, the Act provides for relocation to take place only after consent of the concerned community.
- While the Bill makes no mention of this provision, the Joint Parliamentary Committee recommended that critical wildlife habitats cannot be subsequently diverted for any other purpose. The Act retains this as is.
- The Bill has a limit of 2.5 hectares as the amount of forestland that can be claimed as a right. The Joint Parliamentary Committee recommended no limit while the Act has settled for a four hectare limit.
- While the Bill makes no mention of this provision, the Joint Parliamentary Committee recommended that diversion of forestland for non-forest purposes can only occur with the consent of the gram sabha. The Act omitted this recommendation.
- The Bill extended forest rights only to individual and community land occupied before 1980, to forest resources and to conserve community forests. The Joint Parliamentary Committee recommended that basic developmental facilities be included as forest rights. The Act further clarifies what kinds of development facilities are permissible and specifies that no forest clearance will be required for such facilities.
- The Bill mandates that if any rights-holder "kills any wild animal or destroy forests or any other aspect of biodiversity" and is convicted more than once, the forest right of the offender shall be derecognised for a given period. The Act has omitted this, and offenders are only required to pay monetary fines.
- The Bill entrusts the "responsibility and authority of protection, conservation with sustainable use and regeneration of adjoining forests where community rights have been vested." Additionally, the Bill requires rights-holders to inform the gram sabha and forest authorities on any activity that is in violation of the WLPA 1972, the Forest Conservation Act 1980 and the Biological Diversity Act 2002. In contrast, the Act states that rights-holders and/or gram sabhas are "empowered" to conserve biodiversity, water and forest resources. In their place, it has put the onus on the gram sabha to ensure conservation, but without providing any recourse if it fails to do so.

2.7 WILL THE FRA ACHIEVE LIVELIHOOD SECURITY AND CONSERVATION?

The FRA's explicit intention is to undo a historical injustice and provide security to the livelihoods of forest-dependent communities. Will it do this, and in the process, will it help achieve forest conservation?

The analysis below is part-predictive, part-factual. Though it is over a year since the FRA came into force, implementation has been slow (predictably) and information has not been easy to obtain. The picture presented here will

sharpen over the next few months as implementation proceeds and more information becomes available.

2.7.1 SOCIAL AND LIVELIHOODS IMPACTS

For a large number of forest-dwelling people the FRA is a major opportunity to strengthen economic and social security, and also perhaps to facilitate their political empowerment. Hundreds of thousands of families have lived for decades in fear of eviction, or denial of access to forest resources, since these have never been recognised as legitimate in the eyes of the law. That now *could* change.

We stress that there is no inevitability in such an outcome, despite the explicit intention of the FRA. Whether and how many forest-dwellers actually benefit from the FRA will depend on a whole host of factors. First, forest-dwellers need to be informed about the law, which is especially challenging for communities that live deep inside forests and do not enjoy NGO support or official outreach of any kind. Second, communities need to be sufficiently organised to register their claims in as clear a manner as possible, using available evidence, which can be daunting especially for the weakest of them. Evidence may be hard to obtain. Third, *gram sabhas* need to be effective and equitable enough to register all the legitimate claims, before forwarding these to the sub-committees. Powerful castes and classes within communities could try to capture benefits. Finally, the sub-committees, consisting of forest and revenue officials and *panchayat* members, all of whom may be far-removed from the realities of each village, or not particularly favourable towards the most needy people in the village, are expected to be unbiased in accepting or rejecting the claims. Neither the Act nor the Rules specify a time limit for the committees to finalise their orders. Given past experience with similar processes, claims could remain pending for years, or be rejected on flimsy grounds.

A number of claims have been put forth since the Act came into operation (Table 2.1). Some of the states like Andhra Pradesh, Chattisgarh, Gujarat, Orissa, Tripura, and West Bengal have already almost reached their full potential as far as collection of claims is considered. Therefore, the concentration in those states is on the process of actual issue of titles. As per the information collected from the states up until 31 May 2009, more than 2.1 million claims have been filed and about 166,000 titles have been distributed. More than 189,000 titles are ready for distribution.

There are already indications of a lack of seriousness in the central and many state governments towards the implementation of the FRA. For instance the Rules notified by the central government specify that villagers will have three months to make their claims before the *gram sabha* committee. Additionally, many state governments have issued deadlines inconsistently, specifying one date and then promptly another. However, most of the deadlines are perceived by implementing groups as being too short, especially for communities whose land records are poor, or where communication regarding the FRA's provisions is going out late, or where the needy members of the community require capacity building to make their claims.

Additionally, there have been allegations of violations by the state, in particular the Forest Department vis-à-vis the Act. For example, evictions have been reported from forested areas of Gujarat, Rajasthan, and Madhya Pradesh, though the Act explicitly disallows evictions before the claims process is gone through. Reports also suggest interference of the state in the election of *gram sabhas* and verification of claims. While the Act calls upon the people-based Forest Rights Committee to verify the validity of claims, in many states like West Bengal, Gujarat and Madhya Pradesh, the Forest Department has been insisting on its approval of claims. In some cases, Forest Department officers have also rejected claims prima facie, without reviewing the evidence.

TABLE 2.1 **Status of State-wise implementation, 15 June 2009**

STATE	CLAIMS FILED		TITLES DISTRIBUTED OR APPROVED	
	Individual Rights	Community Rights	Individual Rights	Community Rights
Andhra Pradesh	9,942 228,000*	4	4,412	2
Bihar	2	0	2	0
Chhattisgarh	6,453 250,000*	32 (Bastar District)	52 (430 rejected) 59, 548*	0
Delhi	2	0	0	0
Goa	0	3	0	1
Gujarat	33,185*	425*	Unknown	Unknown
Kerala	0	1	0	0
Madhya Pradesh	1,43,724 297,000*	3	2,696 88,107*	0
Maharashtra	5 116,000*	1 1,500*	2	0
Orissa	5,347 1,91,000*	0	1,097	0
Rajasthan	2,548	4	1,772	2
Tripura	2,973	1		0
West Bengal	20*			

Sources: Ministry of Tribal Affairs;

*Asterisk denotes unofficial information taken from media reports: "The centre reviews implementation of the Forest Rights Act: Over 60,000 land Pattas distributed to the Tribals and Traditional Forest Dwellers under Forest Rights Act", Press Information Bureau, 11/11/2008; Jha, A.K., Tribal Commissioner, Maharashtra State Government, 12/1/2009.

Other factors are also likely to have influence. Vested interests from within and outside the communities can be expected to try to subvert the process. A number of grassroots NGOs in Himachal Pradesh, for instance, have pointed out that more recent settlers in villages fringing forests may be able to make their claims heard and undermine or subvert the claims of the politically weaker original residents. Conflicts could also erupt between *adivasis* and non-*adivasis* where the latter have recently encroached on the formers' lands, as in Assam; or even between one set of *adivasis* and another set (more recent encroachers), as in Andhra Pradesh. Especially difficult will be the process for nomadic populations, as they will need to make their claims before *gram sabhas* controlled by settled populations, which may be hostile to their claims. Across much of India traditional symbiotic relations between these two sets of people have turned into ones of hostility as the cropping and land use patterns of the settled communities has changed, or as the livestock herds of nomadic people have grown significantly in size. Nomadic communities may also find it difficult to make the claims within the three-month specific period if they are moving during this period. The Act and Rules make special provisions for nomads, but it will still take an enormous effort on their part, and very focused and sustained interventions by officials or NGOs, to help them make use of these provisions. For example, in April and May 2009, the Van Gujjar nomadic community were denied entry into their seasonal grasslands in the state of Uttarakhand. The Forest Department had prohibited their migration through Govind Pashu Vihar Wildlife Sanctuary on the grounds that the community could not be allowed into a sanctuary area. However, after concerted protests and lobbying by civil society organisations who stated that such restriction of migration constitutes forceful eviction and is therefore a violation of the Act, the Van Gujjar community was finally allowed entry into the Sanctuary.

The social and economic impact of the FRA is therefore likely to be mixed, with the greatest benefits being in places where *adivasi* populations are well organised and where

inter-community relations are relatively harmonious. In north-western Maharashtra, for instance, movements like the Kashtakari Sanghatana have prepared for such a law for years and have helped to file thousands of claims. In Tamil Nadu and Karnataka, *adivasi* groups are well federated to make their demands heard. At the other extreme is Bastar in Chhattisgarh, where the mass displacement of *adivasis* by the ongoing violent "Salwa Julum" campaign (fed by the state government itself) against naxalites in Dantewada and Bijapur districts has led to a situation in which several hundred villages have been depopulated. This means that there is no one there now to claim rights!. A number of prominent civil society organisations and individuals who otherwise favour the speedy implementation of the FRA have recently appealed to the Chhattisgarh Chief Minister to:

> suspend implementation of the Act in the affected areas while facilitating speedy return of the villagers to their own villages. In the meantime, no land should be allocated to outsiders and no leases or prospecting licenses for minor minerals should be given in these villages as under PESA. These also require Gram Sabha permission, which is not possible under present circumstances (*The Hindu*, 23 March 2008).

Yet another issue that many claimants will likely face is an attempt to capture their lands once the claims are accepted. In many parts of India landless farmers who have been given land under land reforms or in rehabilitation schemes have subsequently faced take-over by more powerful elements from within or outside the village. The land often continues in the name of the original recipient but its bounties are being enjoyed by those who have appropriated it. Tribal land alienation is a serious problem in many states and it will take considerable mobilisation and alertness by recipients and also civil society and government to prevent this from happening with the lands that the FRA gives titles to.

Some of the above issues make it vital that the community rights provisions of the Act are given high priority. Treating forests as a "commons" has been a time-tested way to reduce abuse by individuals within the community or by outsiders. In this context the lack of attention to these provisions in the implementation so far could significantly weaken the Act's socio-economic (and political) potential.

Provisions of the FRA relevant to the granting of development rights to forest-dwellers are also likely to lead to greater economic and social security. There is little evidence of this aspect being part of implementation so far and it remains to be seen whether *gram sabha* claims for health, educational, communications, and other developmental activities would now be better heard and acted upon, if nothing else because the Forest Conservation Act will not apply, eliminating lengthy and often frustrating processes of obtaining permission from the central government. Precisely for this reason, however, this provision could be problematic from an ecological point of view (see below).

Despite all the problems mentioned above, the FRA is bound to provide various degrees of livelihood security and community empowerment, wherever it is implemented with any kind of effectiveness. Will this, however, be sustained if the forests themselves become degraded? The conservation impacts of the FRA are also important to understand.

2.7.2 CONSERVATION IMPACTS

For any forest-dwelling community a framework of rights in the absence of an appropriate framework of conservation is going to be short-lived. Any legislation on forest rights therefore needs also to have clear provisions for the protection of forests and their biodiversity, or supplement existing laws that do. What impact will the FRA have on forests?

The FRA's conservation impact can be judged in three arenas: areas specially designated for wildlife protection (especially national parks and sanctuaries); government forests (reserved and protected) outside such protected areas; and community/private or unclassified forests. Each of these could be impacted in positive or negative ways by the FRA, depending, again, on a host of factors.

Protected areas

The most intense criticism of the FRA from some wildlife conservationists is related to what they say are its implications for protected areas. It is undeniable that such areas have been the single most important step towards halting the rapid decimation of India's wildlife. Without them, many species, such as the Indian rhinoceros and Asiatic lion, would be long extinct.

But, as explained in section 5 above, the majority of India's protected areas are inhabited by communities and most of this habitation predates the notification of the protected areas. For at least two decades many environmental groups have argued that laws enabling the participation of these inhabitants in conservation and the recognition of their basic rights to survival and livelihood resources, without compromising conservation values, are needed. Unfortunately, a handful of powerful conservationists have remained unmoved by this logic (even when shown its global acceptance – see Springate-Baginski et al. 2008) and have systematically blocked attempts to change the Wild Life Act in this direction. Further, the Supreme Court's Centrally Empowered Committee and the MoEF have used a Court order to direct state governments to stop all rights in protected areas. The result has been the dispossession and threatened displacement of three to four million people.

The FRA will have a significant impact on this situation. It provides for the establishment of land and forest resource rights within protected areas (though this will not apply to lands that have earlier been vacated by villagers). Amongst these is the right to "protect, regenerate, or conserve or manage any community forest resource which they have been traditionally protecting or conserving for sustainable use." If fully implemented, this provision has the potential to considerably change the relationship between protected area managers and local communities. The FRA also allows for the establishment of critical wildlife habitats within protected areas to be scientifically determined, followed by a process of dealing with the rights of forest-dwellers inside them. If it is shown that their activities are causing "irreversible damage" and that "co-existence" is not possible, people can be relocated. However, this will need their "informed consent" and the availability of rehabilitation facilities before the actual relocation. In fact, even many conservationists agree that displacement of people should only be with their consent.

A crucial provision that is in synergy with the concerns of conservation groups is that any critical wildlife habitat where people's rights have been modified (including relocation) cannot be subsequently diverted for any other use. This means that no dams, mines, roads, tourist resorts, and so on can come into existence in such areas, a provision that is even more powerful than the Wild Life Act.

How much will state governments use the critical wildlife habitat provision and in how many of these cases will relocation of people actually take place? This is very difficult to predict, for many reasons. Some states may simply be lax in identifying and notifying critical wildlife habitats. Convincing people to relocate will be difficult, especially because the FRA now also provides for rights to developmental facilities. These include schools, health centres, communication facilities, roads, water supply, non-conventional energy sources, and so on. Many villages inside protected areas have thus far been denied such facilities due to conservation related restrictions, or simply because of inefficient government

departments. This denial is one major reason for many villages wanting to opt for relocation. The question arises that if these facilities are provided as a matter of right, will people still want to move? Not only will considerable persuasion be required to gain the consent of people to move, but it will also be necessary to provide evidence that the state can deliver good resettlement. The quality of dialogue with local people and the nature of rehabilitation will have to be substantially upgraded, something which is anyway long overdue. Even more important, though, is the need to start considering co-existence options within protected areas, since most villages currently inside them will never be relocated. Levels and kinds of human uses that are compatible with conservation objectives, institutional mechanisms that involve people in planning and decision-making, and other considerations have to be urgently worked out through a transparent process of consultation and negotiation, if the co-existence option is to be optimally used. That communities will now be able to negotiate as rights-holders rather than as people with uncertain legal status, will force the negotiations to be far more democratic than they have been so far.

The provision of developmental facilities in protected areas (and other forests) is, however, a potential source of ecological damage; especially if they are interpreted by state governments as a sink for money or a means to attain greater power through large-scale development such as major road and construction works. In combination with vested interests present in many *panchayat* this could be the biggest threat to protected areas.

One major relief is that rights to quarrying or mining, listed in previous versions of the FRA, have been dropped. Also, there are conditions on the kind of forest land that can be used, with only seventy-five trees per hectare to be felled. Additionally, the Wild Life Act will continue to apply, which means that developmental facilities would need to be cleared through the wildlife authorities, thus reducing their potential to damage the environment.

The key is to ensure basic developmental inputs to communities, without compromising conservation values; not all roads in protected areas should be viewed negatively (otherwise environmental activists should have been asking for all roads leading to tourism complexes within protected areas, such as at Corbett Tiger Reserve and Kanha Tiger Reserve, to be closed), and construction does not have to be destructive. But negative examples, such as large scale road networks in the Melghat Tiger Reserve, made ostensibly to deal with malnutrition amongst *adivasis*, do exist. Especially vulnerable may be grasslands or naturally sparse forest lands, as these will likely be mistakenly considered "degraded" enough to be diverted for development facilities.

A number of protected areas are already the hub of FRA-related activity. Tree-felling initiated by a political party was reported in July 2007 in Kawal Sanctuary, Andhra Pradesh, the alleged motivation being to capture more land and then claim it under the FRA. This was however revealed to be part of a long-standing ongoing campaign (*bhooporatam)* by the Communist Party of India (Marxist) to take over lands and give them to the landless; it was quickly halted by the Andhra government. Of late, new cases of felling have been reported. Unconfirmed reports of similar forest land clearing in some protected areas in Chhattisgarh and West Bengal have been received. On the other hand, there are also initiatives by people's groups and NGOs to carry out systematic participatory mapping of resource rights and crucial wildlife areas, e.g. in Badrama Sanctuary of Orissa and Biligiri Rangaswamy Temple Sanctuary of Karnataka. This is with a view to use the FRA's provisions to enhance both conservation and livelihood security.

Meanwhile, in October 2007 the MoEF came out with a set of guidelines for declaring critical wildlife habitats. These were issued to all states, which were given deadlines to complete the process. These guidelines have some strong provisions for consultation with g*ram sabhas*,

but their conservation science elements are weak and their timelines are so rushed that crucial scientific and democratic processes are likely to be overlooked. Another set of guidelines that cover all aspects of critical wildlife habitats (identification using the best available knowledge, co-existence strategies, and processes of relocation) have been brought out by several NGOs as part of the Future of Conservation network (see http://www.atree.org/FoC_flyer_090609.doc). The Future of Conservation co-organised a national workshop on this subject with the Indian Institute of Science (Bangalore, 8-9 May 2008), whose recommendations deal with crucial steps needed to declared critical wildlife habitats and critical tiger habitats.

Forests outside protected areas

Most forest-dwellers who will gain rights under the FRA are in forests outside protected areas. Conventionally, in most reserved forests and many protected forests, customary and traditional rights to land and resource use have been inadequately recorded and granted. In states such as Orissa and Chhattisgarh, and parts of the north-east, several hundred thousand hectares of land traditionally occupied or used for farming (including shifting cultivation or *jhum*) have simply not been recorded as such. On the contrary, they have been declared forest lands under government management in an ad hoc manner. On the other hand, there are also huge areas of actual encroachment in forest areas, both by very poor people and by powerful commercial interests. The encroachment situation is especially serious in states such as Assam.

The FRA provides for recognition of "encroached" lands for scheduled tribes who can show occupation up to December 2005 and for other forest-dwellers who have occupied the lands for at least three generations (seventy-five years). The conservation implications are, again, mixed.

Ever since the FRA appeared in its first avatar as a Bill in 2005, some conservationists have claimed it will be the "death-knell" of India's forests. Unfortunately they have continued to indulge in unsubstantiated exaggeration. Estimates by the MoEF from state government data suggest that about two per cent of the country's forests are under encroachment. Even on the assumption that this is an underestimate, not more than five percent of the total forest land could be "encroached" (and this includes lands not truly encroached, as argued above). Only a subset of this would be eligible for regularisation under the FRA. Of course, misuse by state governments to regularise massive encroachments by the land mafia or by recent settlers must be guarded against.

For most traditional forest land occupiers, obtaining a *patta* (documented legal right to property) could be a strong incentive to develop more sustainable land use practices. Insecure tenure (rights and ownership) to land and resources is a major cause of unsustainable and destructive land use globally (the FRA's Statement of Objects and Reasons stresses this; see also Springate-Baginski et al. 2008). This situation is reversed when laws and policies assure more secure tenure, as is clear from many community conservation initiatives in India (Pathak 2009). From this perspective, the FRA could enhance the possibility of conservation.

However, the cut-off date of 2005 is problematic. Already there are scattered reports that people are being encouraged by political interests to encroach forest land, with the assurance that they will be regularised under the FRA. The Andhra incident, mentioned above, is one example. In Maharashtra, news reports and oral reports from social activists suggest fresh forest clearing (no details are available at the time of writing). At a meeting in March 2008 on "Important Bird Areas" ornithologists from Chhattisgarh reported that there was widespread felling in Bastar. Unfortunately, however, most of these reports are anecdotal and very few independent investigations seem to exist. One of these, in Gujarat, showed that

an alleged case of fresh encroachment was actually invented by forest officials and exaggerated by the media.[19]

Nevertheless, the use of the best available land records, satellite imagery, and vigilance by civil society groups will be needed to ensure that the FRA is not misused to incite or allow fresh encroachment. Traditional forest-dwellers themselves should have an interest in stopping this trend as it threatens their own continued existence. After the incidents in Kawal Sanctuary in Andhra, the resident *adivasi* organisations are reported to have issued a statement disassociating themselves from the fresh encroachment.

The provision of rights to developmental facilities could also be problematic if they are employed in deep forests. As in the case of protected areas, other forest areas could also become fragmented by roads, transmission lines, buildings, and so on, resulting in increased biodiversity loss. It is not clear if there is any safeguard against this outside protected areas, since for this purpose the FRA overrides the Forest Conservation Act (under which all projects requiring diversion of forest have to obtain central government clearance).

Some other provisions that could considerably enhance conservation have largely been overlooked. Communities will now have the right to "protect, regenerate, or conserve or manage any community forest resource which they have been traditionally protecting or conserving for sustainable use." As NGOs such as Kalpavriksh, Vasundhara and others have shown (Pathak 2009), there are thousands of community conserved areas in India (e.g. 10,000 community forests in Orissa, forests protected under tribal self-rule in central India, and catchment forests conserved in Rajasthan, Nagaland and Mizoram) covering hundreds of thousands of hectares. Most of these, other than in the north-east, are government forests, but with hardly any government staff present. Most also lack legal backing, rendering them open to damage and destruction by outsiders. The FRA could now provide the legal backing that community conserved areas need, on terms that communities themselves can decide. Indeed the community forest protection provision has the potential to radically alter the relations of inequity between the forest bureaucracy and local communities, as it could effectively transfer power to the latter.

Unfortunately, however, as discussed above, this aspect of the FRA remains highly neglected by officials (many of whom would undoubtedly be resistant to its above-mentioned potential), NGOs, and communities themselves, and there is an urgent need to advocate this more strongly. The CSD issued a call in September 2008 for communities to mobilise around these provisions; it subsequently reported in October that community claims were being increasingly made in several states (CSD communication, forestcampaignnews@gmail.com, 13 Oct. 2008). In January 2009, a meeting was organised by the National Centre for Advocacy Studies and the Tribal Research and Training Institute, specifically to discuss how to promote the community rights provisions in the state of Maharashtra.[20] Meanwhile, some villages, such as Mendha-Lekha in Gadchiroli district of Maharashtra, have filed community forest rights claims for the 1800 hectares of forest they have been conserving.

Secondly, the FRA "empowers" *gram sabhas* and other village level institutions to "protect wildlife, forest and biodiversity" and ensure that "habitat of forest dwelling Scheduled Tribes and other traditional forest dwellers is preserved from any form of destructive practices." An earlier version even had a provision requiring community consent before diverting forest for any non-forest use. This has unfortunately been dropped, but the above two provisions could still give communities a tool

19. Report of the Fact Finding Team of Adivasi Mahasabha, http://groups.yahoo.com/group/forestrights/files/Police-Firing-Feb08-Guj-Vijaynagar%20Report.pdf.
20. The report of this meeting is available from the authors.

to check the incursions of unsustainable development projects. This would have been even stronger had *gram sabhas* been given not only "empowerment," but also the responsibility of ensuring conservation. This crucial element was contained in the 2005 version of the FRA. The Rules now provide for *gram sabhas* to establish a committee to carry out the conservation functions, though it is not clear what recourse there is if the committee or the *gram sabha* itself does not ensure conservation.

The FRA's potential to enable communities to challenge destructive development projects is being tested even as we finalise this report. In Orissa, tribals of the Jagatsinghpura area have issued a notice that any attempt to take over their forest lands would be a violation of the FRA; this is a bid to stop the entry of the powerful POSCO corporation, which wants to set up mines and industries there (*The Times of India*, 10 August 2008).[21] The CSD and others have pointed out that any displacement of forest-dwellers without first having completed claims procedures under the FRA would be a violation of the Section 4(5): "Save as otherwise provided, no member of a forest dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is completed." In the case of *adivasis* classified as "primitive tribal groups," the diversion of their habitats for development projects would be a violation of Section 3(1)e.

2.7.3 LEGAL CHALLENGE

As of the time of writing, there are already nine writ petitions (five in High Courts, two in the Supreme Court) challenging the FRA. Four of these are by retired forest officials, the others by conservation organisations.

One of the Supreme Court petitions has been filed by three conservation NGOs and one Assamese *adivasi* group. It argues that the FRA is constitutionally invalid, that it will impinge on the rights of every citizen of India to a clean environment, and that it will condemn *adivasis* to a life of subsistence with no access to development facilities. The grounds used for this challenge to the FRA are not only flimsy, but also dangerous. It is argued, for instance, that the Parliament does not have a right to pass laws on land matters, since these are exclusively the domains of state governments. If this argument is accepted, the very basis of most current environmental laws would be struck down. The Forest Conservation Act, the Wild Life Protection Act, and the Environment Protection Act (including its specific notifications protecting coastal areas and ecologically sensitive areas) would become constitutionally invalid, since they all pertain to "land" issues including forest land.

The petition in the Supreme Court also betrays a strongly elitist orientation. Regarding the granting of forest rights to forest-dwellers, the petitioners have invoked Right to Life and other provisions of the Constitution. Strangely, they have not invoked the Constitution with regard to the large number of forests that are converted for development projects such as mining, dams, expressways, and industries. This is especially curious because the FRA does not provide for any standing forest to be cut for land rights, whereas such projects often affect standing forests, and sometimes the most pristine forests.

The petition does have a few sound arguments against the FRA, but these are buried under the general diatribe and polemics. Three of India's most prominent conservation NGOs have thereby lost a good opportunity to bring about some substantial improvements in the FRA in a way that could have allowed implementation of the provisions that will strengthen people's livelihoods as well as conservation.

21. The article can be retrieved at http://timesofindia.indiatimes.com/India/Orissa_village_to_use_forest_Act_to_block_Posco_project/articleshow/3347658.cms.

2.8 CONCLUSION

This paper has attempted to assess:

- the implications of the FRA for conservation and people's rights and livelihoods,
- the ways in which different actors have shaped the FRA, including the extent to which tribal peoples have been involved, and
- the problems and prospects of the FRA's implementation.

The assessment has been placed within the context of the reality and history of forest-based livelihood dependence of a very large part of India's population. Several hundred million people live within or use forests as a basis for their sustenance, livelihoods, and cultural identity. Their millennia-old association with forests has also helped them develop sophisticated knowledge systems and practices oriented towards sustainability and conservation, though in recent times this relationship has begun to change. This changed relationship, along with rapid industrialisation, has had serious consequences for India's biodiversity. This history is also ridden with the experience of exploitation of many forest-dependent people, particularly tribal communities, by "invading" communities, before, during, and after the colonial occupation of the Indian subcontinent. The British rule itself marked a major shift in the way natural ecosystems like forests, and their human and wildlife inhabitants, were treated. One aspect of this was the takeover of large forest tracts by a centralised bureaucracy, divesting communities of management control and many customary rights. Another was the nationwide expansion of commercial timber felling. These and other aspects of colonial forest management negatively impacted the lives and livelihoods of forest-dwelling communities. Unfortunately, even after Independence in 1947, centralised control remained and was consolidated, continuing the alienation of such communities. This was especially strongly manifested in the creation of protected areas for wildlife, in which most kinds of rights and activities were severely curtailed or altogether stopped. Judicial orders in the last decade or so have intensified the denial of customary rights and access to livelihood resources.

A change in this scenario was hinted at by the 1988 Forest Policy, which acknowledged the relationship of *adivasis* and other forest-dwellers to forests, and sought their participation in conservation and management. One key outcome was the programme on Joint Forest Management. However, the issue of rights to land classified as "forest" and to forest resources remained unresolved.

It is in this context that the FRA was born. Part of its origin can be attributed to the growing movements of *adivasis* demanding rights to the lands they were occupying and the forest resources they were using. A series of evictions of people classified as encroachers in many states led to the consolidation of these initiatives into a national campaign for a new legislation to provide forest rights. There may have been other motivations (unconfirmed by the authors) within the central government, such as providing forest rights to quell the growing discontent amongst forest-dwelling communities in central India related to lack of livelihoods access, which was believed to be directly fuelling extreme Leftist activities. It can also be speculated that the potentially enormous electoral gains to be made by governments that hand out what could be considered economic sops to a large population may have been another motivation. Whatever the forces behind it, the FRA was enacted in 2006 after a tortuous journey through official processes. It came into force in 2008 after Rules under it were notified.

The FRA provides for a series of rights to forest-dwellers, including both *adivasis* (scheduled tribes) and other traditional forest-dwelling communities. These include rights to land

occupied (before December 2005 for *adivasis* and for at least seventy-five years for others), to forest resources used traditionally; to development facilities of various kinds; to protect traditional knowledge, and others. The Act lays out processes and institutions for implementation.

Ever since it was mooted, the FRA has generated enormous controversy in India. Many grassroots organisations and social action or conservation groups viewed it as historic, the culmination of a 200 year old struggle of the tribal and forest-dependent communities. In contrast, several other conservationist groups see it as a law that would be "the last straw" for already dwindling forests and wildlife in India, and a number of *adivasi* organisations in north-east India expressed concerns about its potential to exacerbate conflicts between traditionally resident *adivasis* and recent settlers. However, according to Deo "this act was never intended to be a land distribution bonanza, as has been claimed by some conservationists; this is only a process by which existing claims can be recognised."[22] He adds "the MoEF had provided the data which stated that only 2.5 to 3% of the forest area was under encroachments, making it obvious that 97 – 98% is still under the Forest Department. Additionally, special recommendations such as establishment of critical wildlife habitats were included in the Act to ensure the interests of wildlife."

Another criticism of the FRA has been that it provides a uniform solution for the nation, whereas the local realities are vastly different in different regions. This, according to some, leaves an opening for groups with a vested interest to take advantage of the situation. Deo agrees that different recommendations for different regions would have been ideal, but the Joint Parliamentary Committee only had three months, which is not enough time for regional discussions and recommendations (ibid.).

This report examines what impacts the FRA is likely to have, both for the livelihood security of forest-dwellers and for forests. The legislation could mean a revolutionary change in the lives of forest-dwellers, if the various rights it provides for are granted. It could also lead to greater democratisation of forest management, providing communities the ability to strengthen or initiate management of forests near their settlements. However, we stress that there is no inevitability of such outcomes, given a number of confounding factors: the majority of forest-dwellers are unaware of the provisions and processes of the FRA; the bureaucracy is in many places unhelpful or even obstructive; local civil society groups that could help communities do not exist in all places, and strong inequities within communities themselves could restrict the access of less powerful sections to the Act's benefits. Many of these factors have already emerged in the fledgling attempts at implementing the legislation. However, where communities are well-organised and/or have civil society or sensitive officials to help, the Act's benefits will reach many forest-dwellers.

Conservation impacts are equally difficult to predict. While the fears of some conservationists who pronounced the FRA as the death knell of India's forests and wildlife are obviously exaggerated, there are nevertheless real chances of fresh encroachment in some places where political or other forces incite it (especially because of the "generous" cut-off date of 2005), as also fragmentation of forests where rights to land and development facilities are claimed in deep forest areas. The FRA's provisions empowering communities to protect forests and wildlife, as also those for setting up critical wildlife habitats within protected areas after due process, could however be a major positive force. Also with significant potential is the possibility of community rights to forests being claimed and used to challenge development projects that seek the conversion of these forests. In the one year of implementation so

22. V. Kishore Chandra Deo, personal interview, 13 August 2008.

far, there are some examples of both negative and positive impacts of these kinds, but it is yet early to pronounce any conclusive judgement on the Act's overall environmental impact.

One aspect of implementation has emerged as a clear issue needing urgent action. Although the Act is about both the individual and community rights of forest-dependent people, in practice most of the debates and in recent times the process of implementation have focused heavily on regularisation of individually encroached land. By mid-2009, a year and a half into the implementation of the Act, there were few states where substantial numbers of claims were filed for community rights and the right to protect traditionally protected and managed forests. There is absolutely no clarity about how these claims are to be filed and what would be the relationship of community institutions managing forests, if they are given such a right, with the Forest Department. In fact, until recently, community rights were not even the focus of the organisations working with the communities, including CSD members. According to Gopalakrishnan, the fact that the rules need to be clearer about community rights has been brought to the notice of the MoTA many times but there seems to be a deliberate downplaying of the same.[23] The reason why the claims process for community rights has been downplayed, according to him, could be because focusing on land *pattas* could be less threatening for the Forest Department and those concerned about forests; this could be a result of "(1) the attitude of the forest bureaucracy, which knows full well where the real challenge to their power lies; and (2) in wider terms, particularly as regards the responses of movements, a reflection of the fact that India is a capitalist society in which a continuous process of commodification, enclosure, and privatisation is underway in all resource spheres as part of the effort to expropriate resources into the capitalist economy" (ibid.). According to Meena Gupta, there was and still is very little understanding about community rights among the drafters of the legislation and rules at the level of the Ministries; it is therefore not surprising that the rules are not clear about them or that implementation is not focusing on them.[24]

Finally, it is important to note the legal challenges to the FRA that been filed in the Supreme Court and several state High Courts. Most of these have claimed the FRA to violate the Constitution. As yet the only impact of these has been partial stays (e.g. to tree-felling, or to the granting of deeds to land) in some states (one of which was lifted on 01 May 2009) and it is impossible to predict what impact the petitions will have.

A number of crucial steps are needed, by both civil society and government if the FRA's potential is to be maximised. Very important is that the government does not rush implementation, but gives the process the time to be able to take into account the differences in social, cultural, ecological, and administrative conditions that each state (or region within a state) displays. This diversity of conditions has a great bearing on the FRA's impacts and any uniform implementation will only create complications and conflicts in many states. People's groups in Assam, Himachal and elsewhere have already warned of escalated conflicts and ecological damage if implementation is rushed; in other states, delays in implementation could lead to greater chances of fresh encroachments by people hoping to get into the list of eligible claimants.

A huge effort is needed by civil society groups in all aspects of the FRA to track its implementation, help communities to make legitimate claims and build capacity to handle the processes of recognition and vesting of rights, raise alerts about any misuse such as fresh encroachments or forcible evictions, and intervene in other ways when implementation threatens conservation or creates social conflict.

23. Shankar Gopalakrishnan, personal interview, 14 August 2008.
24. Meena Gupta, personal interview, 13 August 2008.

Simultaneously, pressure must be sustained regarding suitable amendments (e.g. for a cut-off date that is less prone to misuse, for a provision requiring prior informed consent from communities for any diversion of forest land for non-forest purposes, for some decentralised form of environmental impact assessment for development projects sought by *gram sabhas*, and for the reinsertion of conservation responsibilities tied to rights).

Also needed are revisions and additions to the Rules for the following provisions: the identification of critical wildlife habitats, the process of ensuring fair relocation (including what informed consent should mean), and processes by which communities can use the provisions on protecting forests and wildlife (including for community conserved areas) without having to go through lengthy bureaucratic processes. Also crucial is an independent monitoring mechanism to show what impacts the FRA's implementation is having and to point to corrective actions where necessary. Ideally, the first six months or so of the implementation phase should have been used to do a complete mapping of "encroached" areas, other forests where resource rights will be extended, and community conserved forests that could be legally recognised, and further elements of a baseline on which monitoring can be done. Even at this stage, such a baseline needs to be established.

It is also crucial to lobby for the inclusion of environmental and social action groups in the committees at sub-divisional, district, and state level. Such members can act as critical checks against the misuse or abuse of the FRA and enhance the role of the committees to help *gram sabhas* in the process of implementation.

Finally, there is an urgent need to clarify how precisely the FRA relates to existing conservation laws. The FRA states that "save as otherwise provided in this Act and the Provisions of the Panchayats (Extension to Scheduled Areas) Act 1996, the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force." One interpretation of this is that the provisions of the Wild Life Act and the Forest Act will continue to apply, except where they impinge on rights that can be claimed under the FRA. However, what is very unclear is the institutional mechanisms. What will be the precise relationship between *gram sabhas* and their conservation committees and Forest Departments that have a mandate in the same areas that villages claim under community rights? Can or should the FRA be used to move towards meaningful (i.e. with real power-sharing) joint management partnerships for protected areas and reserved forests?

If advocates of wildlife conservation, human rights, and ecologically sustainable development (none of which are intrinsically antithetical to each other, as shown by many groups that combine all three in their work) do not work together, the interests of both local people and of wildlife will be defeated by powerful corporate and commercial interests that are having increasing influence because of the national goal of achieving a ten per cent rate of economic growth. Even as the government gives forest rights to *adivasis*, it is opening up *adivasi* and other forest areas in Chhattisgarh, Jharkhand, Orissa, and elsewhere, for mining, industries, etcy. Without a sustained collective effort by civil society, lands given to forest-dwellers could be alienated for industry; with a sustained effort, however, the FRA could become a bulwark against such alienation. If the FRA could be used in conjunction with conservation and *panchayat* laws, it could be a powerful tool to halt development activities that are destructive for both wildlife and forest-dwellers.

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CRITICAL REVIEW OF THE FOREST REGULATORY FRAMEWORK AND ITS IMPLEMENTATION IN MALAYSIA

CHAPTER 3

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3.1 INTRODUCTION

Malaysia has a complex regulatory framework comprising 13 states and three federal territories spread over the Malay Peninsula and the Island of Borneo. More than 55% of Malaysia remains forested and rural people living in and around the forest continue to significantly depend on forest produce and services.

Forest law in Malaysia ranges from ancient traditions, through colonial edicts to modern statutes arising from parliamentary democracy. There have been a number of recent developments which can be seen as progressive reforms of the forest regulatory framework in Malaysia. This paper examines these reforms using existing documentation and literature to determine their implications for the rights of forest-dependent people.

3.2 FOREST-DEPENDENT PEOPLE

3.2.1 ETHNIC GROUPS

Malaysia comprises numerous ethnic groups, both native and immigrant. The immigrant groups are largely urban or agricultural, being less reliant on the forest than the indigenous peoples. More than 50 different ethnic groups can be considered indigenous to Malaysia (see Annex I for partial list). While the term "indigenous peoples" (*Orang Asal*) is not commonly used in Malaysian law, one precedent is found in the Protection of New Plant Varieties Act 2004 (Act 634, s 2) which defines the term to mean "persons who fall within the definition of the "aborigine" or "native" as defined respectively in Clause (2) of Article 160 and Clause (6) of Article 161A of the Federal Constitution." Reference to the respective articles of the Federal Constitution reveals that "aborigine" (*Orang Asli*) is defined as "an aborigine of the Malay Peninsula" (Art 160(2)), while Art 161A provides the definition of "native" (*Anak Negeri*) as follows:

> (6) In this article "native" means:
>
> (a) in relation to Sarawak, a person who is a citizen and either belongs to one of the races specified in Clause (7) as indigenous to the State or is of mixed blood deriving exclusively from those races; and
>
> (b) in relation to Sabah, a person who is a citizen, is the child or grandchild of a person of a race indigenous to Sabah, and was born (whether on or after Malaysia Day or not) either in Sabah or to a father domiciled in Sabah at the time of the birth.

(7) The races to be treated for the purposes of the definition of "native" in Clause (6) as indigenous to Sarawak are the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks, Kadayans, Kalabits, Kayans, Kenyahs (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits.

Further elaboration on the definition of "aborigine" is provided by the Aboriginal Peoples Act 1954 (Act 134, s 3):

(1) In this Act an aborigine is:

(a) any person whose male parent is or was, a member of an aboriginal ethnic group, who speaks an aboriginal language and habitually follows an aboriginal way of life and aboriginal customs and beliefs, and includes a descendant through males of such persons;

(b) any person of any race adopted when an infant by aborigines who has been brought up as an aborigine, habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and is a member of an aboriginal community; or

(c) the child of any union between an aboriginal female and a male of another race, provided that the child habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and remains a member of an aboriginal community.

(2) Any aborigine who by reason of conversion to any religion or for any other reason ceases to adhere to aboriginal beliefs but who continues to follow an aboriginal way of life and aboriginal customs or speaks an aboriginal language shall not be deemed to have ceased to be an aborigine by reason only of practising that religion.

(3) Any question whether any person is or is not an aborigine shall be decided by the Minister.

The Aboriginal Peoples Act 1954 (s 2) provides further interpretation as follows:

"aboriginal ethnic group" means a distinct tribal division of aborigines as characterised by culture, language or social organisation and includes any group which the State Authority may, by order, declare to be an aboriginal ethnic group;

"aboriginal racial group" means one of the three main aboriginal groups in West Malaysia divided racially into Negrito, Senoi and Proto-Malay;

"aboriginal way of life" includes living in settled communities in kampungs either inland or along the coast;

In addition to the terms highlighted above, the term "bumiputra" is in common usage, although it is not mentioned in the Federal Constitution. The term (figuratively "Son of the Soil") is often taken to mean "indigenous", although its definition is also often equated with the term "Malay" (*Orang Melayu*), which is given a complex definition by the Federal Constitution (Art 160(2)):

"Malay" means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and-

(a) was before Merdeka Day [i.e. 31 August 1957] born in the Federation [i.e. the Federation of Malaya (which is presently known as Peninsular Malaysia)] or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or

(b) is the issue of such a person;

This definition encompasses, religion, language, custom and geographic origin. However, it does not explicitly include ethnicity or race. The legal terms "Bumiputra" and "Malay" are therefore not automatically indicative of indigenousness.

3.2.2 SUBSISTENCE DEPENDENCE

All communities in Malaysia use forest products and services to some degree. One or two local groups are almost totally dependent on the forest for their subsistence and health (especially the nomadic Penan in Sarawak). Some forest components such as river water and fish provide for the basic needs of some communities even if they are not strictly "forest-dwelling". In addition to food and water, other critical essentials provided by the forest include fuel, fodder (for livestock), medicines and material (for building shelters). Local communities can be said to be "forest-dependent" when there are no readily available alternatives for these basic necessities. Examples of forest products used by local communities include:

- Fruit trees used for subsistence by the Jahai communities in Temengor, Perak, Peninsular Malaysia (Meyer 2003);
- Rattan used for subsistence craft by the Lundayeh communities in Ulu Padas, Sabah (Vaz 2006); and
- Sago palms (Eugeissona utilis) used for subsistence food by semi-nomadic Eastern Penan communities in Suling-Selaan Protected Forest, Sarawak (Brosius 1999, 39).

3.2.3 NON-SUBSISTENCE DEPENDENCE

In addition to the subsistence reliance outlined above, some communities depend on the forest for sustaining their economic livelihood and maintaining their cultural traditions. Examples include:

- Trees known as Nyireh Batu (Xylocarpus moluccensis) and Tengkho (Alstonia sp.) are carved into ceremonial topeng (masks) and patong (sculptures) for the Jo' Oh dance of the Hma' Meri community at Kampung Sungai Bumbon, Selangor, Peninsular Malaysia (Reita 2007, 33-35);
- Communal water-catchment protection groves are considered sacred to the Rungus community, Kudat, Sabah (Appell 1995);
- The Yellow Wagtail Motacilla flava birds are said to be important indicators of planting seasons used by the Kelabit communities of the Bario Highlands, Sarawak (Mackinnon and Phillipps 1993); and
- The 150-year old burial tower of Jalong Ingan (a Kenyah chieftan), Mudung Abun, Belaga, Sarawak is considered important to the cultural heritage of the local community (Si 2007).

3.3 REGULATORY FRAMEWORK

3.3.1 CONSTITUTION

The Federal Constitution is the supreme law of the Federation (Art 4(1)). Rights of forest-dependent people are provided by the Constitution, including the rights available to all citizens (such as the right to property) as well as some rights which are specifically applicable to native people. Of particular relevance to the rights of forest-dependent people is the general provision of the Federal Constitution which states that "no law shall provide for the compulsory acquisition or use of property without adequate compensation" (Art 13(2)). Special provisions are provided in the Constitution for indigenous peoples. In particular, there are about a dozen specific instances where the Constitution makes reference to aborigines and natives. These instances are listed in the following paragraphs.

The Constitution provides for positive discrimination that gives "provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service" (Art 8(5)(c)). Such reservation of quotas is also extended to services, permits, etc. in order to safeguard the special position of

"Malays" and the natives of the States of Sabah and Sarawak (Art 153). The reservation of land for the "natives of the State in which it lies" (i.e. including Sabah and Sarawak) is also specifically provided for (Art 89(6)).

The Constitution allows for persons to be appointed to the Senate who are "capable of representing the interests of aborigines" (Art 45(2)). On a number of occasions the federal government has used this provision to appoint an *Orang Asli* as a senator. However, there is usually only one *Orang Asli* senator at any one time.

The Constitution defines "Law" as including "written law, the common law insofar as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof" (Art 160 (2)). Existing laws shall, until repealed, continue in force (Art 161 (2)).

The Constitution sets out the subject matter which can be legislated upon by the federal Parliament and State Legislature (Art 74). Parliament may make laws related to native law and custom in respect of the Federal Territory of Labuan (Sch 9, List I, 6(e)). The Constitution also gives provisions for Parliament to make laws regarding the welfare of the aborigines (Sch 9, List I, 16). The States may make laws regarding native reservations (Sch 9, List II, 2(b)). Furthermore, the States of Sabah and Sarawak may make laws on native law and custom, including:

> determination of matters of native law or custom; the constitution, organisation, and procedure of native courts (including the right of audience in such courts), and the jurisdiction and powers of such courts, which shall extend only to the matters included in this paragraph and shall not include jurisdiction in respect of offences except in so far as conferred by federal law. (Sch 9, List IIA, 13)

The Constitution enables Parliament, in consultation with any State concerned, to make laws with respect to "any matter of native law or custom in the States of Sabah and Sarawak" for the purpose of "implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organisation of which the Federation is a member" (Art 76).

The Constitution specifies that no amendment shall be made to the Constitution without the concurrence of the *Yang di-Pertua Negeri* (governor) of the State of Sabah or Sarawak or each of the States of Sabah and Sarawak concerned, if the amendment is such as to affect the operation of the Constitution as regards the special treatment of natives of the State (Art 161E(2)(d)). Finally, the Constitution provides that in the States of Sabah or Sarawak a native language in current use in the State may be used in native courts or for any code of native law and custom (Art 161(5)).

3.3.2 STATUTES

In addition to the Federal Constitution, there are a number of federal and state laws that provide definitions of customary rights in the Malaysian context. Numerous Acts of Parliament have been passed that make reference to native customary rights in one form or another. The key Acts of relevance to the forest regulatory framework are the Aboriginal Peoples Act 1954, the National Land Code (Act 56/1965), the Protection of Wild Life Act 1972 (Act 76) and the National Forestry Act 1984. There are other Acts, such as the Native Courts (Criminal Jurisdiction) Act 1991 (Act 471) which also make reference to native rights, however these Acts are not of central relevance to the forestry framework.

The Aboriginal Peoples Act 1954 applies only to West Malaysia (s 1(2)). The Act has a number of provisions related to native customary rights (NCR). The Act acknowledges the authority of aboriginal headmen to exercise authority in matters of aboriginal custom and belief (s 4). The Act provides for the declaration of "aboriginal areas" and "aboriginal cantons" (s 6) as well as

"aboriginal reserves" (s 7). The Act provides for the granting of "rights of occupancy" (s 8) and recognises the existence of "aboriginal inhabited places" outside of aboriginal areas or aboriginal reserves (s 2; s 19).

With regard to indigenous peoples, the schedules of the National Land Code (which applies only to Peninsular Malaysia) make reference to aboriginal areas and aboriginal reserves, requiring any dealings related to such areas to make note of the number and date the areas were gazetted as such (e.g. Sch I, Form 5B). The National Land Code also notes that "except in so far as it is expressly provided to the contrary, nothing in this Act shall affect the provisions of any law for the time being in force relating to customary tenure" (s 4(2)(a)). This clause has been interpreted as having "left open the rights at common law of aboriginal title".[25] From the commencement of the National Land Code, a number of State enactments relating to customary rights were repealed, including the following:

i) Dealings in Land (Malacca Customary Lands) (Occupation Period) Ordinance (41/1949);
ii) Customary Tenure of Land (Settlement of Malacca) Ordinance (10/1952); and
iii) Customary Tenure (State of Negeri Sembilan) Ordinance (33/1952).

The Protection of Wild Life Act 1972 (Act 76) states that any member of an aboriginal community may shoot, kill or take deer[26], mouse deer[27], game birds[28] and monkeys[29] for the purpose of "providing food for himself or his family" (s 52).

The National Forestry Act 1984 contains a number of special provisions regarding the rights of forest dependent people. In particular, the Act provides for the exemption of aborigines from the need to obtain a licence for or the payment of royalty in respect of forest produce removed from any alienated land by any aborigine for the following purposes (s 40(3); s62(2)(b)):

a) the construction and repair of temporary huts on any land lawfully occupied by such aborigine;
b) the maintenance of his fishing stakes and landing places;
c) fuelwood or other domestic purposes; or
d) the construction or maintenance of any work for the common benefit of the aborigines.

In addition to the Acts of Parliament, there are numerous State enactments of relevance to the rights of forest-dependent people. In Peninsular Malaysia, there are enactments that deal specifically with customary rights to land such as the Customary Tenure (Lengkongan Lands) Enactment (N.S. 4/1960); and the Customary Tenure (Negeri Sembilan) Enactment (F.M.S. Cap. 215). In Sabah, enactments specifically related to native law include the Native Courts Enactment (Sabah En. 3/1992) with its subsidiary legislation such as the Native Courts (Native Customary Laws) Rules (G.N.S. 12/1995). There are also numerous laws in Sarawak related to native custom such as the Native Officials (Retiring Allowances and Gratuities) Ordinance (Sarawak 6/1963); *Majlis Adat Istiadat* Ordinance (Sarawak 5/1977); Native Courts Ordinance (Sarawak 9/1992); Natives Courts Rules 1993 (Swk.L.N. 28/94); Native Customs (Declarations) Ordinance (Sarawak Cap. 22/1996); and the Native Customary Marriages (Maintenance) Ordinance 2003.

In addition to State laws dealing specifically with native customs, there are also the State forestry enactments that make some reference to the rights of forest-dependent people. These

25. Chandra Kanagasabai. 'Native Rights & Minority Rights: Promotion or Repression? A Commonwealth Review'; first presented at the 12th Commonwealth Law Conference at Kuala Lumpur in September 1999. *Malayan Law Journal* website: http://www.mlj.com.my/free/articles/chandra.htm
26. Sambur Deer *(Cervus unicolor equinus)* and Barking Deer *(Munctiacus muntjak)* (Sch II, Pt II)
27. Large Mouse-Deer *(Tragulus napu)* and Lesser Mouse-Deer *(Tragulus javanicus)* (Sch II, Pt II)
28. 41 spp. (Sch IV, Pt I)
29. Banded Leaf-Monkey *(Presbytis melalophos)*, Dusky Leaf-Monkey *(Presbytis obscura)*, and Silvered Leaf-Monkey *(Presbytis cristata)* (Sch II, Pt II)

laws include the state-level National Forestry Act 1984 adoption enactments as well as the Forests Ordinance 1954 (Sarawak Cap. 126, 1958 Ed.) and the Forest Enactment 1968 (Sabah En. 2/68). There are also enactments more generally related to land matters that make some reference to native rights such as the Land Ordinance (Sabah Cap. 68/1930) and the Land Code (Sarawak Cap. 81/1958).

In Sabah, the Land Ordinance (Sabah Cap. 68/1930, s 15) states that "native customary rights" shall be held to be:

(a) land possessed by customary tenure;
(b) land planted with fruit trees, when the number of fruit trees amounts to fifty and upwards to each hectare;
(c) isolated fruit trees, and sago, rotan, or other plants of economic value, that the claimant can prove to the satisfaction of the Collector were planted or upkept and regularly enjoyed by him as his personal property;
(d) grazing land that the claimant agrees to keep stocked with a sufficient number of cattle or horses to keep down the undergrowth;
(e) land that has been cultivated or built on within three years;
(f) burial grounds or shrines;
(g) usual rights of way for men or animals from rivers, roads, or houses to any or all of the above.

In Sarawak, the Land Code (Sarawak Cap. 81/1958, s 2) states that:

"Native Customary Land" means –

- land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the 1st day of January, 1958, and still subsist as such;
- land from time to time comprised in a reserve to which section 6 applies [i.e. a gazetted Native Communal Reserve]; and
- Interior Area Land upon which native customary rights have been lawfully created pursuant to a permit under section 10.

Section 5 of this Land Code 1958 gives an extensive definition of "native customary rights", the essence of which includes the following methods by which native rights may be acquired:

- the felling of virgin jungle and the occupation of the land thereby cleared;
- the planting of land with fruit trees;
- the occupation or cultivation of land;
- the use of land for a burial ground or shrine; and
- the use of land of any class for rights of way.

A total of 22 amendments to the Land Code had been made up to 31 December 2004. The amendment enactment A78/2000 deleted an open clause in this section that specified that native rights may also be acquired by "any other lawful methods" (this had been s 5(2)(f)). This amendment and its implications will be discussed in more detail in the section on Reform (below).

3.3.3 NATIVE CUSTOMARY LAW

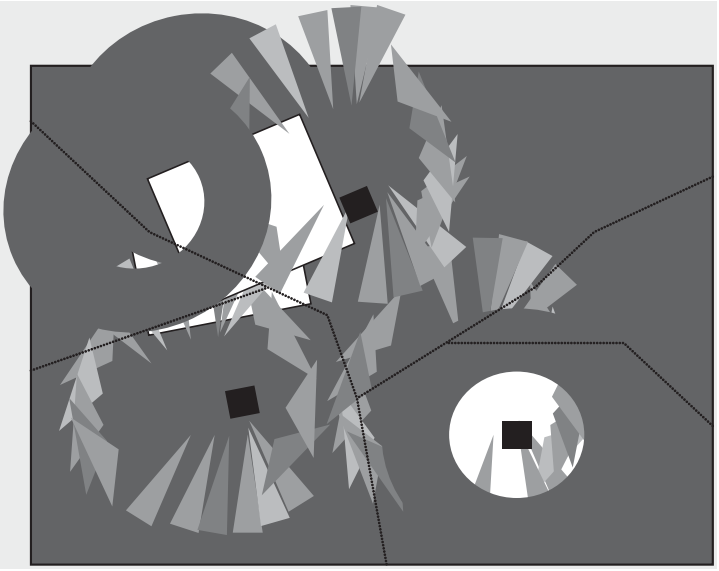
Native customary law regarding land and forest ownership and use rights is generally consistent among the various subsistence agricultural communities in Peninsular Malaysia, Sabah and Sarawak. Throughout the interior regions of Malaysia, swidden rice farming is practised following very similar forms of slash-and-burn shifting cultivation. It follows that the fundamental interests of such communities have many parallels and their traditions, customs and native laws are broadly similar. The concept of *adat* can be taken to refer to the sum of these practices. *Adat* is defined by Sarawak law as "a way of life, basic values, culture, accepted code of conduct, manners, conventions and customary laws".[30] Some authorities on Malaysian law suggest that the law produced by custom may be in general "closer to the people" than statutory law (Hickling 2001, 15).

30. Vid. Swk. L.N. 27/94, s 2; Swk. L.N. 28/94, s 2.

Adat is generally conveyed by oral tradition; however there are a number of instances where it has been codified on a formal basis. In Peninsular Malaysia, the Minangkabau *adat* of Negeri Sembilan and Malacca is known as *adat perpateh* and has been codified by the customary tenure enactments mentioned above. In Sabah, a number of *adat* were codified by the British North Borneo Chartered Company between 1936 ands 1939. These documents include the *The Timoguns* (N.A.B. 1/36), *Tuaran Adat* (N.A.B. 2/37), *Murut Adat* (N.A.B. 3/39), *Dusun Adat* (N.A.B. 4/39 (Putatan and Papar), N.A.B. 5/39 (Tambunan and Ranau), and *Kwijau Adat* (N.A.B. 6/39).[31] In Sarawak, some *adat* have been codified in subsidiary legislation, such as those in the Adat Bidayuh Order 1994 (Swk. L.N. 27/94), Adet [sic] Kayan-Kenyah Order 1994 (Swk. L.N. 28/94) and the Adat Iban Order 1993 (Swk. L.N. 18/93). The Majlis Adat Istiadat (Council of Customs and Traditions) has also completed the codification of the *Adat Bisaya* as well as the *Adat Lun Bawang*,[32] while the *Adat Kelabit*, *Adet Kajang* and *Adet Penan* have been submitted to the State Attorney-General for vetting; the *Adet Melanau Likou* is also in the final stages of completion[33].

The *Adat Iban* can be taken as illustrative of the general concepts of land and forest law among swidden communities in Malaysia more generally. The use of Iban terminology is increasingly adopted by the Courts due to the prominent cases involving Iban communities (particularly the *Rumah Nor* case[34]). In particular, the concept of *pemakai menoa* has been adopted as the term given to an area of land under the control of one long-house or village. The boundaries between the *pemakai menoa* of neighbouring villages usually follow natural ridges and streams (Fig. 3.1). Within these boundaries, *temuda* is the arable land (usually in the valleys) allocated for shifting cultivation and *pulau galau*, the rest of the forest (usually steeper areas), are set aside for the gathering of forest produce.

FIGURE 3.1 **Schematic boundaries between the *pemakai menoa* of three hypothetical villages**



Note: Dashed line – boundaries between pemakai menoa; dark gray – high forest (pulau galau); lighter grays and white – cultivated fields and fallow fields (temuda); black rectangles – longhouse (rumah).

31. These are known as the "Woolley Codes" afte r Chartered Company official G.C. Woolley.
32. Adat Bisaya Notification 2004 (Swk. L.N. 49/2004); Adat Lun Bawang Notification 2004 (Swk. L.N. 47/2004)
33. Sarawak State Government website <www.sarawak.gov.my> viewed on 24 August 2008.
34. [2001] 6 MLJ 241

3.4 IMPLEMENTATION

3.4.1 OVERVIEW

As highlighted above, many of the customary rights of forest-dependent people are protected by Malaysian law. However, in practice, the boundaries of native customary land are often a matter of dispute. Only a small proportion of the boundaries of *pemakai menoa* has received specific formal recognition and has been delineated on maps. No comprehensive exercise to map the extent of native boundaries has been carried out. This deficiency is of concern throughout Malaysia.

Of particular contention is the recognition of the rights to the *pulau galau* (the communal higher forest). Long-houses and *temuda* fields belonging to individual families fit relatively well into the regulatory framework provided by the statutes. However, the state government has been active in curbing attempts of natives to assert property rights over the often extensive area of higher forest that surrounds their villages. The conflict over this land has been brought to the fore by the expansion of logging, plantations and dam creation in such areas.

3.4.2 PENINSULAR MALAYSIA

Between 1994 and 2004 the area of gazetted Aboriginal Reserves in Peninsular Malaysia increased from 17,903 ha to 19,223 ha[35] (Table 3.1).

The gazetted Aboriginal Reserves contain around 116 settlements of the total of around 776 aboriginal settlements in Peninsular Malaysia.[36] Between 1990 and 1999 there had been an increase of 11,775 ha in new applications for Aboriginal Reserves. Local newspapers have reported that the Rural and Regional Development Ministry announced that all aboriginal families will receive two to three hectares of land when the Government transfers the present Aboriginal Reserve land to them in 2006.[37] It was later reported that aboriginal families in Pahang will get titles for 8.4 ha of land each.[38]

3.4.3 SABAH

In Sabah, recognition of native land is intractable. In December 2005 there were reported to be 14,301 Native Title (NT) land applications that were still pending survey under the Land Ordinance (Sabah Cap. 68/1930, s 67).[39] Some applications for title have been pending for many decades and 80% of the complaints Suhakam (the National Human Rights Commission) has received in Sabah are reported to be related to land issues.

TABLE 3.1 **Status of Aboriginal Land in Peninsular Malaysia (as of December 2003)**

LAND CATEGORY	AREA (HA)	PERCENT
Aboriginal Reserve gazetted	19,223	13.9%
Aboriginal Reserve approved pending gazettement	28,768	20.8%
Aboriginal Reserve proposed pending approval	79,716	57.7%
Aboriginal Area in forest/wildlife reserve or national park	9,873	7.1%
Aboriginal Area granted private title to aboriginal individual	644	0.5%
TOTAL	**138,223**	**100.0%**

Source: 'Penyata Rasmi Parlimen' Parliamentary Debates Malaysia: DN 15.12.2004.

35. There has been an overall decline from the 1991 level of 20,666.96 ha.
36. Alina Ranee, 'Land title poser for Orang Asli' New Straits Times, 1 April 1997.
37. 'Government to give land to orang asli next year', The Star, 7 February 2005.
38. 'Land titles for Orang Asli', Malaysiakini, 15 October 2005.
39. 'CM says complaints of some LUCs approving thousands acres', Daily Express, 10 December 2005.

It has been reported that there are about 20,000 people living inside forest reserves[40] in Sabah occupying an area in excess of 50,000 ha. The long term strategy of the Sabah Forestry Department is to have this issue addressed by having all forest reserves under a focused and planned management system (e.g. Deramakot, Tangkulap and Pinangah Forest Reserves). Towards this long-term goal, the present strategy of the Sabah Forestry Department has been to attempt to determine whether the practices of people living inside forest reserves are (i) stable, subsistence use by genuine locals or (ii) expanding, commercial encroachment by newly-arrived outsiders. The Sabah Forestry Department's strategy is to "accommodate" the former and "eliminate" the latter.[41]

3.4.4 SARAWAK

In Sarawak, the State Government has responded to the mass of individual land applications in a similar manner by encouraging native communities to form joint ventures to develop 'NCR Land' (i.e. native customary rights land). This *Konsep Baru* ('New Concept') was introduced in 1991 and includes a private-sector component to the long-established efforts of Sarawak government agencies such as the Sarawak Land Development Board (SLDB), set up in 1972; Sarawak Land Consolidation and Rehabilitation Authority (SALCRA), set up in 1976; and Sarawak Land Custody and Development Authority (LCDA), set up in 1981.[42]

Despite these initiatives, there have been numerous letters, petitions, press statements, police reports and court cases regarding land conflict in Sarawak. There are reportedly around 100 cases before the courts regarding land disputes in Sarawak. As is the case in Sabah, land questions top Sarawakians complaints to Suhakam.[43]

These disputes have also led forest people to start setting up blockades on logging roads. In 1987 around 25 blockades were set up, involving thousands of native people in the Baram and Limbang districts of Sarawak. Most of these blockades were dismantled by the Armed Forces and the Police. Few blockades were set up in the early 1990s. Since 1996 a number of blockades have been set up intermittently, mostly in the Baram district (SAM 2007).

In Sarawak, the recognition of the land rights of Penan people is a particularly difficult case. The majority of the Penan were nomadic prior to the enactment of the state's Land Code in 1958. Therefore, they did not have established permanent long-houses or continuously cultivated *temuda*. The numerous temporary camps (*lamin*) of the Penan have not been given the same recognition as the more established villages of other ethnic groups.

3.5 REFORM

3.5.1 OVERVIEW

Numerous developments related to the forest regulatory framework have taken place in recent years. These developments have included moves made to safeguard the rights of forest-dependent people as well as attempts to restrict their rights.

40. '20,000 in forest reserves acres', Daily Express, 4 December 2006.
41. 'The "OPS Sadang" Team', Sabah Forestry Department 2006 Annual Report. p. 166.
42. Tony Thien, 'Sarawak Native Land-owners Wary of 'Konsep Baru'', *Malaysiakini,* 8 December 2004.
43. Sarawak Native Customary Land Rights Network (TAHABAS), 'Press Statement', 28 April 2006. Posted on *Rengah Sarawak* website <www.rengah.c2o.org>.

In this regard, it should be noted that it is an explicit policy of both the federal and state governments to reduce dependence on the forest in the name of "development". In particular, Malaysia aims to be considered a "developed nation" by the year 2020. The eradication of poverty and increased urbanisation through industrialisation have been characteristics of moves in this direction. The rural population has become the minority and the predominant paradigm sees urban migration as the solution to people's dependence on the forest, rather than safeguarding the rights of such people *in situ*.

The general government attitude in Malaysia is that forest-dependence should be overcome by upgrading one's standard of living and moving to the towns and cities. Nevertheless, the establishment has undergone a number of reforms in recent years that increase the recognition of the rights of forest-dependent people. Of particular note is the recognition by the Judiciary of usufruct and property rights of natives created under customary law. In this regard, there have been a number of landmark cases which have given increasing security to native land in general and forest land in particular. While these reforms have yet to result in the amendment of the statutes, they carry the weight of official endorsement via the common law principle of judicial precedent.

3.5.2 **LANDMARK CASES**

The provisions of unwritten native customary law and the rights of forest-dependent people arising thereof have been upheld in numerous cases that have been brought to the Courts. In addition to the provisions of the Constitution highlighted above (Art 161(2)), the common law principle of *lex non scripta* (unwritten law) provides for the recognition of unwritten *adat*.

Numerous judicial decisions have upheld this principle, with case law in Peninsular Malaysia dating back to *Sahrip v Mitchell* (1870)[44] which affirmed that *adat* remains enforceable even if it has not been codified. More recent cases from the Peninsula include *Koperasi Kijang Mas and 3 Ors v Kerajaan Negeri Perak & 2 Ors*[45] ('*Kijang Mas*'); *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor*[46] ('*Adong*') and *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*[47] ('*Sagong*'). In Sabah and Sarawak, the leading recent case is *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors*[48] ('*Rumah Nor*'). There is a long history of similar cases in Sabah and Sarawak,[49] however *Rumah Nor* is regarded as the landmark case as it set a precedent that earlier NCR cases[50] had failed to achieve. The most recent of such cases is that of *Rambilin binti Ambit v Assistant Collector for Land Revenue, Pita* ('*Rambilin*')[51].

Kijang Mas involved two aboriginal regroupment schemes[52] in the State of Perak, namely RPS Sungai Banun and RPS Pos Legap. The Perak State Executive Council (Exco) had approved the gazettement of the two areas as aboriginal areas under the Aboriginal Peoples Act 1954.[53] Despite the approval of the areas as aboriginal areas, the Perak State Forestry Department issued licences to a private company to carry out logging in the two areas.[54]

44. [1877] SLR Leic 466
45. [1991] 1CLJ 486
46. [1997] 1 MLJ 418 – which held that it was the "first case in this country where the aboriginal people have sued the government for their traditional rights under law".
47. [2002] 2 MLJ 591
48. [2001] 6 MLJ 241
49. E.g. H.H. Lee, *Cases on Native Customary Laws in Sabah (1953–1972)*, Kota Kinabalu: Government Printer; and H.H. Lee *Cases on Native Customary Law in Sarawak*, (1975), Kuching: National Print Dept.
50. E.g. Ara bte Aman & Ors v Superintendent of Lands & Mines, 2nd Division [1975] 1 MLJ 208; Nyalong v Superintendent of Lands and Surveys, 2nd Division, Simanggang [1967] 2 MLJ 249.
51. No. K 25-02-2002 (High Court of Sabah and Sarawak, Kota Kinabalu, July 9, 2007)
52. "Rancangan Penempatan Semula (R.P.S.)" also "kawasan pengumpulan semula orang asli"
53. Sungai Banun was approved on 1 May 1984 and Pos Legap 21 December 1988.
54. Via Licence J.H.Ng.Pk. No. 15/89 covering Sungai Banun; and Licence P.P.N.Pk. No. 10/90 covering Pos Legap.

On 18 July 1990, the aboriginal cooperative, Koperasi Kijang Mas Berhad, together with representatives of the two communities filed a joint suit against the Government of Perak, the State Forestry Director and the logging company. The High Court ruled that the State Forestry Director had exceeded his powers by issuing the licences to log the areas. This was because the Aboriginal Peoples Act 1954 (s 6(2)(iv)) states "within an aboriginal area … no licences for the collection of forest produce under any written law relating to forests shall be issued to persons not being aborigines normally resident in that aboriginal area".

Adong involved a group of about 424 aboriginal people of the Jakun tribe living around the catchment area of the Sungai Linggiu and Sungai Tebak, Johor. In 1990 the Governments of Malaysia and Singapore agreed that 53,273 acres of this area would be used as the catchment for an earth-fill dam to supply water to Singapore. Part of this area was Aboriginal Reserve and part of it was Forest Reserve; however the existing reservations were revoked and the land was alienated for the purpose of the dam catchment. The Government of Singapore paid the Government of Johor a sum of RM320 million as compensation for loss of revenue from the area. Following the dam's completion in 1992, the Department of Aboriginal People's Affairs recommended that RM560,535 be paid to the aborigines as compensation under ss 11 and 12 of the Aboriginal Peoples Act 1954. However, by 1994 no compensation had been paid to the aborigines, causing Tuk Batin Adong bin Kuwau of Kampung Sayong Pinang and 51 other heads of families to sue the Government of the State of Johor and the Director of Land and Mines, Johor. The plaintiffs claimed that the defendants had restricted the area and prohibited them from entering it to forage. The High Court granted the plaintiffs RM26.5 million as compensation for loss of income from the area. Furthermore, the Court of Appeal[55] granted the plaintiffs costs as well as interest at the rate of 8% per annum from the date of the originating summons. Finally, the case went to the Federal Court which upheld the decisions of the lower courts.[56]

Sagong involved a group of aboriginal peoples of the Temuan tribe who had been living on 38.477 acres of land situated at Kampong Bukit Tampoi, Dengkil, Selangor. Part of the group's land had been gazetted under the Aboriginal Peoples Act 1954. A large strip across the gazetted land was excised for the purpose of constructing a highway to the Kuala Lumpur International Airport in Sepang. In consequence, the group was evicted and their fruit trees and houses were demolished on 22 and 27 March 1996. They were offered and paid compensation for loss of trees and buildings which they accepted under protest that it was inadequate and did not cover the loss of land. Sagong bin Tasi and six others, on behalf of themselves and their respective families, sued the State Government, the Federal Government, the Highways Board and the contractor. The High Court granted the plaintiffs compensation under the Land Acquisition Act 1960 for loss of the gazetted portion of their land. Furthermore, the Court of Appeal extended the compensation to cover the un-gazetted portion of the plaintiffs' land and awarded damages for aggravated trespass as well as costs.[57] A further appeal has been made to the Federal Court.

Rumah Nor involved 672 hectares of land occupied by an Iban longhouse community known as Rumah Luang/Rumah Nor in the District of Sekabai, Bintulu Division, Sarawak. Between 1984 and 1989 the land had been subjected to at least two rounds of industrial logging where all large trees had been removed. In each instance the logging contractor had paid the community compensation. Title to the land had then been issued to a company, Borneo Pulp Plantation Sdn Bhd, that was to be part of a one-million hectare plantation. In

55. [2002] 3 MLJ 705
56. The distribution of the compensation money has since become the subject of dispute.
57. [2005] 347 MLJU 1

1998, contractors cleared the land and planted fast-growing trees for the production of pulpwood. In 1999, Tuai Rumah Nor Anak Nyawai, the headman, together with three other representatives of the community alleged trespass and sued the plantation company, the sub-lessee of the land as well as the Bintulu Superintendent of Lands and Surveys. The High Court placed an injunction on the plantation company from entering the area and directed the Land and Survey Department to rectify the company's title to exclude the area. All costs were awarded to the plaintiffs. This ruling was, however, overturned by the Court of Appeal in 2005.[58] A further appeal has since been made to the Federal Court.

The above-mentioned cases set a number of important precedents. *Sahrip v Mitchell* had already long established that *adat* provided rights to land that had been cleared and was being cultivated. However, *Adong* was the first case that extended that principle to include the rights to foraging, hunting and fishing on land that was not being cultivated (these are termed 'usufruct'). *Sagong* further extended those rights to include the proprietary rights to the land itself in the case of aborigines' cultivated land. *Rumah Nor* has similarly established that *adat* form an important basis for the law in Sarawak. Although the Court of Appeal overturned the decisions of the High Court based on the particular circumstances of the *Rumah Nor* case, a number of key principles regarding the importance of *adat* were affirmed.

Although *Kijang Mas* did not delve into matters of customary rights, one important feature of the case was the fact that the two aboriginal areas in question, although approved by the Exco, had yet to be formally gazetted. The High Court ruled that Exco approval was sufficient for the plaintiff's rights under the law. This is an important precedent for aborigines in Peninsular Malaysia, as the majority of aboriginal areas have yet to be formally gazetted (in many instances, the Exco has approved gazettements, while the *Gazette* notification has yet to be published and from the point of view of statute law the areas have yet to be created).

The judgement in *Adong* came to the following conclusions:

> In Malaysia specifically, the aborigines' common law rights include, inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers … It is clear that the land on which those trees are planted is either a reserve land for the aboriginal people or an area where they had a right to access, which is a jungle reserve. As such, adequate compensation must be made for these trees but not for the land. In the present case adequate compensation for the loss of livelihood and hunting ground ought to be made when the land where the plaintiffs normally went to look for food and produce was acquired by the government. The compensation was not for the land but for what was above the land over which the plaintiffs had a right.

As noted, *Sagong* extended the precedent set by *Adong* to include the right to the land itself:

> I follow the Adong case, and in addition, by reason of the fact of settlement, I am of the opinion that based on my findings of facts in this case, in particular on their culture relating to land and their customs on inheritance, not only do they have the right over the land but also an interest in the land. I am fortified in my view by the leading Privy Council case of Amodu Tijani v the Secretary, Southern Nigeria [1921] 2 AC 399 ("the Amodu case"), which was relied on by the High Court in the Adong case though the issue of settlement did not arise in the case.

58. [2005] 266 MLJU 1

Furthermore, the Court of Appeal in *Sagong* noted that it was necessary to modify s 12 of the Aboriginal Peoples Act 1954 to "render it harmonious" with Art 13(2) of the Constitution regarding the question of compensation. This meant the relevant phrase in s 12 ("If any land … in any aboriginal area is … disposed of … the State Authority may grant compensation therefore …") be read as "the State Authority **shall** grant **adequate** compensation therefore" (emphasis as original).

> By interpreting the word "may" for "shall" and by introducing "adequate" before compensation, the modification is complete. I am aware that ordinarily we, the judges, are not permitted by our own jurisprudence, to do this. But here you have a direction by the supreme law of the Federation that such modifications as the present must be done. That is why we can resort to this extraordinary method of interpretation.

In *Rumah Nor*, the Court of Appeal followed *Adong* and *Sagong* and upheld the following expositions of the law regarding native customary rights:

a) that the common law respects the pre-existence of rights under native laws or customs though such rights may be taken away by clear and unambiguous words in a legislation;
b) that native customary rights do not owe their existence to statutes. They exist long before any legislation and the legislation is only relevant to determine how much of those native customary rights have been extinguished;
c) that the Sarawak Land Code "does not abrogate whatever native customary rights that exist before the passing of that legislation". However natives are no longer able to claim new territory without a permit under section 10 of that legislation from the Superintendent of Lands & Surveys"; and
d) that although the natives may not hold any title to the land and may be termed licencees, such licence "cannot be terminable at will. Theirs are native customary rights which can only be extinguished in accordance with the laws and this is after payment of compensation".

These questions of law were upheld by the Court of Appeal, even though the particular orders of the High Court were overturned.

Many other cases paved the way for these recent landmark cases. These include some precedents set by other Malaysian cases,[59] but the majority of the precedents leading to Malaysia's landmark NCR cases are native rights cases from other common law jurisdictions. Of particular influence have been native rights cases from Australia, Canada and the United States (Annex II).

3.5.3 STATUTE REVISION

Following a court ruling that the provisions of a statute are unconstitutional, it is incumbent upon the government of the day to appeal the ruling, amend the statute, or amend the Constitution. In most of the above cases the government has chosen to appeal the ruling. Even where the ruling has not been appealed (or has been upheld upon appeal) the federal and state governments have been generally reluctant to resolve the conflict by amending the statute or the Constitution.

In the case of Sarawak, the Land Code 1958 and the forest laws have been amended to increase the power of the state to extinguish native rights. The original Land Code 1958 contained a number of provisions allowing for the extinguishment of Native Communal Reserves (s 6(4)) and for the extinguishment of Native Customary Rights (ss 94(2) and 15). The

59. Adong followed Selangor Pilot Association (1946) v Government of Malaysia & Anor [1975] 2 MLJ 66 and S Kulasingam & Anor v Commissioner of Lands, Federal Territory [1982] 1 MLJ 204 – which established that all acquisition of proprietary rights shall be compensated. Rumah Nor followed Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors [1990] 3 MLJ 427 – which established that representative actions are appropriate in cases involving the rights of forest-dependent people.

original enactment has since been amended numerous times:

- In 1974, an amended s 5 (3 & 4) granted power to the Minister to extinguish native customary rights after six weeks notice by publication in the government Gazette.
- In 1988, an amended 33 (1)(a) allowed a fine to be imposed if land was not used consecutively over a three year period and the land then would later be re-classified as state land if title rights were not implemented. This amendment does not appear to take into consideration the fact that long-rotation shifting cultivation is required to maintain soil fertility.
- In 1994, an amended s 46 allowed for acquiring land for broadly defined purposes of 'public utility'.
- In 1996, an amended s 5(3&4) shifted the burden of proof of ownership of native land from the government to the claimant.
- In 2000, an amended s 5(2) removed the possibility for native customary rights to be created by any lawful methods other than those specified in that section (the original s 5(2)(f) was a blanket clause that allowed for the possibility of other "lawful methods" being used to create native customary rights).

As can be seen, the various amendments to the Land Code 1958 were aimed primarily with administrative considerations in mind rather than increasing the rights of forest-dependent people. In this respect, these revisions can hardly be termed 'reform' in the sense of progressive legislative change from a rights perspective.

3.5.4 FOREST CERTIFICATION

In parallel with the various recent court rulings a number of other initiatives have been carried out that have potential implications for the rights of forest-dependent people. Perhaps foremost has been the concept known as 'forest certification' or 'timber certification'. This involves the certification of forest management as 'sustainable', 'responsible' or simply 'legal'. Timber from such forests would then be able to be sold as "certified" and thus achieve marketing advantages (especially in certain "sensitive" niche markets in Europe and North America). A number of certification schemes have been established, with the global Forest Stewardship Council (FSC) scheme and the national Malaysian Timber Certification Scheme (MTCS) operating in Malaysia. These schemes both make reference to the need to respect the rights of forest-dependent people; in this respect, the FSC scheme raises the bar higher than the MTCS scheme which focuses on ensuring compliance with the existing regulatory framework.

In Sarawak, two forest management units (FMUs) have been certified under the MTCS. However, this certification has been opposed by some local people and members of civil society on the grounds that land conflicts in the area have yet to be resolved. In particular, some Penan villagers of Long Benali have challenged the validity of the MTCS certification of the Samling logging concession in Ulu Baram, Sarawak. Despite the maintenance of the MTCS certificate, the high-profile nature of the case has brought attention to the conflict in the area and thus served the interests of the villagers.

Somewhat similarly, a proposed legality licensing scheme for the assurance of legality of imports to the European Union has highlighted the plight of forest-dependent people in Malaysia. Representatives of some of these communities (and some civil society groups) withdrew from discussions regarding the formation of the scheme following concerns that the issue of native land claims would not be adequately addressed. By publicly withdrawing from discussions, these groups drew attention to their concerns.

3.5.5 INVOLVEMENT OF FOREST-DEPENDENT PEOPLE

The opportunity for forest-dependent people to assert and defend their rights is compromised by a general lack of free, prior and informed consent prior to extinguishment. This situation is due to the apparent reluctance of the government to address the complexities in carrying out full and meaningful consultation and disclosure of the statutory provisions to the affected people. These complexities include the logistical difficulties of dealing with disparate communities living in remote and inaccessible areas; communication barriers caused by diverse cultures and languages and low rates of literacy; combined with conflicts of interest caused by the relative power and patronage of the timber and plantation proponents competing for the land.

While Malaysia is nominally a parliamentary democracy, the opportunities for the involvement of forest-dependent people in the democratic process are constrained at both the federal and state level. The fundamental right to citizenship is often frustrated by bureaucratic obstacles such as the need for birth certification (which can be problematic for some forest-dependent communities in Malaysia). Furthermore, the dominance of political parties by the urban elite often acts to exclude forest-dependent minorities from the law-making process. Safeguards which allow for the appointment of minorities as lawmakers are inadequate and forest-dependent groups (such as the Orang Asli and the Penan) continue to be under-represented in Parliament and the various State Legislative Assemblies.

3.5.6 PROSPECTS FOR INCREASED RECOGNITION OF RIGHTS

The importance of *adat* as part of Malaysia's legal framework is becoming deeply entrenched and this development merits further study into the current practices of the many and varied groups of indigenous peoples throughout Malaysia. Such study would lead to a greater understanding of a subject which is particularly important in terms of forest management in cases where indigenous people are – rightly or wrongly – claiming that the forest belongs to them.

In Sabah, the State Government has mentioned the possibility of setting up a Commission of Enquiry to address native land rights.[60] The State Government is also encouraging individuals to make land applications *en bloc*. Although individuals are still allowed to apply for land, small holders are encouraged to join together and apply for land through cooperatives or joint ventures with corporations or government agencies such as the Federal Land Consolidation and Rehabilitation Authority (FELCRA).[61]

3.6 CONCLUSION

The Malaysian experience with forest regulation and the rights of forest-dependent people provides a number of lessons that may have broader regional application. Perhaps foremost among these is the general observation that reform can be initiated through the judiciary rather than the legislative arm of government. Indeed, it appears that in some cases the only avenue for forest-dependent people to seek reform and remedy is via the Courts. The failure of parliamentary democracy to provide adequate assurances to forest-dependent minorities has been somewhat assuaged by the relatively consistent rulings that may find application in other common law countries.

60. 'Land Tribunal may be set up to hear claims, says CM', Daily Express, 1 December 2005.
61. 'Preference for land applications en-bloc', Daily Express, 11 November 2005.

Very few, if any, reforms have originated through the political process. The government appears to have put the broader economic interests above the rights of forest-dependent people. What changes have been made to existing legislation have usually sought to constrain rather than expand the rights of forest dwellers. In such a scenario, the role of alternative initiatives (such as forest certification) is of increased importance. Through globalisation, the role of the market and international considerations will become increasingly important influences on the rights of forest-dependent people (despite the remote and inaccessible location where such rights might be exercised).

Given the complexities of Malaysia's demographic and political framework, the reform of laws regarding forest-dependent people will remain intractable for some time to come. However, the combination of political will and administrative competence may ultimately lead to the rights of such people being enshrined more securely in the statutes of the various states. Until such time, Malaysia remains an example of how forest statutes and their implementation have failed to provide adequate treatment of livelihoods and rights.

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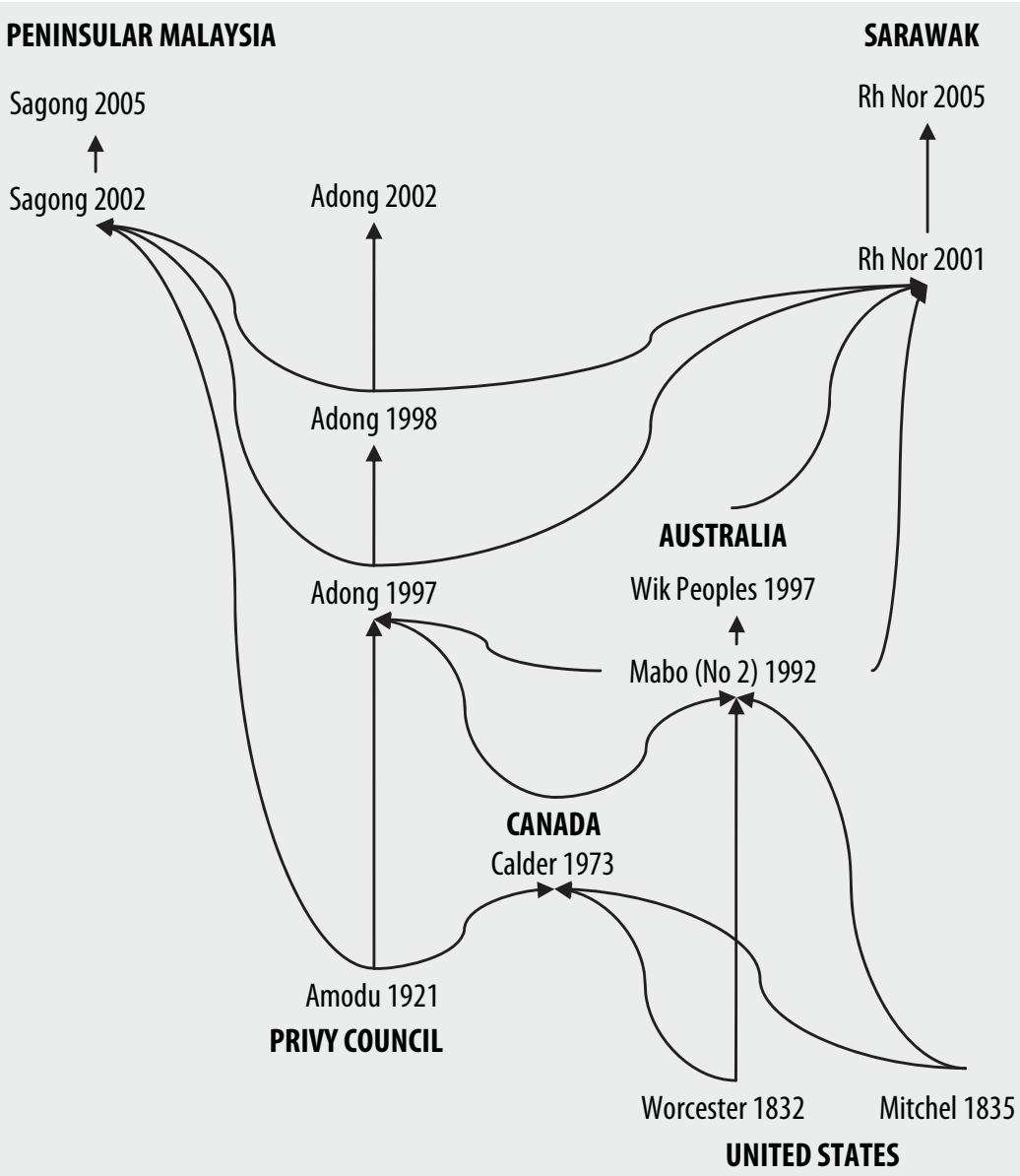
ANNEX I SELECTED INDIGENOUS PEOPLES OF MALAYSIA (WITH SYNONYMS)

PENINSULAR MALAYSIA	SABAH	SARAWAK
◎ Bateq, Bateg, Batok, Kleb, Nong, Tomo ◎ Che' Wong, Cheq Wong, Beri, Chuba Siwang ◎ Jahai, Jehai, Pangan ◎ Jahut, Jah Het ◎ Jakun, Jaku'd, Jakud'n, Jakoon, Djakun, Orang Hulu ◎ Kensiu, Kenseu, Kensieu, Kensiw, Moniq, Monik, Mendi, Negrito, Ngok Pa, Orang Bukit Semang, ◎ Kintak, Kintaq, Kenta, Bong ◎ Lanoh, Jengjeng ◎ Mah Meri, Besisi, Cellate, Betisek ◎ Mendriq, Minriq, Menriq, Menrik, Menraq ◎ Mintil, Mitil ◎ Orang Kanak, Orang Kanaq ◎ Sabüm ◎ Semai, Central Sakai, Senoi, Sengoi ◎ Semaq Beri, Semaq Bri, Semoq Beri ◎ Semelai ◎ Semnam ◎ Temiar ◎ Temoq ◎ Temuan ◎ Tonga, Mos	◎ Dumpas, Doompas ◎ Ganaq, Gana', Minansut, Keningau Dusun ◎ Kadazan-Dusun, Dusan, Dusum, Dusur, Kadayan, Kedayan, Kadasan, Minokok, Kimarang, Labuk, Lotud, Kuijau, Tatana, Tengara, Bisaya, Rungus, Dumpas ◎ Kimaragan, Kimaragangan, Maragang, Marigang ◎ Lundayeh, Lundayah, Lundaya, Lundayoh, Southern Murut ◎ Murut, Kolod, Okolo, Gana, Kalabakan, Sebangkung, Serudung, Tagal, Sumambu, Baukan, Nabay, Timugon ◎ Tambanua, (Abai) Sungai, Hulu Kinabatangan, Sinabu, Lobuu, Rumanau, Lingabau ◎ Tebilung, Tabilong, Tobilang, Tobilung	◎ Berawan ◎ Bintulu ◎ Bisayah, Dusun ◎ Bukitan ◎ Kadayan, Kedayan ◎ Kajang, Sekapan, Kejaman, Lahanan, Punan Bah, Tanjong, Kanowit ◎ Kalabit, Kelabit ◎ Kayan ◎ Kenyah, Sabup, Sipeng, Badang, Medang, Malang, Sebop, Sebob, Sabup, Sambup ◎ Land Dayak, Bidayuh ◎ Lisum, ◎ Lugat, ◎ Lun Bawang, Lundayeh, Lundayah, Lundaya, Lundayoh, Southern Murut ◎ Murut, Tagal ◎ Penan (Eastern/Western) ◎ Punan ◎ Sea Dayak, Iban ◎ Sian ◎ Tabun ◎ Tring ◎ Ukit ◎ Western Kenya, Kenja, Kinjin, Kindjin, Kanyay

ANNEX II LANDMARK NCR CASES IN MALAYSIA AND THEIR PRECEDENTS



- Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418; [1998] 2 MLJ 158
- Amodu Tijani v the Secretary, Southern Nigeria [1921] 2 AC 399
- Calder v A-G of British Columbia [1973] 34 DLR (3d) 145
- Mabo v State of Queensland (No 2) [1992] 175 CLR 1
- Mitchel v United States [1835] 9 Peters 711
- Nor Ak Nyawai v Borneo Pulp Plantation Sdn Bhd [2001] 6 MLJ 241; [2005] 266 MLJU 1
- Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors [2002] 2 MLJ 591; [2005] 347 MLJU 1
- The Wik Peoples v The State of Queensland & Ors [1996-97] 187 CLR 1
- Worcester v State of Georgia [1832] 6 Peters 515, 31 US 530

THAILAND'S FOREST REGULATORY FRAMEWORK IN RELATION TO THE RIGHTS AND LIVELIHOODS OF FOREST DEPENDENT PEOPLE

CHAPTER 4

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4.1 INTRODUCTION

The passing of the Community Forest Bill[62] by the interim Thai Parliament in late 2007 occurred after more than 15 years of often acrimonious debate about the rights of people living in and near forests, the nature of community forestry and what should be allowed under the proposed Act. Different versions of the Community Forestry Bill were alternatively proposed for discussion, before being sent back for re-drafting or re-thinking. Essentially, these versions were alternately liberal or restrictive in terms of the provisions for community forestry, providing greater rights for local people in one case, and fewer rights in the next.

The passing of the Bill by Parliament was something of a landmark after such a long period of debate, although it was quickly obvious that the provisions were restrictive and the Bill was widely criticised. A critical review of the potential impacts of the Bill in terms of human rights was timely.

However, the excitement was something of a false alarm as the Bill was not ratified by the King pending Constitutional High challenges by several Senators on the grounds that it is inequitable because it treats different communities differently and is therefore unconstitutional. Subsequently, following two changes of government the Bill has effectively lapsed.

This paper was originally commissioned by IGES to review the Community Forest Act, 2007 "from a rights perspective" and to assess its impacts (or at least its predicted impacts) on livelihoods. However, the task has been a moving target. While ratification was pending the focus shifted towards assessing the potential impacts of the "Act" on the assumption that it would be passed. Now, as there seems little chance that community forestry legislation will be resurrected in the foreseeable future, the focus has again shifted. In the current situation, the paper attempts to examine the exiting legislative and policy framework relevant to community forestry, forest dependent people's rights and forest-related livelihoods, taking into account the history of the related political and policy debate.

62. There is some confusion as to whether the draft passed by Parliament should be referred to as a Bill or as an Act. Although the draft was passed by Parliament it never passed into law, so I will continue to refer to it as a Bill.

4.2 FORESTS AND LIVELIHOODS IN THAILAND

4.2.1 OVERVIEW OF FOREST HISTORY

In order to set the context for efforts to reform the regulatory framework related to forests in Thailand, it will be useful to provide a brief history of forests and their relationship to Thai society. Perhaps the most crucial point for departure in this historical discussion is the severe deforestation which occurred in Thailand from the 1960s to the late 1980s.[63] Estimates of the extent of deforestation since World War II vary widely. Summarising various sources, Fisher and Hirsch (2008, 77) conclude:

> Whatever the differences in estimates, the various reports suggest that forest areas in Thailand as a whole declined by 50% or more from about 1960 to 2000.

It seems likely that the period of rapid decline stopped around the end of the 1980s.

Although much contemporary discussion of deforestation focuses on the impacts of the practices of forest dependent people especially as a result of "shifting cultivation," it is fairly clear that the causes of deforestation are more varied and that they relate more to national policy than to local causes. Delang (2002) stresses the importance of post World War II policies leading to "highland colonisation." Ethnic Thais from Central Thailand were encouraged to move into the previously heavily forested "frontiers" and to clear land for agriculture. This "highland colonisation" process also involved logging and extensive road construction. The policies promoting settlement in the northern "frontiers" of northern Thailand were largely related to efforts to counter the communist insurgency by populating areas used as hiding places by the insurgents. Phongpaichit and Baker (2002) argue that what they call "peasant colonisation" resulted in ethnic minorities being left in the remaining forest areas.

In addition to the conversion of forests for agriculture, a second contributing factor in forest decline was heavy logging, a major source of national income. Serious floods in 1988, which killed 251 people, were seen to have been a result of deforestation and led to a nation-wide logging ban in 1989. This led to a dramatic change in the role of the Royal Forest Department (RFD), with a shift from its previous role of managing the logging industry and managing forests for timber production, towards a focus on forest conservation. Despite frequent controversies over the involvement of elements of the RFD in illegal logging and timber smuggling, the RFD has largely remade itself in the image of a conservation agency.

It is important to emphasise that the high rate of deforestation up to the late 1980s is associated with policies that favoured settlement of the forest frontier and that the RFD was an actor in implementing these policies. The original populations of the northern frontier regions (mostly members of minority ethnic groups frequently referred to as "hill tribes") were affected by the arrival of a new population of immigrants, with whom they competed for land and resources, as well as by the policies of the army during the insurgency and the RFD as it adopted the conservationist mantle. All of this happened in the context of the marginality of the ethnic minorities in terms of citizenship. Many members of these groups were not recognised as Thai citizens, regardless of the length of residence, and large numbers still do not have citizenship certificates.

The army had been heavily involved in the forest areas during the insurgency in the 1970s and into the 1980s. In 1991, the army commenced the Kho Jo Kor programme which planned to move six million people away from forest areas (Phongpaichit and Baker 2002). On the other hand, the army had previously supported the settlement of remnants of the Chinese Nationalist

63. For a discussion of this change see Fisher and Hirsch (2007) and Kaewmahanin and Fisher (2007).

Forces (the Kuomintang, followers of Chiang Kai-shek) in Doi Mae Salong in northern Thailand in return for assistance in combating insurgents. The clearing of land within what is now a National Reserved Forest contributed to deforestation in the area. The army has been involved in various types of "community forestry" programmes, essentially associated with securing security-sensitive areas, for many years.

Forced relocation of forest dwellers by the RFD dates back to the 1980s (Kaewmahanin and Fisher 2007). Although it is now politically difficult for the RFD (since 2003 part of the Ministry of Natural Resources and Environment) to relocate people, relocation, or the threat of relocation, has been a long-running source of tension.

In 1964, the National Forest Reserve Act declared all land without occupation to be reserved forest. This category was not related to the presence of forest cover, but was solely defined by the absence of "occupation." Absence of occupation was, in practice, defined by the absence of settlements marked on a map. This Act meant that any agricultural activity within a reserved forest was technically illegal. The result was a legal fiction, as large numbers of people were living in reserve forests and were engaged in agriculture. Significantly, in a 1973 speech His Majesty the King described the process as encroachment by the authorities:

> It seems rather odd for us to enforce the reserved forest law on people in the forest which became reserved only subsequently by the mere drawing of lines on a piece of paper. The problem arises inasmuch as with the delineation done, these people became violators of the law. From the point of view of the law it's a violation because the law was duly enacted. But according to natural law the violator is he who drew the lines, because the people possess the right to live. Thus it is the authorities who encroached upon the rights of individuals and not the individuals who transgressed the law…
> H.M. The King of Thailand, 1973

It is significant that the King's speech clearly distinguishes legal rights and "natural" (human) rights.

Land reform and land certification were attempted to resolve some of the inconsistencies. The issuing of certificates indicating the right to farm partially addressed this problem.

In the 1980s the RFD issued certificates called STK (Sithi Tham Kin) which allowed usufructory rights within forests for areas up to 15 rai (2.4 ha) (ICEM 2003). The STK essentially recognised a "right to farm."

In 1992, a new programme, specifically aimed at "illegal squatters" living in national reserved forests commenced. Under this programme, Sor Por Kor (SPK 4-01) certificates were issued by the Agricultural Land Reform Office. These allowed forest dwellers to farm in areas within reserved forests, and also allowed inheritance of the land, but did not allow sale of land. Consequently farmers were unable to obtain bank loans to support investment to improve the productivity of land.

In an assessment of the impacts of the SPK programme ICEM (2003, 52) finds that "To 2002, the SPK program has resolved the tenure arrangements for 889,955 families who once lived illegally in national forest reserve areas." It is rather a generous assessment to suggest that the programme "resolved the tenure arrangements," given the very limited usufruct rights allowed. The solution for those who received the certificates – probably a minority in any case – was at best a temporary and partial solution.

4.2.2 CURRENT FOREST CATEGORIES

Subsequent to the declaration of national reserved forests after 1964, the Seventh NESDP (National Economic and Social Development Plan) 1992-1996 set a target of 25% of the total land area of Thailand to be set aside as conservation forests and 15% as economic

(production) forests. These targets were confirmed by the Eighth NESDP Five Year Plan 1997-2001. These areas remain targets and do not represent present declared areas within each category or actual forest cover. The area of the national reserve forests is greater than the 40% target. Within the broad category of national reserved forests, some areas of high conservation value have been designated as Protected Areas (PAs) (including National Parks and Wildlife Sanctuaries).

4.2.3 PEOPLE, LIVELIHOODS AND FORESTS

Assessing the impacts of the forest governance framework on human livelihoods and human rights requires some understanding of the categories of people who use forests in various ways and, ideally, of the approximate numbers of people in each category. This discussion is often phrased in terms of forest "dependent" people. However, as Byron and Arnold (1997) point out, this term is highly questionable because there are many different types of forest dependency and the question of dependency raises issues of the presence or absence of alternatives. One alternative to referring to "forest dependent people" would be to refer to "forest people," but the Thai translation of forest people (*khon paa*) is considered to be perjorative. In this paper I will continue to refer to "forest dependent people," while recognising the limitations of the term. I agree that it is important to try to take account of different types of livelihood systems in terms of the way in which forest use is relevant. It is more important to recognise various forms of forest use.

Types of forest use by rural people in Thailand include:

- The use of timber, mainly for domestic purposes. (Timber harvesting is illegal, but widely practiced on a small scale.)
- The use of non timber forest products (NTFPs). A wide variety of NTFPs are used including edible plants, medicinal plants and small animals for food. This last category includes marine animals from mangrove forests.
- Agriculture and horticulture practiced in forests, often using shifting agriculture/ swidden.
- The growth of commercial crops, such as tea for sale in the market.

An important trend in forest livelihoods is the increasing movement towards collection and production for commercial purposes. This move away from subsistence-oriented forest use was not captured in the aborted Community Forestry Bill 2007 with its emphasis on use for subsistence only. It is also an issue in terms of the tendency of the community forestry movement to de-emphasise agriculture and commercial use. (I will return to this point later.)

4.2.4 NUMBERS AND CATEGORIES OF PEOPLE WITH FOREST-RELATED LIVELIHOODS

At first sight, it should be relatively easy to give estimates of the number of people with various types of livelihoods related to forests. Obvious broad categories would include: people living within forests (including PAs) and people living near forests who use products from the forest. In practice even the first of these categories is extremely difficult to estimate.

The problem is that the figures are very vague, the boundaries of various land categories are sometimes unclear and no comprehensive survey has been carried out. Where there are estimates (or guesstimates), these are often picked up and quoted by other sources without reference to qualifications made in original papers. Some examples of the estimates given are as follows.

- The Ford Foundation (1998) estimated that 10-15 million people potentially could be involved in community forestry in Thailand based on the area of suitable forests potentially available for community forests. This estimate presumably includes people living both in and around forests as they would be most suitable for involvement in community forestry, so it is a proxy estimate of people with forest livelihoods.

- ICEM (2003) estimated that by 1980 10 million people had established farms in National Forest Reserves, but no source is cited for this specific statement.
- Lynch and Talbot (1995) estimated that there are (were) 20-25 million directly dependent on forest resources in Thailand and 14-16 million "living on land classified as public forest."

Fisher et al. (1997, 7) point out some of the risks involved in providing estimates of the numbers of people "dependent" on forests:

> Although the terms of reference for this paper ask for "guesstimates of numbers of people closely dependent on forests", we have, on careful consideration decided not to provide any estimates for three reasons. Firstly, there is a tendency for guesstimates, however carefully qualified, to attain the status of "facts" after a few cycles of citation and re-citation. Secondly, broad numbers related to broad categories tend to aggregate quite different types of people-forest relationships, masking differences which have potentially quite important consequences. Thirdly, the process of generating the estimates was so arbitrary (reflecting the limitations of meaningful data) as to be quite unacceptable.

So, what, if anything, can be concluded? It can be seen that:

- It is impossible to be precise, but there are certainly considerable numbers of people living in and around forests in Thailand (certainly millions);
- The extent and type of "dependence" is likely to be highly variable;
- There are significant numbers of people involved in agriculture in reserved forests and PAs. These were often present before the PAs or reserved status were declared;
- Use patterns are changing over time, with an increasing trend towards collection or production for sale.

4.3 THE HISTORY OF THE CF BILL

The history of the Community Forestry Bill, or rather the history of the clash of versions of the Bill is complex and reflects a major tension within Thai society between advocates of strict conservation and advocates of the rights of forest dependent people. There have been many versions of the Bill, more or less alternating between versions that would allow forest dependent people to legitimately live in forests (including PAs) and to use forest resources (subject to restriction) and much more restrictive versions that would stringently limit the eligibility of people to practice community forestry and the type of forest use allowed. It is not necessary or practical here to go through every step of this story in detail. Instead I will focus on some of the key steps and the main issues discussed. Table 4.1 provides a summary of the chronology and gives some idea just how much debate has occurred, leading to multiple versions.

The first draft Bill was prepared by the RFD in 1992, focusing on reforestation and ways to involve people in reforestation (Makarabhirom 2000). In 1993, an alternative Bill was drafted by activists and academics. This version provided for significant rights to be recognised for forest dwellers. A lengthy trail of drafts and competing drafts began.

It has been common to present the debate about community forestry as being essentially between "dark green" NGOs and "light green" NGOs. In this somewhat oversimplified view, the "dark green" NGOs are essentially "preservation" focused, arguing that forests need to be preserved in as natural state as possible and that it is impossible for people to live within them and to main conservation values at the same time. The "light green" NGOs argued for the rights of forest dwellers, generally based on a picture of forest dwellers as essentially nature-friendly. The

TABLE 4.1 **A summary of major events in the history of the Community Forestry Bill**

Time	Event
1992	◎ The Draft Bill prepared by RFD was approved in principle by Cabinet.
1993	◎ The "People friendly" community forestry Bill was drafted and supported by "Light Green" non-governmental organisations (NGOs) and activist academics.
1995	◎ NESDB conducted a workshop for drafting the community forestry Bill with involvement of identified stakeholders and their representatives. ◎ The "Suanbua Draft" was produced.
1996	◎ The Bill was approved in principle by Cabinet on June 2, but the government postponed the passing of the Bill. ◎ "Dark Green" NGOs and RFD officials criticised the "Suanbua Draft" and demanded a revised draft.
1997	◎ A public hearing was conducted by an appointed committee consisting mostly of academics. Approximately 250 people attended. ◎ A new committee with a different composition was set up, chaired by the Prime Minister's Office Minister. A revised version was drafted and submitted (the "Juridical Committee Version").
1998 (May 18)	◎ A new revision of the draft emerged (the "P.M. Appointment Committee Version").
1999	◎ The Northern Community Forest Network was established and campaigned for a people-friendly Bill.
2000	◎ The draft people version was formulated and submitted to the Parliament (referring to Article 170 of the 1997 Constitution). ◎ The end of the Chavalit government in November stopped this legislative process.
2001	◎ The Thai Rak Thai Party won the general election and came to power on February 26. ◎ The draft Bill was approved on November 7 by the House of Representatives (the Lower House). ◎ A committee with 27 members appointed by the Upper House of Parliament was set up with three representatives from the "Light Green" NGOs to consider the Bill.
2002	◎ The Bill was revised by the Senate on March 15. ◎ The House of Representative confirmed the approved version.
2004	◎ A joint appointed committee with representatives from both the Lower and Upper Houses of Parliament was set up to find mutual agreement on the Bill.
2007	◎ The Bill was taken up again for consideration by the post-coup government and was passed on November 21. ◎ Members of the Senate filed a petition to the Constitutional Court challenging the passed version on constitutional grounds.

Source: Provided by Surin Onprom

RFD and the "dark green" NGOs shared a common reluctance to allow people to live in forests. The activists in the "light green" camp were often supported by academics (including anthropologists and other social scientists).

Makarabhiron (2000) presents a slightly different analysis, identifying a number of interest groups involved in the community forestry process. This categorisation is summarised by Kaewmahanin and Fisher (2007, 130):

> These are national-centred, community-centred and government-centred. The first two groups comprise not only NGOs but also academics and people's networks. The national-centred group has mostly green conservationist members that have strong conventional conservation beliefs in which the utilisation of natural resources should not be allowed in natural forests. The community-centred group primarily consists of grassroots-based NGOs that work closely with local people, academics including anthropologists and sociologists, field-based social foresters and networks of people's organisations that consist of rural and indigenous forest dependent communities from all regions. This group is concerned with participatory decision-making processes and the sustainable livelihoods of local people. The group recognises that maintaining traditional forest management systems that allow utilisation together with local norms, beliefs and regulations is essential to bringing about sustainable forest management. The group, as the main supporter of the community forestry Bill from the beginning, points out that more than 800,000 people are permanently included in the PAs where they had resided long before the declaration of the PAs. The government-centred group consists primarily of government staff and influential politicians.

The long period of public debate (one that continues) has been characterised by competing discourses essentially presenting forest dependent people as forest destroyers on one hand and environmentalists on the other. Forsyth and Walker (2008) refer to competing

narratives about "forest destroyers" versus "forest guardians". Although the underlying issue is one of different notions about nature and the place of people in it, there has been an element of stereotyping on both sides, with ideas about primitive and ignorant hill people on one hand and of wise people living in harmony with nature on the other.[64]

Events in 1997 were, in some ways, pivotal to the community forestry debate in two respects. Firstly, tens of thousands of members of a movement of rural people called the "Assembly of the Poor" camped for 99 days outside parliament in Bangkok demanding policy reforms. Many of the demands related to forest issues. Secondly, a new constitution was introduced which guaranteed people's rights to manage their own natural resources. The Constitution also refers to the need to clarify land issues and to the right of people to participate in forest management (Pragtong 2003).

On the basis of the 1997 Constitution (which allowed the submission of legislation by petition), activists submitted a people-friendly version of the Bill with a petition signed by 52,698 people in 2000. A Commission was formed to consider the Bill. According to Roonwong and Onprom (2000), only one person on the Commission represented the people's version. In any case, consideration of the proposed Bill lapsed due to a change in government. A later version was passed by the lower house in 2004, but the Bill was changed by the Senate. The Senate deleted Article 18, which would have allowed people who had been settled in various types of PAs before the Bill was passed to remain in PAs and use natural resources. The issue of people living in PAs and using resources in them had been an underlying point of contention between different versions of the Bill since the beginning, and ultimately remains the crucial issue.

4.4 THE COMMUNITY FOREST BILL, 2007

On 21 November 2007, the National Legislative Assembly (formed under the military government which ruled following the 2006 coup) passed another draft Community Forestry Bill. While the draft was awaiting Royal Assent, it was challenged by some senators who claimed that it was inconsistent with the 1997 Constitution on the grounds that it discriminated against certain categories of people. A petition was filed with the Constitutional Court. Subsequently, following the election of a post-coup government in early 2008 the draft was referred back to Parliament for reconsideration. According to one anonymous informant, the government was too distracted by political events following the election to deal seriously with any legislation and further substantive work on the Bill did not take place. During its term the government failed a vote of confidence and was replaced in early 2008. In effect the Bill has lapsed and seems unlikely to be revived in its present form, although some activists have mentioned the possibility of recommencing the process.

Although the Bill is essentially dead, it is useful to consider its key provisions and the reactions to them, as this casts light on the policy process involved in forestry reform and on the key debates which continue to surround it.

Chapter 2 of the Bill establishes a national Community Forest Policy Committee, consisting of a Minister, senior officials and experts and four members of (local) community forest management committees. Key responsibilities and authorities include preparation of regulations and to consider appeals on "requests to establish or revoke a community forest".

64. One extreme example of the failure of legislators to acknowledge even basic human rights (and essentially of racism) is the case of the Natural Resources and Environment Minister, Anongwan Thepsuthin, who was reported as suggesting that a birth control programme should be implemented amongst forest-dwelling communities to prevent forest encroachment (Bangkok Post 18 March 2008).

Chapter 3 establishes Provincial Community Forest Committees, whose key powers and responsibilities relate to decisions about requests to establish community forests, requests to revoke community forests, dismissal of forest committee members and "to control and supervise the management of the community forest by the Community Forest Management Committee so that it is done in accordance with the laws, ordinances, rules and the community forest management plan" (Sect. 17 (8)).

Chapter 4 refers to the establishment of community forests outside PAs. This refers to communities which have "a forest close by, that is not a protected forest". It is required that "over fifty individuals over the age of eighteen, who have lived in that area for not less than five years" should request the Provincial Community Forest Committee "to establish a community forest" (Sect. 18).

Chapter 5 refers to the establishment of community forests inside PAs. There are strict requirements regarding the eligibility of communities to request establishment of a community forest in such situations:

> Section 25. A request for establishing a community forest in a protected area in any locality can be made only in the case where that community has settled before the declaration of the area, in which that community is situated, as a protected area, and where that community has conserved and cared for the above mentioned area as a community forest for not less than ten years before the date of the entering into force of this Act, and continues to conserve and care for the above-mentioned area as a community forest continuously up to the date of the request to establish the community forest in accordance with this Act, and has demonstrated behaviour that clearly shows a culture and way of life which is supportive of the conservation of the forest and the ecosystem. This request must be submitted within 5 years counting from the date of entering into force of this Act.
>
> The PAs in which it is possible to establish a community forest in accordance with paragraph one, must not be an area which the government has designated to be specially reserved for the purposes of protection, academic study and research, or other benefit of the state, and the proportion of the area which can be requested to set up a community forest in a protected area shall be in accordance with the protocols and procedures and conditions which the Community Forest Policy Committee determines and declares in the Government Gazette.

Significantly, there is no suggestion that people have "natural" rights to community forests. Stringent conditions must be met, but even these do not guarantee that a request will be approved.

Once Community Forests (inside or outside PAs) are approved a Community Forest Management Committee must be elected by the community (Sect. 30). A community forestry management plan must be authorised by the Provincial Community Forest Committee (Sect. 32).

Logging is prohibited in all cases in community forests within PAs and can only be harvested "according to need" in community forests outside PAs if the forest "has been planted by the members of the community forest" (Sect. 35). Community forest areas cannot be used for housing or farming (Sect. 37). Although the use of non-timber forest products is allowed, use "shall be in accordance with the ordinances of the Community Forest Policy Committee" (Sect. 35). It is unclear what the intention of the Bill is in this respect.

4.4.1 CRITICISMS OF THE BILL

A number of concerns have been expressed about various provisions in the 2007 Bill. In my view, one major practical issue is the highly bureaucratised process for approving and regulating community forests. It seems that Community Forest Management Committees have many responsibilities and little power to make meaningful decisions. Of course there is room, if the Provincial Community Forest Committee were to take a liberal view, for greater

community input in the management plans, but this is very much a matter of discretion. As previously mentioned, the Bill does not refer to community rights to forest resources.

The Bill is highly restrictive in terms of the residency qualifications required as a precondition for requesting a community forest in a protected area and even if these preconditions are met, approval of the request remains discretionary. There is nothing in the Bill which says that where conditions are met community forests should be approved.

There are several types of communities for which the Bill has implications:

- People who live in a PA who may be eligible to have a community forest approved (as they meet the requirements) – Weatherby and Soonthornwong (2007) refer to these as A-type communities);
- People who live outside a PA and who use resources in it. They are clearly not eligible to have a community forest approved, although their ongoing connections and traditional claims are not fundamentally different from people living in the protected area – Weatherby and Soonthornwong (2007) refer to these as C-type communities;[65]
- People living outside PAs who request establishment of a community forest in reserved forest land.

It was the inequitable treatment of the second category that led to the appeal to the Constitutional court and this remains a serious concern in terms of any rights-based approach to community forestry.

A criticism raised by Weatherby and Soonthornwong (2007) is that Section 34 restricts communities to collection of NTFPs and does not allow harvesting of timber within PAs. A related criticism is that it does not allow agriculture. This is an important limitation as many of the people living within PAs are engaged in agriculture or horticulture. Walker (2004) has argued that the community forestry movement generally has suffered from too much focus on trees at the expense of agriculture. He points out that none of the drafts (people-friendly or otherwise) allow agriculture in forests, even though agriculture is a principle source of subsistence and income for forest dwellers. Following the passing of the since aborted 2007 Bill he noted some of the concerns that activists had expressed about the restrictive nature of the Bill, and then went on to say:

> These concerns are reasonable and understandable. But the protests are also somewhat misleading. As I have argued previously *the widely supported "people's version" of the community forest bill placed very significant restrictions on local resource management*. In particular, the "people's version" proposed to make agricultural activity in community forest areas illegal (with a sanction of 5 or 15 years in prison) and also limited community forest management to communities that could demonstrate a "culture of life that is consistent with care of the forest" (Walker 2008, emphasis in original).

It is something of a paradox that agriculture has been so ignored by the proponents of people's versions of community forestry, given that agriculture has traditionally been an essential basis of subsistence for the people living in the upland forests. The community forestry movement has continued to frame forest dwellers as forest people living traditional sustainable livelihoods. But, as Fisher and Hirsch (2007, 81) point out:

> Shifting cultivation is no longer subsistence based, or based on traditional cash crops such as opium. Upland-based ethnic minority cultivators increasingly respond to urban and even international markets for products such as cool climate vegetables and flowers.

65. Weatherby and Soonthornwong (2007) identify a further category (B-type) which they describe as being distinguished in Sect 25. These are communities that "live within the protected area but have withdrawn from managing resources from the protected area at the present day". I assume by this they mean people living in the protected area who don't meet the qualifications, but the reference to having "withdrawn from managing resources within the protected area" is not clear.

Perhaps the explanation for the de-emphasising of forest agriculture is the felt need of community forestry proponents to counter the powerful policy narrative that present forest dependent people as primitive forest destroyers. This policy narrative is particularly focused on criticisms of "shifting cultivation", often referred to with the negatively-loaded term "slash and burn". In the face of this policy narrative, it seems likely that the explanation for avoiding claims for rights to farm in the forest might be the felt need to counter claims that forest dependent people are forest destroyers by portraying them, and their livelihoods, as sustainable and essentially conservationist. This counter narrative can be thought of as what Li (2002) refers to as a "strategic simplification". Nevertheless, as Fisher and Hirsch (2007, 81) suggest, this might be a risky strategy:

> Is it possible that, by focusing on the rhetoric of the capacity of upland peoples to conserve forests by framing them as "forest people", that is, by trying to operate a counter discourse within the conservationist framework, community forestry is actually creating a potential "rhetorical trap"... tying people into a commitment to preserve trees and forests, without really addressing issues which are more central to poverty reduction, such as secure rights to forest land for agriculture?

Whatever the reason for the de-emphasising of the possibility of agriculture in community forests, it seriously distracts from the potential of community forestry to meet the economic and livelihood needs of forest dwellers. It seems clear that the narrow focus on forestry in the community forestry movement has been limiting and that a more comprehensive landscape approach might be more helpful.

While there has been a great deal of criticism of the Bill by community forestry advocates, Usher (2009, 7) points out important positives about the process by which the Bill emerged:

> The Community Forestry Bill is, I would argue, in spite of its obvious shortcomings, the most innovative piece of Thai state forestry legislation to be passed in a century, since it resulted not from industry pressure or bureaucratic interests but from the demands of an unprecedented popular movement. It remains to be seen whether it will survive scrutiny by the Constitutional Court and, if it does, what its impact will be.

4.5 CONCLUSION: THE EXISTING REGULATORY FRAMEWORK, RIGHTS AND LIVELIHOODS

The history of the community forestry movement to date represents a failure to reform the policy framework surrounding the rights of forest dependent people. There is no legislation supporting community forestry in Thailand, although there are thousands of named community forests. Essentially community forestry remains a movement. Nevertheless, while there is no formal policy that recognises community forests, there are government initiatives that provide a legal basis for types of "participatory forestry". These are often based on various types of decrees which, to a limited extent, do create space for activities resembling community forestry at least at a project level.

The legal basis for "participatory forestry" in Thailand rests on the following (Onprom, pers comm):

- The National Reserved Forest Act 1964 is the basis of RFD community forestry projects. According to Section 19: "... for the purposes of control, supervision, maintenance or improvement of the National Reserved Forests, the Director-General is empowered to order, in writing, the competent officer or officer of the Royal Forest Department to carry out any activity therein."
- A Cabinet resolution of 30 June 1998 provides strategies to solve land use and resource management problems in forest areas. The JOMPA Project (Joint Management of Protected Areas) uses this resolution as a legal basis.

- A Cabinet resolution of 10 August 2004 is the basis of the Royal New Forest Village Project.

The discretionary provision in the National Reserved Forest Act and resolutions such as those referred to above give room for experiment and certainly allow some legitimacy for the concept of community forestry, although they do not provide support for wide recognition of community rights to forests or forest products.[66] It is very clear that recognition of community forests and other forms of participatory forest management is discretionary rather than based on any recognition of broad human or citizenship rights.

Far from there being a comprehensive treatment of rights for forest dependent people, there is, in fact, a comprehensive lack of rights. Rights to agricultural land in the uplands are very restrictive, with large numbers of people having very limited usufruct rights or no legal rights at all. The World Bank's Land Titling Programme, which commenced in the 1980s, does not apply to land within forests as the government regards all forests as state property (Leonard and Na Ayutthaya 2003). Generally upland (essentially forest) agriculture is merely tolerated, either due to the goodwill of individual officials or the unwillingness of government agencies to enforce the laws. As already mentioned, many people in the uplands do not have citizenship rights.

In this respect, the focus on forest rights needs to be considered in the context of claims for wider citizenship rights, a point which Li (2002) makes for upland peoples in Southeast Asia more generally. In Thailand, it may have been a strategic mistake for reformers to focus on rights to forests through community forestry. The underlying problem facing many rural people is the lack of clear land title. This is a problem that successive governments have been unwilling to address. Although people in forest areas may have confidence that they will not be relocated or prevented from farming in the medium term, as a result of the lack of secure tenure, they do not have access to the finance necessary to invest for greater productivity from agriculture.

Reform is necessary, but remains an elusive target and, given the history of the community forestry movement, is likely to remain so. It is significant that, even if the 2007 Bill had become law, it would not have addressed the rights and livelihoods concerns that are so important to the community forestry movement.

It is unclear whether the failure of the 2007 Bill will be followed by new attempts at people-friendly forest reform. In any case, the extent to which such reform would be implemented in practice remains a serious question.

4.6 ACKNOWLEDGEMENTS

I wish to thank the following for their assistance in preparing this paper: Surin Onprom provided important background information, and assisted with searching for references. Rebeca Leonard, combining her excellent knowledge of Thai and her professional skills as a lawyer, provided a translation of the version of the Bill passed in November 2007. Dr Somsak Sukwong, Attjala Roonwong, Rawee Thaworn, Thanonsak Janthong and Somying Soonthornwong kept me up to date with developments and the implications (or potential implications) of various versions of the Community Forestry Bill. Dr Philip Hirsch provided useful comments on an earlier version of the paper. The opportunity to work with Jaruwan Kaewmahanin on an earlier paper on forest governance in Thailand provided important background relevant to this paper.

66. There are other signs of contradictory attitudes to community forestry within the RFD and the Ministry of Natural Resources and Environment. For example, Pred Nai community mangrove forest in Trad Province was awarded a prize by the RFD in 1992 (Kaewmahanin et al. 2005).

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WHERE ARE INDIGENOUS PEOPLES GOING?

REVIEW OF THE INDIGENOUS PEOPLES RIGHTS ACT 1997 PHILIPPINES

5 CHAPTER

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5.1 INTRODUCTION

Indigenous Peoples' (IPs) identity and specific location is part of the Philippines' own uniqueness and diversity and is a fundamental human richness to be acknowledged by all. The government's economic agenda and corporate interests in the country's forests and forestlands can no longer ignore the IPs. With their rights enshrined in the 1987 Philippine Constitution and the enabling law, the Indigenous Peoples Rights Act (IPRA) of 1997, indigenous communities are increasingly speaking out to defend their rights to their ancestral domains, forests, mineral wealth and other resources. In today's recognition of the ecological crisis and climate change IPs play a major role in human reconciliation with creation.

The movement to have indigenous rights recognised seeks social justice for IPs by correcting their disenfranchisement in state-claimed forestlands. At the national and international levels, indigenous rights are also established through their ecological roles, particularly in sustainable forest management and biodiversity conservation. Ancestral domain recognition through the IPRA's forerunner, DENR Administrative Order 02-1993 under the Community Based Forest Management (CBFM) programme of the Department of Environment and Natural Resources (DENR), helped indigenous communities gain a level of security to their domains and forest management.

The legislation of IPs' rights to their territories, indigenous culture and self-determination fills a legal gap. In recognising their rights to their ancestral domains, the IPRA lays down a legal basis for major reforms in forestland tenure and forest management, and puts in place mechanisms for the exercise of these rights. The histories of many indigenous communities, who have claims on much of the country's remaining forests and forestlands, include struggles for their ancestral domains and resources, and their displacement or relocation in many cases, as many now live in places they have migrated to avoid lowland domination especially over the last century.

The allocation of lands under the IPRA took off from within the CBFM framework of the DENR, the national strategy of the national government to ensure the sustainable management of the country's forests and alleviate upland poverty. Although the IPRA is not exactly a forestry or environmental law, it necessarily overlaps with environmental and natural resources policies because the community ancestral domains are located primarily in the country's forestlands, mineralised areas and areas of critical environmental concern.

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Policies that focus on indigenous rights have done much to improve society's attitudes towards IPs. The Indigenous Peoples Rights Act is one of these. The IPRA is a major reform that has been referred to when considering what the rights framework for IPs might be in other Asian countries, notwithstanding that there are still many concerns about the security of the forest and its continued degradation in the Philippines uplands. Though each country is unique in its history and in its relations with marginalised cultures, there is much to be learned from the experience of participation in the development of the IPRA, its enactment and implementation, and the resulting limitations and opportunities that have emerged over time.

This review focuses on the IPRA with respect to law making, content and implementation from a rights perspective. Based mainly on available secondary materials, this review does not claim comprehensive coverage of the experiences and situations of all indigenous communities in the country, who are geographically dispersed and varied in their socio-cultural, political and economic contexts. It begins with a description of the diversities of the historical and current contexts of IPs in the Philippines and the forces that are responsible for poverty in the uplands. As part of the context setting, it provides discussion on indigenous forest management practices, forest-related policies in relation to IPs' rights, and participation of indigenous peoples in law making. The discussion then turns to salient points in the IPRA. The chapter concludes with observations on opportunities, gains and challenges after 10 years of IPRA implementation.

Over the past decade of IPRA existence, a pragmatic view of the IPRA recognises opportunities in the law for IPs to assert their rights, on the one hand, and threats to their wellbeing, on the other hand. The IPRA has both opportunities and limitations that enable or constrain the exercise of these rights.

While the IPRA upholds IPs' rights to forest management and exploitation, there are still many concerns about the security of forests and its continued degradation in the uplands. Policy focusing on indigenous rights can help strengthen a positive and engaging attitude in society, but the means of accomplishing a significant difference are complicated and slower to come by.

5.2 INDIGENOUS PEOPLES AND FORESTS IN THE PHILIPPINES

5.2.1 DIVERSITIES OF HISTORICAL AND CURRENT CONTEXTS OF INDIGENOUS PEOPLES

There is as yet no precise and disaggregated statistics of IPs in the Philippines. The National Commission on Indigenous Peoples (NCIP) estimates their population in 2000 at 15% of the national population, with 60% in Mindanao (collectively called *lumad*), 30% in Luzon and the rest in the Visayas (NCIP 2001).

The IPRA defines IPs along some common criteria: homogeneous societies, identity through self-ascription and ascription by others, communal and bounded territories, common traditions and cultural traits, and cultural differentiation from the dominant social groups.

Historically, IPs maintained their relative autonomy during most of the country's colonial history through active resistance or increasing withdrawal to the interior. As a result of their marginalisation, they have maintained a level of continuity with their shrunken territories largely in the country's forest areas and resources as well as customs and practices, which differentiated them from the dominant lowland social groups. However, IPs are neither homogenous nor immutable. They are undergoing social, cultural, political, and economic changes as they are affected by, and as they respond to, macro and micro pressures and processes. They vary

considerably in their cultural practices and institutions, and the extent to which these continue today to hold sway in their lives, across and within groups.

While maintaining their relative independence, IPs had been largely marginalised from the national political and economic system. With their integration into the Philippine State, laws that they had been unaware of and had no bearing on their lives impinged on their rights as citizens. Many IPs suffered development aggression because of the state's disregard for their territorial rights, allowing the entry of commercial logging, mining and crop plantations and the in-migration of landless lowlanders who followed access roads that cut into forest areas. Until now, IPs remain poorly represented in the national political system. They are dispersed and lack socio-political coherence as a sector. Their access to political venues at the local, national, and international levels through their members, assisting groups, or networks, varies.

Indigenous communities are undergoing transitions in their subsistence and livelihood activities as they participate in the market economy within their predominantly rural contexts. They are abandoning their traditional forest-based and farming activities to commercial production and wage labour, though still largely at subsistence level, to raise cash. The reduced and degraded status of their forests, government regulations on access and marketing difficulties among other factors are forcing IPs to become less dependent on forest resources.

Lack of peace in the uplands is a major force that is weakening the progress of human security, as defined by Japanese initiatives in the UN (Walpole 2005), and the implementation of the IPRA. The histories of many indigenous communities are pockmarked with violence and conflicts in defence of their rights to land and resources against state and corporate interests. Many IPs engaged in active resistance, aligning themselves with government or with anti-government forces, but many also lost their lands because of powerlessness and manipulation. The threat of violence persists in a number of indigenous communities.

5.2.2 DECLINE OF PHILIPPINE FORESTS

More than half of the country's total land area of around 30 million hectares (ha) is forestlands (53% or 15.85 million ha). Forestlands is defined by law as areas over 18% in slope and classified as public domain. However, only around 24% of the country's total land area had forest cover in 1987. Over the past century the country's forest cover declined progressively from 21 million ha in 1900 to 15 million ha in 1950 then to only 7 million ha by 1987 (ESSC 1999a).

Logging for export initiated during the American rule triggered rapid deforestation in the country that continued during the post-colonial period (Kummer 1992). During the logging boom in the 1960s–1970s, timber license agreements (TLAs), the main instrument for large-scale forest exploitation (Vitug 1993, 13), covered almost one-third of the Philippines. These were granted mostly to the traditional elite, military officials and politicians. The annual deforestation rate reached its highest at around 300,000 ha per year in the late 1970s and 1980s. This dropped to about 100,000 ha per year in the early 1990s with the imposition of a logging ban in certain areas, cutback on TLAs and DENR's reforestation programme (ibid.). The 2002 forest cover update by ESSC that put the figure for 2002 at 21.7% of the country's land area reflects a further loss in forestland cover, although the decline has slowed down and diversified with some areas showing regeneration in vegetation (Walpole 2010). Though there are claims that forest cover is increasing in the Philippines (Forest Management Bureau – Department of Environment and Natural Resources 2008, 3), these figures now includes tree plantations while there is little effort to programmatically assist natural regeneration.

5.2.3 COMMUNITY-BASED FOREST MANAGEMENT (CBFM)

The complex process of deforestation through the years left "degraded ecosystems and an impoverished socio-economic system" (Kummer 1992, 11). Poverty and increasing population in forestlands continue to exert pressure on the remaining forests. Upland-dwelling IPs and lowland migrants are among the poorest in the country, and their dependence on forest resources for subsistence and livelihood poses threats of land use conversion and resource over-extraction.

Ancestral domain management is one of the strategies under DENR's CBFM programme, aimed at devolving forest management to address forest loss and upland poverty. The CBFM programme grants indigenous and local communities portions of the forestlands for them to develop, protect and manage, and also access to forest resources therein. Ancestral domain management recognises the rights of IPs, who have long been living in the forest areas and exploiting and protecting forest resources, to the forests and to their management practices.

About six million ha of forestlands, left as open-access after the drastic reduction of TLAs in the 1990s, are now under different forms of CBFM including ancestral domain management. However, instruments similar to TLA, like the Industrial Forest Management Agreement (IFMA), which promote monoculture in logged-over forests, are gradually replacing TLAs (Table 5.1). Some IFMAs located in ancestral claims are under dispute.

CBFM offers opportunities in the achievement of the Millennium Development Goals, particularly poverty alleviation and environmental sustainability (AFN 2006, 31) through various benefits from forests. However, a review of assessments made on CBFM implementation in the country notes its impact of "limiting equity on forestlands allocation and access to forest resources" because local communities are faced with difficulties in accessing forest resources (Bacalla 2006, 168).

5.2.4 INDIGENOUS PEOPLES' RELATIONSHIPS WITH FORESTS, LIVELIHOODS AND FOREST SUSTAINABILITY

Decades of commercial forest exploitation reduced the forest cover and dislocated many IPs from their homes and livelihoods. They had no say where logging activities were carried out except for some operators who gave consideration to burial grounds and ritual sites. Most companies were armed in their operations given the widespread insurgency in the uplands. Logging encouraged a migration pattern of landless labour into uplands who then took over and cleared the logged over areas for agriculture. Without early land reform, lowland migrants sought lands in post-logging areas within indigenous territories and turned degraded forests into permanent agriculture or degraded grasslands (*Imperata cylindrica*).

Most of the country's forestlands and remaining forests are occupied cultural landscapes of IPs whose traditional ways of life are interlinked

TABLE 5.1 **Management schemes for public forest areas**

TENURE INSTRUMENT	NUMBER	AREA (HA)
Timber License Agreement	17	779,000
Industrial Forest Management Agreement/Industrial Tree Plantation Lease Agreement	178	713,000
Socialised Industrial Forest Management Agreement	1,837	40,000
Community-Based Forest Management Programme	5,503	5,970,000
Forest Land Grazing Management Agreement	395	109,000
Tree Farm / Agroforestry	222	107,000
Total		**7,718,000**

Source: Philippine Forestry Statistics, FMB, 2005

with the forest ecosystems (ESSC 1998a). Approximately 60% of the country's forests are in cultural areas, not including certain areas of Sierra Madre in Luzon, parts of Palawan and the islands of Samar and Leyte. Forest ecosystems in the country are characterised by high biological and cultural diversity.[68] This cultural plurality offers a wealth of knowledge and opportunities in biodiversity conservation and forest management (Philippine Biodiversity Conservation Priorities 2002) now recognised in national and international policies.

Various studies have documented IPs' relationships with their forests and territories: their production systems, institutions and norms, ownership and management practices, beliefs and rituals. While some studies tend to place IPs on a "cultural pedestal for conservation or preservation" (Quitoriano 2003, 9), it is important to recognise that indigenous practices and institutions are dynamic, can have limitations, and are subject to existing conditions that lead people to put unchecked pressure on resources (Resurreccion 2000, 50).

Certain indigenous forest management practices (e.g. conservational resource use cognisant of the needs of future generations) are sustainable, but not all forest-based livelihoods of IPs at present are sustainable. Many IPs are shedding their spiritual beliefs and consequently the spiritual values associated with forests and nature (Van Den Top and Persoon 2000, 171), in their assimilation of other religions, formal education, market values, etc. In general, IPs are being drawn into commercial activities and are losing their traditional productive strategies (hunting-gathering and long-fallow swiddening) because of the shrunken and degraded state of their resource base. Swidden farms and forest fringes are giving way to intensive farming. Extraction of non- timber forest products (NTFPs) is often at unsustainable rates due to marketing difficulties, unfavourable government regulations and lack of stock enhancement. There are those who are directly involved in illegal logging, or are turning a blind eye to such activities in their domain because of armed groups. Speculation of mining, plantation and other business interests in their territories and resources add further pressure to their livelihoods.

There are indigenous forest management systems at work but they are under economic pressure. DENR rules and regulations on forest resource use permitting are a disincentive to local efforts and tend to encourage illegal activities in the forests. Ifugao is the only area in the country with a policy issuance (DENR Memorandum Circular 96-02) formally recognising the indigenous *muyong*[69] forest management practices and legalising the harvesting of timber in established private *muyong* for commercial use (Butic and Ngidlo 2005, 410) through a *Muyong* Resources Permit (MRP). Among the Kankanaey and Bontok communities in Mountain Province, the local DENR is lenient and allows the cutting of pine trees from their community managed *batangan* or pine forests for domestic or personal use but are strict when it comes to the transport of lumber out of the areas (ESSC 1998b, 14).

In Mindanao, the bureaucracy and economics of growing and harvesting fast-growing trees in ancestral domains (and titled lands) are a source of frustration. Small-scale tree farming has become widespread in Mindanao, with its favourable climate. As logging companies withdrew in the 1980s they scattered seeds on degraded IP territories that thrived in some areas to become a thick first growth of falcata (*Paraserianthes falcataria*). Gmelina (*Gmelina arborea*) and *Acacia mangium* seeds were also planted along the boundaries of small farms. However, problems arose as timber harvesting and transport are made illegal without DENR

68. There are 176 languages in the country that show the uniqueness and diversity of cultural origins. Six of these are considered mainstream (Tagalog, Cebuano, Ilokano, Hiligaynon, Bicol, Waray, Kapampangan and Pangasinan; sometimes Kinaray-a, Maranaw, Maguindanao, and Tausug are included) (Summer Institute of Linguistics, http://www.ethnologue.com/show_country_bibl.asp?name=PH). There are 163 other distinct languages spoken by various cultures. To the other extreme, seven other languages are on the verge of extinction, with only a few remaining speakers (http://www.ethnologue.com/nearly_extinct.asp#Asia).
69. A *muyong or pinugo* is a privately owned woodlot that is viewed as an extension of one or more *payoh* or rice paddy below it that it supports in terms of water supply and as source of firewood for cooking.

certification. Harvested wood that was planted by the Bendum Pulangiyen was wasted because the local DENR would not issue a permit to transport. A permit required tenurial rights and a management plan that many Certificate of Ancestral Domain Claim (CADCs) after ten years still do not have. Cornered by regulations but the need to raise cash for food, IPs and migrants are forced to sell illegally.

The status of IPs' relationship with their forests would determine whether they contribute to the problem or solution in forest management (AFN 2009, 9).

5.3 HISTORY OF THE IPRA: POLICIES ON FORESTS, FORESTLANDS AND INDIGENOUS PEOPLES' RIGHTS

Philippine laws on forests and natural resources, which geographically cover IPs' territories, draw on the so-called Regalian Doctrine that is enshrined in past and current Philippine Constitutions: *All lands of the public domain, waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna and other natural resources are owned by the State* (Sec. 2, Art. XII). The state claims "full control and supervision" on the exploration, development and utilisation of natural resources (de Leon 2005, 360).

Land laws promulgated by colonial and subsequent post-colonial governments consolidated territories of cultural minorities as part of the public domain and centralised control in the state. The Spanish government issued the Maura Law in 1894 that "declared forfeited to the state all titles that were not adjusted or failed to seek absolute ownership under the royal decree issued on June 25, 1880" (ESSC 1999b, 17). Land registration was also required under the American government, and unregistered lands became property of the state. The untitled territories of IPs were then placed under bureaucratic control (allocated as reserves, watersheds, etc.) and private ventures (through the issuance of logging concessions and other permits). Mindanao, Palawan and other frontier areas that were unappropriated were opened to migrant settlers, mostly from Visayas and Luzon, who claimed indigenous lands and cleared forests for homesteads, cattle ranches and crop plantations without regard for IPs' rights (ADB 2002; Brown 1996, 101-104).

5.3.1 PRESIDENTIAL DECREE 705

In recent decades, the law that effectively disenfranchised IPs of their ancestral domains is Presidential Decree (PD) 705, or the Revised Forestry Code, which Pres. Marcos issued in 1975. It contains a provision that prohibits the release of lands having slopes of 18 per cent or more as alienable and disposable (A and D) lands. These are classified as state-owned forestlands: thus, PD 705 made the majority of the IPs in the uplands squatters on their own lands and created for the state the legal pretext to lay claims to their territories and natural resources.[70] (Until now, the proposed Sustainable Forestry Bill is yet to be passed.)

The Cordillera region is around 85% forestlands pursuant to the above 18% provision. But even without land titles, the indigenous communities in the Cordillera generally have a strong sense of ownership of their lands and resources (Arroyo 1992, in Rood 1995). They "overwhelmingly" considered it unlikely that the government would usurp their lands for forests, mainly because they are paying property taxes on the land (the lands are covered by tax declarations), and are taking care of it (ibid.).

The IPs of the Cordillera defended their territories against two large-scale development projects during the Marcos dictatorship: first, the Chico River dam project that threatened to displace Kalinga, Bontoc and Kankanaey villages along the river and selected tributaries and, second, the Cellophil Resources Corporation's

70. Section 16 of PD 705 declares that the classification of forestlands is permanent.

logging concession that aimed to exploit the forests in Abra extending to the boundaries of Mountain Province and Apayao. These encounters gave rise to the struggle for ancestral domain in the region. They set off social movements, armed resistance and fora to demand the state's recognition of ancestral lands/domains, indigenous cultures and regional autonomy (Florendo 1994, 38-39). Mobilisation against these projects generated an unprecedented level of unity among the affected villages, which transcended village and ethnic lines and fostered a level of regional consciousness on these common issues (de Raedt 1995, 3; Finin 2005). Macli-ing Dulag, an eloquent Kalinga leader who was killed during the Chico dam resistance, is held as an icon of the struggle for IPs' rights.

5.3.2 1987 PHILIPPINE CONSTITUTION

The restoration of Philippine democracy in 1986 created political space for constitutional change to prevent the repetition of past abuses. The IPRA shares its origins with other rights reformation that occurred after the lifting of martial law in 1981 and in the 1987 Constitution. The demand for the recognition of IPs' rights sought legislative courses of action. Advocacy and lobbying efforts, led by the Cordillera Peoples' Alliance (CPA)[71] (Manzano 1999, 66) and with an anthropologist in the Constitutional Commission, saw the inclusion in the 1987 Philippine Constitution of provisions on the state's recognition of IPs' rights.[72] This initiated the shift toward the recognition of IPs' rights to their territories, natural resources and cultures. Subsequent environmental policies and laws on the utilisation and management of natural resources have to a lesser or greater extent taken into account the rights of IPs.

5.3.3 LOCAL GOVERNMENT CODE OF 1991

The Local Government Code of 1991 mandated the devolution of substantial responsibilities and powers from the central government agencies to the local government units (LGUs). Although it provided for IPs' representation as a sector in local councils, IPs' participation in local governance remains poor in most areas. IPs are subsumed under local political units dominated by migrant settlers, except in most of the Cordillera where the IPs assume local political leadership. In terms of forest management functions, the DENR devolved the implementation of community-based forest management projects (e.g. integrated social forestry projects), management and control of communal forests of 5,000 ha and the management and maintenance of small watershed areas that supply local water needs.

5.3.4 NATIONAL INTEGRATED PROTECTED AREAS SYSTEM

The National Integrated Protected Areas System (NIPAS), enacted in 1992, primarily aims to establish national parks for the protection and conservation of areas with high, rare or endangered floral and faunal diversity. There were objections to NIPAS on its perceived limited recognition of rights of IPs who have claims to biodiversity-rich forests and coastal areas. Approximately 1.5 million ha of forestlands are under NIPAS. Although NIPAS mandates the recognition of IPs' rights, it has been feared that the priority placed on conservation would cause difficulties in the efforts of some IPs to secure their ownership and control over their territories and to access their livelihood resources and cultural areas within protected areas. With adequate participation of affected indigenous

71. At the time, the CPA was participating in the Working Group for Indigenous Populations within the UN Commission for Human Rights and the Economic and Social Council. The CPA adopted the term indigenous peoples.
72. The 1987 Constitution "recognises and promotes the rights of ICCs [indigenous cultural communities] within the framework of national unity and development" (Sec. 22, Art. II). It also stipulates "the rights of ICCs to their ancestral lands to ensure their economic, social and cultural well-being" (Sec. 5, Art. XII) and "the rights of indigenous cultural communities to preserve and develop their cultures, traditions and institutions" (Sec. 17, Art. XIV) (de Leon 2005).

communities, planning and policies for the management of a protected area may ensure the compatibility of IPs' rights to their sacred and ritual grounds and livelihood practices with the management zoning to be adopted.

5.3.5 PHILIPPINE MINING ACT OF 1995

The Philippine Mining Act of 1995 poses the most serious challenge to the recognition of IPs' rights and to the forests at present. The law liberalises the mining industry and seeks to require greater accountability and checks on the environmental impacts of mining. It aims to attract foreign investments by allowing 100% ownership of mining projects by foreign companies for a maximum period of 50 years, with tax holidays and timber, water and easement rights. Immediately after the passage of the 1995 Mining Act, there was a mad rush for mining permit applications, covering large swathes of ancestral domains and forest areas (ESSC 1999c). Many of the mineralised areas are located in ancestral domains and most mining conflicts are over contested IPs' consent.

Anti-mining environmental non-governmental organisations (NGOs), IPs' groups and members of civil society are calling for the repeal of the 1995 Mining Act. The mining industry does not have credibility in the eyes of broader civil society engaged in concerns for the margins. Two reasons sustain the mistrust: one, the poor track record of mining in the country for environmental accountability and sustainable local development and, two, a fear of potential displacement of indigenous and local communities. It did not help the industry that the first new mine that operated under the 1995 Mining Act in Rapu-Rapu, Albay, failed to take adequate precautions in a typhoon zone for heavy rains. The resulting overflow of cyanide was denied until it could no longer be covered up. Many of the mineralised areas are in ancestral domains and forests, and are ridden with environmental and IPs' rights violation issues. Applications for mineral exploration increased since the Supreme Court's decision in 2004 upholding the law's constitutionality and with the government's vigorous investment roadshows. Accompanying the aggressive mining campaign is the simplification of the free prior informed consent (FPIC) process that undermined this safeguard mechanism.

5.3.6 OTHER PROCESSES FOR THE RECOGNITION OF INDIGENOUS PEOPLES' RIGHTS TO THEIR ANCESTRAL DOMAINS AND LANDS

Legal analyses arguing for the state's recognition of ancestral domains/lands draw on the 1909 ruling on the case filed by Mateo Cariño, an Ibaloi, against the American colonial government for its confiscation of his property in Baguio City. The decision declared that the land was held as private property since time immemorial and was therefore never part of the public domain. This established the legal basis for the recognition of native title on lands occupied since time immemorial, but which was long ignored in Philippine laws.

The executive strategy for the recognition of IPs' rights to their ancestral domains and lands was started in the late 1980s. The DENR issued Special Orders 31 and 31-A in 1990 that created a Special Task Force on Ancestral Lands for the identification and recognition of ancestral land claims in Baguio City and the Cordillera, which was adopted for Palawan in 1991. The DENR then broadened this issuance into Administrative Order (AO) 02-1993[73] that outlined the guidelines for the delineation and recognition of ancestral domain/land claims, and specified the rights and responsibilities of IP-claimants to manage the forests and resources therein. A total of 2,546,035 ha of ancestral domains in forestlands were recognised in 1994-1998.[74] A follow up AO 34-1996 prescribed the guidelines for the formulation of an ancestral domain management plan (ADMP) for the protection and sustainable

73. Rules and Regulations for the Identification, Delineation and Recognition of Ancestral Land and Domain Claims.
74. Under the IPRA, the CADCs can be converted into Certificates of Ancestral Domain Title (CADTs).

management of an ancestral domain while promoting the socio-economic wellbeing of the community and the preservation of their culture and traditions.

DAO 02-93 was viewed as a breakthrough in getting government recognition of IPs' ancestral domains and ancestral land claims. However, it was criticised because it did not have the full force of a law and a certificate of claim was inferior to a land title, and thus did not guarantee adequate security for IPs.

CBFM was adopted in 1995 through Executive Order 263 as the national strategy to ensure the sustainable development of the country's forestland resources in a way that promotes social equity and environmental sustainability. This framework consolidates DENR's earlier social forestry projects, including ancestral domain recognition, and establishes the CBFM Agreement (CBFMA) as a tenurial instrument for access and management by local non-IPs or IPs' communities, organised as people's organisations, to forestlands and forest resources.

Some indigenous communities availed themselves of CBFMAs or CADCs to secure their territories. However, DENR's early social forestry projects did not recognise the forest management practices in indigenous communities. In some cases, IPs' rights were ignored in CBFMAs issued to lowland migrants within ytheir ancestral territories. In the Cordillera, these early projects gave some members a justification to lay private claims on community pasture and forest areas (using the traditional norm that introducing permanent improvements on the land entitled a member to ownership), and failed to loosen DENR's regulatory hand on the people's access to forests they claimed as theirs (Rood 1995).

While the IPRA is not strictly a forestry or environmental law, it introduces significant reforms in forestland tenure and forest management. The IPRA is the only comprehensive law in the country that recognises indigenous rights: ancestral domain, cultural integrity, self-determination and social services. IPs' rights cannot be ignored in talks on forest utilisation and management because much of the country's forests are within ancestral claims of IPs.

However, as the IPRA came at the heels of earlier environment and natural resource (ENR) laws, implementation is complicated because of overlaps and conflicts in provisions. The Supreme Court's dismissal in December 2000 of the challenge to the IPRA's constitutionality filed barely a year after its enactment cleared a major legal hindrance to its implementation. Despite the 1987 Philippine Constitution and the IPRA, the state still operates on the premise that, pending the acquisition by IPs of titles of their ancestral domain, the classification as forestlands remains (Quitoriano 2003, 8). The harmonisation of the IPRA provisions with those of other ENR laws is ongoing.

5.4 INDIGENOUS PEOPLES' PARTICIPATION IN LAW MAKING

The IPRA was passed after decades of armed struggle, advocacy, social organising and networking, legal cases and dialogues in encounters among IPs, civil society, government and private corporations. Indigenous rights and environmental movements at the international and national levels during the post-Marcos period also influenced IP policies.

Prior to the IPRA there were previous attempts from IPs and civil society groups to demand state recognition of indigenous rights through legislative or executive measures. Bills were passed in the 8th and 9th Congresses that some IPs and assisting groups actively supported, but that were stymied by lawmakers who lacked understanding of indigenous worldviews and had interests in lands, logging and mining (Vitug 1993, 148).

In the late 1980s, ancestral land claimants in Baguio City, who stood to lose their lands after

the ban on the processing of land applications within the town site reservation was lifted,[75] joined together in pressing their case with the DENR. In response, the DENR issued Special Orders 31 and 31-A in 1990 that created a Special Task Force for the identification and recognition of ancestral land claims in Baguio and the Cordillera. Implementation, however, was limited because of inadequate funds and focused personnel (Rood 1994, 14). In 1991, IPs and assisting groups in Palawan also lobbied with the DENR (Mayo-Anda 1994, 31), which adopted the same administrative issuance. This issuance was then broadened into DENR AO 2-1993 for nationwide coverage.

During the 10th Congress (1995–1998), some IP representatives, NGOs and church-based groups, along with the DENR, undertook sustained lobbying for an enabling law of the constitutional provisions on indigenous rights. The then Social Reform Agenda of the Ramos administration included an IP agenda, primarily advocacy for the IPRA, among its priorities. In late 1995, they held regional and nationwide consultations with IPs and assisting groups on a legislative agenda for IP rights. The consultations brought together IP members and NGOs that espoused different political orientations and perspectives on indigenous issues (Ibanez 1998). Owing to limitations in resources, however, broad consultations were not sustained. Subsequent consultations involved the organisations that formed two coalitions to support the lobby.[76]

These initial consultations, existing policies (DAO 02-1993, ILO Convention 169, UN Draft Declaration on Indigenous Peoples' Rights) and previous bills on ancestral domains were inputs into the IPRA bill (de Guzman, in Rico 2007, 61). It incorporated seven non-negotiable items in anticipation of difficulties and challenges from lawmakers: recognition of native title and rights to ancestral domains; right to cultural integrity; recognition of IPs' political structures and governance; delivery of basic services; respect for human rights; elimination of discrimination; and creation of an office that would address IPs' needs (de Guzman 1999, 61).

The IPRA contains many of the demands of IPs, but the draft bill was not adopted in full by the lawmakers. It underwent major amendments during deliberations, as lawmakers questioned certain provisions (e.g. definition of ancestral lands/domains and FPIC) and inserted contentious points that watered down the bill. What came out in the end was "an acceptable compromised version" (de Guzman 1999, 62).

Neither the IPs nor the NGOs were united in their views of the IPRA from the start (Rico, 2007, 71). There were criticisms on the consultation process and on the content. The making of the IPRA was participated in by IPs and advocates (seemingly, mostly from Luzon), but it was not inclusive of all IPs. Thus, the process did not benefit from what the non-participating groups could have contributed from their specific contexts. During meetings, some IPs were more vocal in articulating their positions than others (ibid.). The substantive criticisms include the contentious provisions and the manner of selection (presidential appointment) of NCIP Commissioners.

Reactions to the passage of the IPRA were mixed. Its supporters considered it a milestone in the drawn-out struggle for the recognition of IP rights. In contrast, some IP groups and NGOs rejected the IPRA altogether because it emanates from the Regalian Doctrine and has problematic provisions. Others expressed guarded optimism and were pragmatic about the IPRA, recognising the provisions supportive of IPs but also cautious of its use to constrain or compromise IPs.

The IPRA created the NCIP as the primary government agency to formulate and implement policies, plans and programmes that promote and protect IPs' rights and wellbeing. The NCIP Commission allows for geographical

75. Baguio is declared a Town Site Reservation: as such, the disposition of alienable lands within the public domain is through public bidding and the land title is awarded to the highest bidder.
76. The two federations are the Coalition for Indigenous Peoples' Rights and Ancestral Domains (CIPRAD) or Koalisyon para sa Karapatan ng mga Katutubo at Lupaing Ninuno (KKK) and the Katutubong Samahan ng Pilipinas (KASAPI).

representation of IPs, but the political appointment of its members and its nature as a government arm already limits its capacity to represent indigenous interests. The NCIP's early controversial issuances did not undergo consultations with IPs and other stakeholders. The NCIP now at times conducts some consultations and seeks inputs from some IP organisations or civil society groups, but broad participation remains a gap.

5.5 SOME SALIENT POINTS AND MECHANISMS IN IPRA

As a rights-based approach in forest management, the IPRA recognises a wide-range of rights that reinstates in IPs ownership and management control of their forests and promote indigenous forest management.

5.5.1 RECOGNISING RIGHT TO ANCESTRAL DOMAIN

The rights to ancestral domains cover ownership, access and control over the lands and water bodies and the natural resources therein that IPs have traditionally occupied, owned or used. The IPRA defines ancestral domain as geophysical areas encompassing lands and water bodies, including natural and cultural resources (such as forests, pasture areas, mineral, agricultural lands, worship areas, etc.), which are covered under a time immemorial claim (communal or individual) of an indigenous community. Ancestral lands refer to lands (such as residential lots, rice paddies, swidden farms, private forests) of individuals, families or clans belonging to an indigenous community. The Certificate of Ancestral Domain / Land Title (CADT/CALT) formalises their claims.[77]

The IPRA recognises the priority rights (not exclusive rights) of IPs in the harvesting of benefits of their natural resources, including forests. Exploitation or development of natural resources in their territories by non-members requires their FPIC. Related to FPIC are the rights to negotiate the terms for the exploration of natural resources; to participate in the planning and implementation of any project that will impact on their territories; and to say yes or no to such development projects.

Qualifying the recognition of IPs' rights is Section 56 of the IPRA, which provides for the recognition of property rights that predate IPRA or were approved prior to IPRA effectivity. This provision was assailed for undermining the IPRA.

The IPRA specifies the ecological responsibilities of IPs in protecting biodiversity and watersheds and in restoring denuded areas within their domains. This provision was criticised as having made the IPs "the most burdened private land owners" under Philippine laws (Manzano 1999, 67). These responsibilities, however, form part of their right to protect and manage their territories and resources in their terms, for which they may need external assistance.

5.5.2 PROMOTING CULTURAL INTEGRITY AND SELF-DETERMINATION

The rights to cultural integrity and self-determination grant IPs more control over their forests and territories, including being able to practice their indigenous forest management systems and having a say in the exploitation of their forests and other resources. IPs also have the rights to practice and revitalise their customs and traditions; to practice and develop their spiritual and religious traditions and indigenous

77. The IPRA provides for the principle of self-delineation in the identification and delineation of ancestral domain claims. Long-term occupation, possession and access form the fundamental basis for an ancestral domain or land claim. The proofs include a sworn statement of elders and written evidence of time immemorial possession or occupation; written records of traditions, political structure and institutions; photographs of old improvements, burial grounds, sacred places and villages; historical accounts, such as agreements with adjoining communities on boundaries; maps; genealogical surveys; photographs and written description of traditional communal forests and hunting grounds.

knowledge and practices; and to develop and control their education system. The IPRA upholds the primacy of customary laws and conflict resolution institutions in the settlement of disputes involving IPs.

5.5.3 EMPOWERING INDIGENOUS PEOPLES FOR SELF-DETERMINATION

Self-determination is premised on the recognition of indigenous people's rights to their ancestral domains and resources as well as their indigenous institutions and customary laws. The IPRA recognises IPs' rights to determine and pursue their economic, social and cultural development priorities; to participate fully at all levels of decision-making in matters that affect their lives; and to form people's organisations in protecting and pursuing their collective interests and aspirations. In addition, the IPRA also seeks to promote social justice for and human rights of IPs as well as their right to basic services.

The CADT, FPIC and the ancestral domain sustainable development and protection plan (ADSDPP) are critical mechanisms for IPs to exercise the above rights. The CADT secures for IPs tenurial security. The FPIC and ADSDPP are opportunities for them to participate in local forest management and environmental governance and to benefit from the resources for their livelihoods. However, the opportunities these create are affected by other ENR policies.

5.6 A LOOK AT 10 YEARS OF IPRA IMPLEMENTATION: OPPORTUNITIES, GAINS AND CHALLENGES

Ten years into IPRA implementation, its impacts on IPs' livelihoods and forests are not yet clear. There are numerous constraints that hinder the recognition of indigenous rights under the IPRA beyond rhetoric.

In general, the implementation of the IPRA has largely been fragmented. Ancestral domain/land titling, management planning and capacity building and FPIC consultations were undertaken separately, and not within an integrated framework of empowering IPs. Some ancestral domain titles have been issued without planning or capacity building to prepare the indigenous community for what a title entails.

5.6.1 ANCESTRAL DOMAIN TITLING

As of 2008, the NCIP approved 71 CADTs covering over 1.6 million ha (Table 5.2). Ancestral claims at different levels of NCIP processing cover about one-third of the country's forestlands. Funding for the survey and processing of ancestral domains come from NCIP's operational budget and assisting NGOs, funding agencies and a few LGUs.

Gains in securing ownership and rights to ancestral territories and resources

A CADT allows indigenous communities tenurial security to their territory. While a CADT gives

TABLE 5.2 **Status of ancestral domain and ancestral land titling and delineation as of 1 June 2008**

	CADTS		CALTS	
	NUMBER	AREA (HA)	NUMBER	AREA (HA)
Approved CADTs/CALTs	71	1,635,972.7655	180	5,628.2437
Survey Completed	55	1,402,077.2300	11	8,077.6400
Survey in progress; for survey	32	723,058.3800	25	3,652.7600
Undergoing social preparation	70	1,386,541.8100	480	3,444.000
TOTAL	**228**	**5,147,650.1855**	**696**	**20,802.6437**

Source: Ancestral Domains Office, NCIP

an indigenous community leverage, the security it affords depends on the community's capacity to consolidate their positions and assert their collective interests vis-à-vis external and internal pressures and threats. A CADT is effective to the extent that the community is able to exercise effective control over their resources and manage these sustainably to improve their quality of life (NCIP 2003, 6).

Securing land tenure and control over forests resources

Recognition of ancestral claims is encouraging some indigenous communities to regain control over their lands and forest areas.

The Kankanaey and Bago villages comprising the municipality of Bakun, Benguet – organised as Bakun Indigenous Tribes Organization (BITO) – were the first to be issued a CADT from the conversion of their CADC issued in 1998. The recognition encouraged the BITO to reclaim ownership and control over their forests covered under a TLA that expired in 1998. The villages revived their *muyong* forest management and their individual and collective responsibilities over their forests based on their traditional resource use rights (Mendoza 2001). The capacity of the BITO to protect and manage their forests however was challenged by DENR, in light of a previous case of a clan-owned woodlot that the owners commercially exploited after obtaining title on the land. The BITO then organised the woodlot owners to strengthen their cooperation and monitoring of the management of private *muyong*. Active campaigns against forest fires significantly reduced the occurrence of forest fire in recent years (Malanes 2002, 48).

Ancestral domain claim in a reservation

Some groups whose lands were placed under reservations (Tasaday, Mangyan and B'laan) are seeking the recognition of their territorial claims and rights under the IPRA. In the case of the Mangyan and B'laan, the reservations did not stop land acquisition and titling by non-members. The Tasaday (ESSC 1998a) are applying for a CADT over their territory within the 19,247 ha Tasaday-Manobo Blit Preserve declared by Pres. Marcos for them and the Manobo-Blit communities in 1972.[78] The Tasaday want to have full recognition of their tenurial and cultural rights through the IPRA, as the proclamation does not amount to territorial ownership. They are consolidating their stake in the area with the other communities in view of recent external development projects (the opening of a major road) and commercial interests in their forest area (logging and coal mining), in-migration and the territorial claims initiated by neighbouring groups.

Securing ancestral coastal waters

The formalisation of the claim of the Calamian Tagbanwa of Coron Island in Palawan over their ancestral domain – through a CADC in 1998, converted into a CADT in 2004 – that includes parts of the sea set the precedent for the recognition of indigenous communities' claim over ancestral coastal waters in the country (Philippine Association for Intercultural Development 2000). Coastal waters form an integral part of the ancestral domain of the Tagbanwa fishing community, who derive their subsistence and income more from the sea than from the use of forest resources. When the Provincial Special Task Force on Ancestral Domain reduced the coverage of the Tagbanwa ancestral claim owing to lack of existing policies on the inclusion of "ancestral waters" and "coastal areas" in ancestral domains, the Tagbanwa brought their case to the DENR-Central Office which upheld their claim to their ancestral waters.

Challenges and issues in CADT processing

A CADT does not guarantee better forest management or equitable benefit sharing. In some cases, the opportunity of ancestral domain recognition could be vulnerable to exploitative interests and could result in unintended consequences if the issue of indigenous rights is narrowly defined as a problem of land tenure or resource access, without capacity building for ancestral domain management.

78. While anthropologists are still stuck with the Tasaday question of whether they are authentic "stone-age" peoples or not, this is immaterial to their CADT application. They identify themselves as indigenous peoples and are officially recognised by NCIP as indigenous peoples. They remain economically and politically marginalised.

Installing new landlords in ancestral domains

The recognition of the ancestral domain of the Manobo in Quezon, Bukidnon created a new "landlord." In 2001, the Manobo (Vidal 2004, 62-72) were finally installed in their ancestral domain with the intervention of two presidents and with civil society support. They obtained their CADC in 1998 and CADT in 2004 over what remained of their originally vast territories they lost to ranches, sugarcane plantations, and forms of forestland tenure issued to non-indigenous members. In the 1990s, some Manobo applied for individual stewardship certificates and CBFMA with the DENR to secure their remaining territory. They applied for a CADC covering over 12,340 ha in 1994, but which the DENR reduced to 2,093 ha after excluding titled areas.

Even while awaiting their CADC conversion, the datus or traditional leaders already divided the CADC area among the four clan-claimants. One datu assumed the role of a "landlord," exercising the power to distribute land among the members, to charge a 10%-share of gross harvest from use of the land, and to withdraw lands from members who failed to turn out good harvest or profit. Sale of use rights, lease and mortgaging of ancestral lands by claimants were common and most buyers were non-Manobo. They got their CADT in 2004. The weak alliance among the claimants because of existing divisiveness and issues on leadership, representation and land allocation are hindrances to their future collaboration for the management of their ancestral domain.

CADC/CADT for resource extraction

In another case, forest resource access in ancestral domains could be taken advantage of merely for commercial exploitation. The application for two CADCs by the Manobo (Vidal 2004, 91-95) of Lanuza, Surigao del Sur that lie in an active TLA was not a collective effort by the Manobo to regain territorial control. It was instead largely driven by the interest of "Kumander Jack," a rebel returnee, in the abundant timber stock in the area. Kumander Jack, taking a cue from the local DENR that a CADC could be issued within a logging concession and would allow more access to forest resources, encouraged some Manobo leaders to form an organisation that applied for a CADC. The DENR gave their first CADC (312 ha) in May 1994 and their second CADC (9,907 ha) in June 1998. These were merged in one CADT issued in 2002. The Manobo participated in the survey and delineation only.

The TLA holder, Surigao Development Corporation (SUDECOR), tried unsuccessfully to block the CADC delineation, to protect its exclusive resource use right to its concession area. When its efforts failed, SUDECOR restricted the Manobo farming activities and access to forest resources within its TLA. For Kumander Jack, along with the Manobo leaders, the CADC became a license for legally harvesting logs in the ancestral domain, abetted by cutting permits they obtained from the DENR. In the formulated ADSDPP, ancestral domain "development" was defined as the "full utilisation" of the forestland and resources. Little has been actually done for organisational capacity building and community development since the awarding of the CADCs (Vidal 2004, 96).

Overlapping interests over lands and resources

IPs are struggling to claim their ancestral domains and exercise their rights at the local level within the national economic and political framework. The Government's economic development strategies, such as mining, plantation development, etc., are in conflict with its environmental agenda (forest management and protected areas) in many areas. There are overlapping and conflicting ENR laws and forestry regulations on resource access. Land reform through Certificate of Land Ownership Award in forestlands complicates the CADT process. The forestlands – and also, ancestral domains – are a mosaic of overlapping and incompatible land uses, development goals and interests and resource use instruments that link to various laws. IPs compete with the state, private companies, LGUs and migrant settlers that have existing or on-process permits. The pluralist land and resource policy environment puts to question the feasibility of IPs effectively securing their claims to their ancestral domains (Vidal 2004, 101).

The delineation process is fraught with bottlenecks in bureaucratic and legal hold-ups that obstruct effective implementation. The NCIP's mandate to issue CADTs necessitates the ironing out of procedures and policy issues with other government agencies. The performance of the NCIP of its duties is also severely curtailed by its shortages in budget and technical capacity.

CADT processing could not keep pace with mining permit application and environmental compliance certificates of corporate interests and development projects to be implemented in indigenous territories. In ancestral domains where there are mining interests, indigenous communities and mining companies try to outpace each other in obtaining a CADT or a mining permit. Acquiring a CADT before a mining permit allows IPs more leverage in asserting their rights.

Local conflicts and frameworks in defining ancestral domains

The ancestral domain discourse, framed in the context of IPs' interest versus non-indigenous (particularly, the state and corporate) interests, unifies IPs. On the ground, however, making ancestral domain claims is divisive within and between indigenous groups who have competing claims over territory, boundary, leadership, histories, etc. IPs also compete with migrants and LGUs. Inter- and intra-village or tribe conflicts impede CADT applications.

In the Cordillera, the strategy of the DENR and the NCIP of defining ancestral domains along political-administrative units (Mendoza et. al., undated) particularly the municipality,[79] is confounding ancestral domain with political interest in bigger land areas to gain more share in revenue allocation. This approach may appear unproblematic because most of the LGUs belong to the same ethnic group, elected officials are mostly from the indigenous communities, and the administrative structure can serve a practical advantage where traditional socio-political structures are eroded.

With this approach, however, ancestral domain delineation is reduced to boundary conflicts with designs on gaining more revenue share and claims to some resources near borders. LGUs tend to prioritise the resolution of boundary disputes more than securing a CADT (Dunuan 2007, 56) for their revenue allocation. Applying for a CADT or CADC conversion is not urgent unless there are impending external or internal threats to territory and resources. Further, as the IPRA guarantees self-delineation, some communities are taking liberties in re-constructing their past to fix their claims to forests, water sources and streams along their borders for current or future access. Some villages within and between municipalities have overlapping or competing claims to forests and water resources, and these are the reasons for some inter-village conflicts. The focus on boundary resolution more than collaborative forest management efforts contributes to human pressure on these areas with overlapping or conflicting claims.

In Mindanao, competition, disunity and internal power struggle among the *lumad* are obstacles in their claim making (Vidal 2004, 99). Ancestral domain claims would bring together tribes that make a collective claim, but would also breed or intensify divisiveness among the excluded or marginalised groups. At times, the "divide-and-conquer" strategy of mining and logging firms would come into play to weaken local opposition and establish their local support base.

Level of understanding and support of local government units

The level of awareness and support of LGUs is critical in IPRA implementation. Where IPs are politically marginalised at the local level, many conflicts on ancestral claims and resource control were with local governments. For example, the Tagbanwa ancestral claim that extends to the sea in Coron, Palawan was confronted with 14 resolutions from the Coron municipal council opposing the recognition of their ancestral claim on the bases of other interests in the area, such as tourism, large-scale commercial fishing and a

79. A municipality, however, is not the ancestral domain unit but lumps together a number of ancestral domains, i.e. villages. A village usually comprises a barangay, but villages with large populations and land areas were split into two or more barangays to gain more access to national resources.

protected area programme (Philippine Association for Intercultural Development 2000, 59–60). The inclusion of the Tagbanwa ancestral waters in their CADC issued in 1998 (converted into a CADT in 2004) set the precedent for the inclusion of ancestral waters in the definition of ancestral domain (Philippine Association for Intercultural Development 2000, 61-62).[80] This was questioned at the provincial level due to the lack of existing policies on incorporating "ancestral waters" and "coastal areas" in ancestral domains, but which was duly upheld by the DENR-Central Office.

Some local governments questioned the awarding of extensive lands in their jurisdiction to IPs and their capacity to manage vast areas. In Central Luzon, the municipal mayor of Limay, Bataan questioned the capacity of around 300 Aeta families to manage their domain encompassing almost 75% of the town's land area, as did the Kalawakan, Bulacan municipal officials of the Aeta whose territory include almost 22 ha of the La Mesa Dam watershed (ESSC 2007, 5).

Non-coverage of the IPRA in specific areas

IPRA implementation is being impeded in areas covered by specific laws to the disadvantage of IPs in these places. The IPRA will need nuanced interpretations in terms of conflicting provisions and of how the NCIP will relate with the implementing bodies.

The Autonomous Region of Muslim Mindanao (ARMM) is excluded from IPRA coverage. This is a major area in western Mindanao where the Bangsamoro have engaged in decades of armed struggle asserting their Muslim identity and their homeland claim. The claim of a homeland is broader than ancestral domain, and those cultures that are Muslim seek their identity as Moros before their individual culture. There is much contention in the present ARMM area and calls for expansion of the areas are being contested (Mastura 2008, 135). Within the Muslim area there are IPs of Christian, Muslim and traditional beliefs. They also have historical claims to their territories, but lack a unifying political framework to have a stronger voice. They mostly live in the forest areas and have been co-existing with the Muslim population. The presence of migrants since the American territorial period fragmented the broader area and cultural consolidation.

The NCIP has no presence in ARMM, although it approved one CADT through the conversion of a DENR-issued CADC. The Bangsamoro makes reference to the IPRA as a basis for their homeland claim[81] but reject indigenous status. (For instance, the Magindanao and Maranao, along with the non-Muslim Irinan, do not consider themselves IPs.) The other communities (generically termed *lumad*) raised the disregard of their rights and their lack of participation in the preparation of the draft agreement on the Bangsamoro Juridical Entity (BJE) between the Philippine government and the Moro Islamic Liberation Front (MILF) that sought to expand the ARMM. The recognition of the territorial claims of these IPs is not clear, and the non-implementation of the IPRA in ARMM coverage and the proposed BJE denies at present these IPs a clear legal framework for the recognition of their rights.

In Palawan, the NCIP entered into an agreement with the Palawan Council for Sustainable Development (PCSD), a legally-created body. According to their mandate, the PCSD is authorised to delineate the zones by ancestral zoning. The NCIP is processing 12 CADTs in Palawan. The process has to pass through the PCSD, which adds another level of bureaucracy in titling. The NCIP endorsed the first CADT in Calauit Island[82] to the PCSD.

80. A supplemental agreement was drawn up by the NCIP and the Land Registration Authority on the registration of ancestral domains incorporating ancestral waters.
81. The Government of the Republic of the Philippines – Moro Islamic Liberation Front Memorandum of Agreement on Ancestral Domain cites the IPRA as part of its Terms of Reference, but presented an expanded definition of ancestral domain that goes beyond land ownership through four sub-topics or strands: concept, territory, resources, and governance.
82. Kalawit Island was surveyed because there is a Department of Justice (DOJ) opinion that it is an ancestral domain, apart from it being a priority of the President.

5.6.2 ANCESTRAL DOMAIN MANAGEMENT PLANNING AND FOREST MANAGEMENT

IPs do not ordinarily consult a formal plan in daily life, but engaging in a planning process has its practical advantages. More important than the plan-document to fulfil a bureaucratic requirement is the planning process that can be an opportunity for "social contracting" at different levels. Internally, planning is a venue for the members and other stakeholders to negotiate their different rights and interests in their resources and territories. It is not a given that all the members of an indigenous communities share a single, coherent interest or live by a common sustainable resource management framework. In relation to government and external groups, the planning process is also a useful mechanism "to bridge community interests and bureaucratic agenda" (Mendoza 2003, 8). The ADSDPP can also serve as a catch-all or convergence of their needs in basic services.

Not all ancestral domains are under sustainable management, and giving CADT without appropriate planning and community capacity building will not improve management. Not all those with CADCs or CADTs have completed their ancestral domain plans.[83]

Strengthening forest management practices, access to resources and livelihoods

A major question on the impact of CADTs is on what value-added it gives to IPs as regards their access to livelihood resources. The Aesta in Pastolan, Batangas, whose CADT issued in 2004 covers approximately 45% of the Subic Bay Freeport Zone,[84] were still pressing for livelihood opportunities and access within the built-up area included in their CADT. The Aeta declared that they would demand their share from new developers that would do business in their ancestral domain (Caballero 2004, 9).

While the IPRA in principle "affirms [the Indigenous Peoples'] culture by restoring to them much greater control over their environment," (ESSC 1999b, 32) many IPs have yet to exercise effective control and management because the DENR retains a strong regulatory hand over forest exploitation even with CADTs. Even with CADTs, the DENR retains its mandated task in the conservation, management, development, and proper use of the country's ENR, including forest and mineral resources. The CADT introduces land tenure reform in forestlands, but IPs' exercise of their right to resources is clipped by the DENR's regulations on permitting.

In July 2008, the DENR and the NCIP issued a Joint Memorandum Circular (MC) for the recognition, documentation, registration and confirmation of effective traditional or indigenous forest management systems in ancestral domains. This Joint MC evolved from a proposed DENR issuance drafted by Community Environment and Natural Resources Officer (CENRO)-Sabangan to recognise the *batangan* (pine forest) management systems of the Kankanaey and Bontok in Mountain Province.[85] DENR-Cordillera wanted to expand the proposed policy to other indigenous forest management practices in the region. In turn, the DENR-Central Office with the NCIP adapted it for nation-wide implementation.

The Joint MC, however, aims primarily to strengthen IPs' role in watershed and biodiversity protection and secondarily to legalise their use of forest resources (e.g. forestland for farming, and forest products), subject to regulations, for their livelihood and economic enterprises.

83. There are 20 completed ADSDPPs submitted to the Ancestral Domains Office (ADO). The ADO is currently assisting in planning in 94 ancestral domain areas through external funding assistance – the Japan Social Development Fund, in 25 areas; the UNDP-Phase 2, in 10 CADT areas; the International Fund for Agricultural Development (IFAD), in 17 areas in Caraga and Region 10 for delineation and ADSDPP formulation; and the National Power Corporation for titling and ADSDPP formulation and implementation in Benguet.
84. The Subic Bay Freeport Zone is a former US naval facility in Subic Bay, Pampanga that the Philippine government, through the Subic Bay Metropolitan Authority (SBMA), is developing into a commercial, industrial and tourism centre.
85. Batangan refers to pine forest or woodlot of the Northern Kankanaey in Mountain Province. In some municipalities, the local communities themselves established the pine forests in former cogonal areas near their settlement areas of their own initiatives for their wood needs prior to the establishment of the government forestry office in the locality.

Nevertheless, it would be a flawed approach to require IPs to act on forest protection first and their livelihoods second. Instead, improving livelihood security and cultural integrity will improve their capacity for forest management (AFN 2009, 9).

Under the Joint MC, the concerned IPs, with LGUs and the local DENR and NCIP offices will formulate the joint implementing rules and regulations (JIRR) for their respective forest management systems. The IPs' customary resource rights and practices will govern resource extraction for household consumption, but extraction for commercial purposes is subject to DENR laws and regulations. DENR rules on shipping/transport documentation requirements apply in the disposition of timber and NTFPs extracted for utilisation to be traded outside the domain/locality. Also subject to DENR rules and traditional resource rights is the use of resources from naturally grown forests for livelihood projects such as carving, handicrafts, manufacturing, etc. Only the allowable volume/ number of species needed as raw materials for the projects could be brought outside the domain/locality. Likewise, resources harvested from established indigenous forest/forest plantation for processing into finished products (i.e. carving, ornamental, handicrafts, novelty items, etc.) can be transported to any market outlets subject to DENR rules. Extraction will be allowed only in community-designated production sites and regulated using traditional forest management practices, such as replanting or similar customary practice, especially for watershed protection.

The DENR and the NCIP have yet to resolve in their policy discussions the definition of traditional and commercial resource use (if the basis is on area extracted from, on volume, or on poverty threshold). Commercial and traditional scale of resource extraction are difficult to differentiate since the shifting lifestyles of many IPs have long adopted selling of traditional products, but are now in increased or commercial quantities (ESSC 2007, 19).

The above guidelines fall short in strengthening IPs' resource control and in simplifying resource utilisation policies for their livelihoods. The participatory formulation of JIRR by the local stakeholders for specific indigenous forest management systems can be an opportunity for innovativeness and commitment in working out acceptable permitting and regulatory mechanisms on the extraction of timber and non-timber products.

A policy recommendation to improve indigenous and local communities' access to NTFPs for their legitimate livelihoods calls for the simplification and streamlining of the permit system (Aguilar 2008, 10). With the above DENR-NCIP Joint MC, participatory and comprehensive documentation of practices and plans in the JIRR and ADSDPP should cancel out the administrative requirements of the DENR, and serve as basis by which IPs can be held accountable for what they do with the resources within their domain with regular monitoring.[86]

The formalisation of indigenous forest management systems should be integrated in the ancestral domain management planning and capacity building process. While indigenous systems offer workable strategies in environmental management, these are being weakened and lost with increasing economic and political pressure (Stavenhagen 2003, 13). For instance, customary rules on clan-owned *batangan* in Mountain Province have weakened as safeguards against small-scale commercial timber harvesting by community members who own chainsaws (Rood 1995). A T'boli leader in Lake Sebu acknowledged that their indigenous forest management capacity needs strengthening (Logong 2000, 232). Participatory internal monitoring mechanisms and safeguards against the possible abuse of utilisation permits and unsustainable utilisation of timber and NTFPs are necessary. A regional NCIP officer in Mindanao invoked an IPRA provision that recognises traditional resource rights in endorsing supposed traditional certificates of timber origin issued by a tribe to about 5,000

86. Unless extraction is on a large-scale that would then necessitate mandated requirements, e.g. the Environmental Compliance Certificate.

cubic meters of wood (about 500-1,000 truckloads) (ESSC 2007, 19).

Working out options for payment for ecological services (PES) of forests

PES is still new in the Philippines. One PES form is the national wealth tax from the use of natural resources that accrues to LGUs. Some local governments in the Cordillera negotiated with lowland LGUs hosting hydropower dams for their share in the national wealth tax paid by these hydroelectric corporations, as compensation for the ecological services of their forests/ watersheds that support these hydropower plants. They propose a redefinition of "host community" – from the LGU where the hydropower infrastructure is located into a watershed-based definition – so that upland communities can access the environmental fund for their watershed management. They are also considering the imposition of water tax on lowland farmers who depend on the Cordillera watersheds for their irrigation supply (Cabreza 2008). One proposal is to add a small charge to the payment of farmers benefiting from irrigation supply sourced from community-managed watersheds to water distributors (Rice 2005, 48). IPs' forests are headwaters of most of the rivers that supply irrigation and hydropower dams in Luzon and Mindanao.

The Kankanaey-Bago ancestral domain in Bakun, Benguet is one of the "Rewarding Upland Communities for Environmental Services (RUPES)" project sites, which aims to show the link between sustainable watershed management by upland IPs and downstream benefit users, the hydroelectric companies (Leimona and Lee 2008, 7). Payments from the dam companies funded road construction, interest-free loans and health services. RUPES recommended the direct channelling of voluntary benefits to Bakun farmers to improve the PES scheme.

The Kalahan Educational Foundation's (KEF) partnership with Mitsubishi UFJ Securities Co. Ltd. is tapping the Afforestation/Reforestation Clean Development Mechanism (A/R CDM) of the Kyoto Protocol for KEF's carbon sequestration project in the Ikalahan ancestral domain in Nueva Vizcaya and Nueva Ecija (Not by Timber Alone 2008, 4). The company's commitments include providing consulting services, purchasing Certified Emissions Reductions (CERs) earned by the project until 2012 and shouldering transaction costs. The A/R CDM is difficult for IPs to access for their forests' carbon sequestration contribution because of its complicated guidelines. Discussions on reduced emissions from deforestation and degradation (REDD) mechanisms in international climate change talks need to be more inclusive of IPs' stake in forests for these to be equitable, effective and sustainable (Tauli, 2007).

Devising workable incentive or market mechanisms for forests' ecological services (carbon sequestration, watershed protection, biodiversity conservation) is an emerging strategy in strengthening indigenous forest management systems. These can create economic opportunities for IPs to increase their income, improve delivery of basic services or provide other benefits that help take off pressure from forests.

Management planning of overlapping protected areas and ancestral domains

DENR-NCIP Joint MC 01-2007 aims for integrated management planning and clarifies management responsibilities over overlapping protected areas and ancestral claims. An integrated plan for the management of the ancestral domain–protected area overlap can be prepared; or existing ADSDPP and protected area management plan (PAMP) will be harmonised; or a completed ADSDPP (if there is no PAMP) can be enhanced. IPs in protected areas will be primarily responsible in maintaining, developing and protecting overlap areas in accordance with the integrated plan, with assistance from the DENR and other agencies. Where there are overlaps, the NCIP as the agency representing IPs' rights is now a co-implementer with the DENR, concerned indigenous communities and LGUs, in protected area establishment, delineation of boundaries of the protected area and/or buffer zones, resource assessment and inventory, and formulation of the management plan.

Review of complicated ADSDPP guidelines

NCIP AO 1–2004 sets the guidelines on the preparation, form and content of an ADSDPP. The guidelines are elaborate and arduous for IPs to accomplish. Imposing the complicated format is disempowering to indigenous communities with low levels of literacy, weak LGU linkage and limited external assistance (ESSC 2007, 11). The NCIP needs to be flexible in how indigenous communities put forward their plans.

Incorporation of ADSDPP into local plans

Getting ADSDPPs incorporated in the plans of LGUs and government line agencies remains a gap. Local government planners have limited information on ancestral domains and land use practices of IPs, and are not fully integrating these in their land use plans. For a number of LGUs, ancestral domain claims interfere in their local plans and opportunities for revenue generation, "while obliging them to extend basic services to non-tax paying Indigenous Peoples" (Quitoriano 2003, 11).

The Cordillera Regional Development Council recommends that the ADSDPP should serve as the Comprehensive Land Use Plans (CLUP) if the ancestral domain comprises a municipality or complement existing plans if the ancestral domain straddles two or more municipalities. Some local planners in the region raised the lack of applicability of the CLUP guidelines in their geo-physical and cultural contexts, i.e. existing indigenous land uses and forest regimes. Without guidelines to incorporate the plans, nonetheless, they feel compelled to follow CLUP guidelines.

LGUs are still struggling to develop their CLUP to claim their IRA. For LGUs in forestlands, it is more appropriate to formulate Forest Land Use Plans (FLUP) than a CLUP. However, as LGUs are only at the beginning of the planning process and few have effective CLUPs that cover the lowlands, it will take some time before they get to any effective consideration of the broader and distant FLUPs before tackling the detail of an ADSDPP and its recognition and integration in terms of real land use management.

5.6.3 CAPACITY BUILDING AND PROMOTING CULTURAL INTEGRITY

Besides material deprivation, poverty indicators among the *lumad* include weakening or loss of influence of indigenous culture and relationship with ancestral domain (ADB 2000). Lack of respect and support for one's culture and identity is a root cause of impoverishment and loss of land. The introduction of electricity in Balit, Agusan del Sur two years ago brought about major lifestyle changes that led some Manobos to sell their lands they kept despite military operations, famine and pestilence, to buy karaoke equipment and billiard tables (ESSC 2007, 16).

There are IPs actively engaged in various forms of cultural regeneration (Alejo 2000) to strengthen territorial claims, natural resource management or cultural identity. These include renewing their interest in their ancestry, traditions and language; restoring or re-organising their indigenous leadership and institutions; reviving and documenting their indigenous know-ledge, beliefs and spiritual relationships with nature; strengthening their customary laws; etc.

IPRA implementation has been giving less attention to strengthening local cultures of CADT applicants. The demarcation of boundaries alone, however, would not "stabilise forest resources or meaningfully empower resident peoples" (Poffenberger 2000, 97). They need to define their management goals and strategies to address their internal and external concerns, to consolidate their positions and strengthen their capacity.

With the legalisation of cultural rights and tradition, IPs appropriate their tradition and history to legitimise their claims or contest those of others when negotiating over territory and resources with government, external interests or even with other IP communities. These, however, could also be used against them.

Ancestral domain and capacity building must acknowledge and assess the changes in values, worldviews, and spirituality. The socio-cultural

changes that IPs are undergoing are affecting how they relate to their territories, resources and the community. Cultural integrity must veer away from the 'preservation' of traditions, institutions or indigenous knowledge (NEDA-CAR 2004, 49) because these cannot be frozen in time.

Revitalising indigenous leadership institutions

Competent and strong indigenous leadership institutions are significant in capacitating IPs to self-determination. In recent years, indigenous leadership and representation have become a critical locus in negotiation and decision-making for FPIC vis-à-vis corporate investments. The IPRA requires traditional consultation process, including consultation with traditional leaders, to give legitimacy to FPIC. This can either be a positive or negative, depending on the capacity and accountability of indigenous leaders.

Their authority is now undermined at varying levels in different communities. Current issues and pressures place new demands and threats on traditional leaders (Rixhon 2002, 10) that their repertoire of customary laws and practices are unable to deal with. Traditional leaders could be vulnerable to manipulation. In Mindanao, government's practice of co-opting datus or installing 'fake' ones to facilitate the smooth operation of logging companies weakened traditional leadership. A strategy of mining companies is to install certain community members in favour of mining as "community leaders" (sometimes, with recognition by government agencies) to counter anti-mining traditional leaders.

IPs in the Cordillera assumed local governance positions, but political leadership in many areas is now with elected local officials. The elders are generally relegated to cultural roles but may still be consulted in ancestral domain concerns, dispute processing and customary practices. While recognising the influence of the indigenous cultures in local governance in some areas in varying extent to this day, the Cordillera Regional Development Plan regards as a problem the "dearth of models for integrating local traditions with sound, effective local management" (NEDA–CAR 2004, 46). Where IPs have control over local political leadership, devolution can allow them more leeway in local forest management.

Strengthening or reviving leadership institutions should build on their capacity to effectively deal with internal affairs and to encourage community participation as well as to engage LGUs, government agencies and corporations. The exercise of FPIC by Tagbanua elders without transparency and participation is being questioned by some members who are marginalised in their decision-making (Mayo-Anda, Cagatulla and La Vina undated, 20). A T'boli datu acknowledged the need to gradually train their people away from the orientation of ascribing to their datu "blanket authority" to decide on their fate (Logong in Enters, Durst and Victor eds. 2000, 232).

Approaches to revive or strengthen indigenous leadership institutions include strengthening or seeking recognition of indigenous structures where these remain influential; revising structures in areas where traditional leadership structures have weakened; or promoting IPs' participation in local governance where they are fully assimilated (Quitoriano 2003, 5). With assistance from the International Labour Organisation (ILO), the Kankanaey and Bago in Bakun CADT reorganised their council of elders that is traditionally village-based at the level of the town-wide CADT.[87]

Strengthening customary laws and legal pluralism

While the IPRA provides for the primacy of customary laws and practices in the delineation of ancestral domains, resolution of conflicts involving IPs or communities and in land

87. An ILO-assisted project facilitated the formalisation of the Bakun Indigenous Tribes Organization or BITO as the indigenous peoples' representative organisation and the consolidation of the councils of elders from the different villages. The structure of the organisation is composed of the general assembly, whose membership includes all the Bakun residents, a 15-member council of elders *(papangoan)* selected from all the villages throughout the municipality, and a project team (Malanes 2002, 58)

disputes and also in natural resources management, these customary laws are losing their legitimacy in actual practice with some IPs contesting their validity and applicability. On the other hand, customary laws are being re-affirmed or formalised as local ordinances in some areas to give more teeth in implementation.

Shifting property regimes and values attached to resources

The IPRA favours communal property, but collective ownership is not the norm for all IPs (Gatmaytan 1999) and does not necessarily avert loss of land. Retaining or subdividing communal resources (such as forests, pasture areas) is an adaptive strategy for those faced with persistent external threats of encroachment by corporate interests and land grabbing by migrants, as well as the internal threat of members allocating these resources for their exclusive access and benefit. The Mangyan in Mindoro opted to parcel out their shrinking territory among the members to ensure equitable land distribution (Gaspar 2000). Problems are emerging on claims being made on distant, shared-access hunting areas without clearly defined boundaries.

Land ownership in ancestral domains is changing. Some IPs prefer private titling for practical ends – as collateral for bank loans and as proof of ownership during land disputes (Prill-Brett 1992, 51). Formalised claims become more practical and effective in areas where social norms (e.g. strong community censure and negative public perception) have weakened as regulatory mechanisms for violations of customary laws. The tax declaration scheme led to the privatisation of communal forests and pasture areas by certain community members. Nonetheless, some Kankanaey in Sagada, Mountain Province were against the registration of their woodlots for fear that their communal forests and pasturelands would be alienated by only a few privileged members as was the case with clan-owned forests in the past (Cabalfin 2001, 26).

It cannot be generalised today that all indigenous claims to territory and resources emanate from special relations with lands or forests, in light of the loss or weakening of traditional beliefs. An active land market in many indigenous communities reflects a weakened sense of inter-generational responsibility to ancestral lands. Devoid of spiritual or traditional meanings, land and forest are viewed as economic assets. Interviews with *muyong* owners in Ifugao noted the shift in the perceived primary purpose of the *muyong* from its water to timber value. Recent permits showed that 100 trees were cut from a single *muyong* for the lucrative woodcarving business (Osbucan et. al. undated, 45).

Pursuing culture-based education

Cultural regeneration is also being pursued through literacy programmes, alternative, cultural or mother tongue education with informal programmes and increasingly formal curriculum. Formal Philippine education lacks sensitivity to IPs' needs and contexts, which contributes to the cultural alienation of indigenous youth and loss of indigenous knowledge.

There are a number of programmes run by organisations working on literacy programmes, alternative, cultural or mother-tongue education with informal programmes and increasingly formal curriculum. Workshops or education seminars for principals of elementary schools with large populations of indigenous people children are now being run so that these schools will develop more sensitivity for IPs (Aclub and Walpole 2008). These literacy programmes are widespread in Mindanao. Increasingly curriculums are designed so the education is integrated and holistic and promotes and deepens cultural understanding while linking with the public education. The transmission of indigenous knowledge (customary laws, forest management, farming, healing, etc.) is now shifting from oral and practical experiences to non-formal, semi-structured or formal settings, or through documentation. Knowledge and skills for children and youth along the Pantaron Range in Bukidnon/Agusan enable them to relate confidently with mainstream Philippine society, advance them up the formal education ladder, and help them engage with society while

gaining greater objectivity of their culture (Walpole 2010). On seeing such a school the Department of Education issued a Memorandum in 2004 permitting indigenous learning. This shows a further step in emerging national recognition of the lack of concern for cultural education.

Many organisations see indigenous rights as a problem of tenure, but for a lot of communities it is also access to basic services. It is often bemoaned that communities will sign off their rights in the hope of a better life with basic needs met. Many communities themselves do not see the value of early education in their own language and feel they will be more acceptable and have greater opportunity if they can blend in with the national language or English. What is lost is their respect for their identity. Education is a basic right, but the government system is not yet equipped in enabling IPs to grow and learn based on who they are while at the same time integrating them into the system. As the interest in achieving the Millennium Development Goals grows, the only way to realistically achieve this in many areas is through multi-lingual education that starts with the mother tongue. Education for IPs should be nuanced and re-worked as appropriate to their respective cultures and languages.

IPs' rights to forests are not only about tenure and resource access and control. They are also about cultural rights, social services and livelihoods. The IPRA also supports efforts to bring education responsive to indigenous cultures (through multi-lingual education) and other basic services.

In multiple ways and on a daily basis, IPs struggle with external pressures while suffering from the lowest availability of basic services and lack of adequate recognition to their traditional resource base. Within cultures and communities there are also many conflicts of interest and value changes. The rights some groups have are often not enough for them to withstand internal and external pressures, but there are other groups that are withstanding and adapting to pressures in ways that strengthen their identity.

5.6.4 FREE, PRIOR AND INFORMED CONSENT (FPIC) PROCESSING

FPIC is a tool for IPs to assert their rights vis-à-vis state and commercial interests in their forest, mineral and other resources. The IPRA defines FPIC five requirements: consensus of all indigenous community members; process that follows their respective customary laws and practices; freedom from manipulation, interference or coercion; consent after full disclosure of an activity's intent and scope; and use of a language understandable to the community.

There are serious limitations with the FPIC process: on pertinent administrative issuances to operationalise FPIC; on the capacity of IPs to arrive at an informed decision and negotiate external and internal pressures; on how mining companies (and other corporations) can manipulate the law; and on how government (especially the NCIP and the DENR) deals with issues and fail to ensure integrity in the process.

Rethinking guidelines on FPIC

NCIP issuances on FPIC undermine its empowering potential. NCIP AO 3-1998 exempted all leases, contracts, licenses and other forms of concessions within ancestral domains before the promulgation of the IPRA implementing rules and regulations (IRR). NCIP also passed off as FPIC all resolutions or written agreements with indigenous communities before the IPRA IRR. This pre-empted a review and rectification or termination of problematic agreements or resolutions that are still being contested to this day, and demand accountability from companies and government officials.

The revised FPIC guidelines contain rigid, procedural approaches to FPIC processing. The prescribed procedure with corresponding timetable makes limited consideration of IPs' organisation and way of decision making, schedules and geographical spread. It does not involve "an iterative process of engagement between indigenous landowners and outside interests", but requires a one-off favourable

decision or repeated meetings for a community to reconsider a project if their decision is negative (Colchester and Ferrari 2007, 12).

Violations of FPIC process

FPIC is a controversial mechanism. Contested FPICs show patterns of deceit and manipulation in the orchestration of FPIC through bribery, misrepresentation, force or coercion and inadequate information, even for those endorsed by government agencies (Bangaan in Colchester and Ferrari 2007, 12). The lack of accountability mechanisms on the part of concerned government agencies further undermined FPIC. Often, mining companies failed to give full disclosure of their operation and environmental and socioeconomic impacts at various stages, but highlight promises of economic benefits. Mining companies would resort to a 'foot in the door' strategy in that they would only present information on their initial operations, withholding plans for future expansion (Doyle, Wicks and Nally 2007, 13). The validity, adequacy and inclusiveness of consultations were also contested. Consultations are often a participation of mere presence, a requirement to be met but not leading to any incorporation of what might be the perspectives or desires of a community.

When the intention is to secure a "Yes" or a "No" within a prescribed timetable, the FPIC process is reduced to a government procedure rather than a culturally strengthening process. When a community is rushed, bought off, out-talked or misrepresented in consultative meetings, the spirit of the process is crushed and defeated.

Community's capacity to give FPIC

Low literacy, poverty and lack of political resources can undermine indigenous communities' capacity to give FPIC, since they are likely to lack the skills to access and process information and to negotiate effectively (Miranda et. al. 2003, 26). This is where support and assistance are much needed, as most IP communities are faced with the daily survival of meeting their basic needs.

FPIC requires strong community organisations and leadership, with clear accountability measures, to represent and assert their collective interests and protect themselves from manipulation (ESSC 1999b). This entails that the community's consensus-building and decision-making processes, through its indigenous socio-political structures, are able to consolidate their positions as a community so that they can assert their rights more effectively.

Building the capacity of IPs takes time – may be generational – which national society does not have and neither do the communities probably. Again, the accompaniment of communities will help ensure the quality of the FPIC process. It is easily forgotten today given the speed of communications that most communities established changes on a generational transition with meagre resources. Even if a community is given the resources, the time and sense of generational learning are not present to assure the process.

FPIC and mining

Mining is moving too quickly for indigenous communities, in the process pre-empting their practices. IPs complain that mining companies hardly respect their culture. As a strategy, companies resort to installing new leaders and establishing their legitimacy if the existing leadership is anti-mining. Mining issues have polarised many indigenous communities. Consequently, indigenous decision-making processes are undermined, community leadership is redefined, and the legitimacy of representation becomes highly contested.

The mining industry lacks credibility and companies are not bound as a group with effective self-policing. New exploration companies are hard to tie down, their offices are not public knowledge, and the new wave of activities emanating through the Office of the President lacks any credible process in terms of civil society. In many areas there is a politicisation of communities, covert ideological resistance, and threat of violence. Small-scale mining is also not clear as the cases are diverse and given the role of local government, the management and accountability is on a case-to-case situation.

When a community is actively sought for its consent in a mineral exploration agreement yet was neglected in the past in terms of basic services delivery, FPIC can be a negotiating venue. There is, however, a thin line between development assistance and co-optation. The offer of mining companies to fill the gap in basic social services and infrastructure that the government should have provided can be attractive to impoverished indigenous communities.

Lack of mechanism to ensure the meaningful FPIC processing

The vulnerability of the IPRA and FPIC to manoeuvring to suit the expediency of commercial interests is generating frustration and disillusionment in the IPRA. The UN Special Rapporteur Report (Stavenhagen 2003, 13-14) pointed out that policy safeguards (FPIC and environmental impact assessment studies) required prior to the approval of development projects "are recognised in principle," but economic and political interests tend to prevail over IPs' legitimate rights. Whether FPIC is truly a mechanism for IPs' empowerment or is merely an instrument for legalising the entry of corporations into ancestral claims remains a question.

Despite past and recent cases of contentious FPICs, there is as yet no mechanism to ensure that FPIC requirements are sincerely met. Suggestions for strengthening FPIC include the formation of an independent body to review FPICs for mining applications that will have the power to recommend the cancellation of mining licenses (Doyle, Wicks and Nally 2007, v) as well as the following: "review decision-making systems and assess them for accountability, inclusiveness and capacity; build up leadership, assess and confront internal divisions and generate community consensus; insist on the community's use of own systems of decision making and representation and on the use of local language; refuse negotiation until satisfied that complete information has been provided; insist on iterative process of FPIC; insist on the completion of Environmental and Social Impact assessments before negotiating and accepting projects" (Colchester and Ferrari 2007, 21).

Capacity of and trust in the NCIP as the agency for Indigenous Peoples' concerns

The NCIP has contradictory roles as representative of both the state and IPs. Its mandate as a state agency is to follow and promote the government agenda. This often clashes with its mandate to recognise and protect indigenous rights and interests, which inherently challenge state sovereignty (ESSC 2007, 13) and are not always consistent with the government agenda. The two-faced nature is also seen in the NCIP Commission as regional representatives of IPs but appointees of the president.

In many cases, the NCIP has low levels of trust among IPs and civil society because of their lack of competence and capacity to respond to IPs' concerns, reputation as pro-mining and contentious issuances and decisions in the past. There is a limit to the reach and services of the NCIP given its paltry budget. There is also a need to note that this new government body cannot be expected to have an easy start and there is often no previous understanding or shared political history, sense of national service or knowledge of IPs throughout the country.

Following the institutional audit and revitalising of the NCIP through the Office of the Presidential Adviser on Indigenous Peoples Affairs (OPAIPA) in 2001, there are improvements in NCIP operations and systems. In the process of NCIP's efforts in rationalising a system, however, it is imposing standardised processes and mechanisms that do not consider the diversity and complexity of IPs' contexts. There are also some improvements on capacity building for NCIP staff, especially with the increase in mining permit applications. Through the NCIP, government agencies are becoming more aware of the IPRA and its mechanisms. The NCIP encourages civil society and their partners to assist in the empowerment of IPs.

The limited understanding of the IPRA within broader Philippine society may be attributed to the weak articulation of IPs as a strong and empowered sector that can contribute to the country's development. While the Constitution and the IPRA ensure their rights and

entitlements and while numerous international development assistance funnel funds directly for IP development, there is limited communication on how a strengthened IP sector can contribute to the country's national development.

5.7 CONCLUSION

The IPRA marked its 10th year of implementation in 2007 since its enactment in 1997, which is over 10 years since provisions for the state's recognition of the rights of IPs were enshrined in the 1987 Philippine Constitution. Legislating several indigenous rights, the IPRA promotes in principle a rights-based approach to the development of indigenous communities and lays down a legal basis for major reforms in forestland tenure and forest management. Though not exactly a forestry or environmental law, the IPRA necessarily overlaps with environmental and natural resources policies because the IPs' ancestral domains are located primarily in the country's forestlands, mineralised areas and areas of critical environmental concern.

Notwithstanding its limitations, the enactment of IPRA was a milestone in terms of IPs' participation in the law-making process as well as in terms of content. From formerly dispersed efforts to lobby for legislative or executive policies with no or limited success, the making of the IPRA attained to an extent a national level collaboration among a number of indigenous communities and IPs' rights advocates although representation did not involve all or most of the indigenous communities and assisting partners. The IPRA draws from international instruments (such as the ILO and the then Draft UN Declaration on the Rights of Indigenous Peoples), past bills and existing executive issuances on ancestral domains in legislating a number of indigenous rights historically ignored by national policies. The inclusion of contentious provisions by the lawmakers in the IPRA, however, effectively built in weaknesses in the law.

The mechanisms created by IPRA for the recognition of these rights – namely, the CADT, FPIC, ADSDPP and the NCIP – are important mechanisms for IPs to exercise their rights. The CADT, as a policy reform of forestland tenure and cultural rights, grants to an indigenous community security of land tenure over their domains. The FPIC is a tool for decision making among indigenous communities that allows them to approve or reject the entry of development plans in their ancestral domains. The ADSDPP in turn offers an opportunity for the inclusion of the aspiration of IPs in local development plans.

IPRA implementation over the past decade shows some opportunities in the law for IPs to assert their rights, on the one hand, and threats to their security and well-being, on the other hand. At the local level, the IPRA is not a self-implementing law, and the extent to which it promotes the rights of IPs depends on the interplay of various internal and external factors.

The implementation of the IPRA has been largely fragmented in many areas, with focus on CADT issuances not integrated with capacity strengthening and management planning that could prepare communities to issue FPICs to incoming development projects, owing in part to limitations in the NCIP's financial and human resources and technical capacity. Adopting a holistic approach to address concerns of IPs that integrates land and resources tenure security with livelihoods, basic needs, cultural integrity and capacity building requires major support and commitment from national government. Clearly, the CADT, ADSDPP and FPIC are not the ends in IPRA implementation, but are mechanisms for building the capacities of indigenous communities, who will ultimately give meaning to the title and the plan.

The mechanisms are not automatic shields against the entry of corporate interests in an

ancestral domain. These provide only some leverage for IPs to assert their rights and articulate their plans in relation to external interests to the extent that they can consolidate their divergent positions and effectively negotiate. Mining is proving to be disastrous for the integrity of many cultures, but now that the law is there and they have the right to decide, companies are free to negotiate with communities in the presence of the NCIP and with the option of large sums of money the community leadership may have little capacity to manage or understand viable options that would not overrun the capacity of securing cultural identity.

The value-added of a CADT, ADSDPP and FPIC for forest-dwelling communities in terms of improved access to resources and livelihoods remains unmet. Even with titles and plans, the DENR retains its regulations on permitting, which does not allow forest dependent communities to benefit from their efforts to improve their social and economic well-being. Many IPs are faced with difficulties of daily subsistence and lack the capacity to effectively negotiate projects. The usefulness of the ADSDPP lies in the extent that they are prepared to engage in the market economy and there is a favourable market. There is much talk of payment for ecosystem services secured by good management of the lands but there are no working mechanics. Even in LGUs comprising of and led by predominantly IPs the benefits may not reach the poorest of the community and developments do not always reflect environmental sustainability. The NCIP has yet to ensure that ADSDPP are genuinely integrated in local and national government plans.

The CADT, ADSDPP and the FPIC do not guarantee better forest management or equitable benefit sharing. It cannot always be assumed that indigenous communities prioritise ecological balance. A CADT can even lead to lead to some unintended consequences, if the issue of indigenous rights is narrowly defined as a problem of land tenure or resource access, without capacity strengthening for ancestral domain management. Nonetheless, there are ongoing indigenous forest management practices that can be strengthened.

FPIC can work to the advantage of IPs to the extent that the community has the capacity to give a genuine FPIC with a level of understanding as to how they safeguard the future generation and that this cannot simply be done through acquiring money while losing management of much of the domain. Revised guidelines on the processing on FPIC reduced the FPIC into procedural steps but give little security to communities who have not engaged previously in market economics or internalised the impact corporate transactions have on community decision making.

The extent to which the mechanisms have meaning for the indigenous communities is also dependent on the ways by which the indigenous groups take advantage of the new opportunities or use them to reduce new threats arising from regulatory reform. The capacity of local communities to establish political coherence and capacity to negotiate collective interests is poorly developed.

Many organisations see indigenous rights as a problem of tenure, but for a lot of communities it is also access to basic services. The IPRA is more than forestry: the rights of IPs are also about basic services that can also strengthen their cultural identity and leadership. It is often bemoaned that communities will sign off their rights in the hope of a better life with basic needs met but this is often done with little understanding of how this is achieved.

It is not realistic to expect an effective and comprehensive cultural empowerment in society of the margins to occur within the years from the constitutional change of 1987 and the present; there is clear realisation that much more has to be done to sustain the rights of peoples and the value of culture within a society in terms of the quality of life and integrity of identity. Increasingly, building the capacity of IPs at the local level needs support and enabling mechanisms at the national level.

Community empowerment has not been strong for many and practices of cultural integrity have not been sustained. Many cultures no longer see value in their own language or tradition. Decision

making process of old on the one hand may need to adjust to the youth of today and on the other need to be upheld for what they contribute. Indigenous communities need to strengthen their cultural integrity, which is in many cases fragile and unarticulated. Internal and external pressures continuously bear upon the communities' cultural hold. The strength of the indigenous culture in a community contributes to their forest management capacity but in many cases these need to be internalised anew with regard to actual values held in the culture.

Improving the internal capacity of IPs includes strengthening their leadership institutions, with engagement of the youth, to build their capacity to make decisions and plans. There is much need for capacity and confidence to engage and negotiate, without losing sight of what their culture represents and the objectivity required. For many external relations to have a credible cultural hold, inter-generational participation in the process is necessary.

Ultimately, how effective the CADT, ADSDPP and FPIC are depends on the capacity of IPs themselves to make these work to their advantage. Efforts to strengthen IPs' capacities are also focusing on cultural regeneration; fostering partnerships or networks at different levels; appropriate delivery of basic services; livelihood assistance; awareness-raising on the IPRA and pertinent laws; and broadening their participation in local governance.

Institutionalisation of plans and enabling mechanisms at the local level include the adequate integration of the ADSDPP, which can serve as catch-all or convergence of basic services, in the local development plans. Ultimately, the communities need to be able to ensure the sustainability of the CADT through the management plan that they themselves formulated. Ancestral domain planning can formalise the existing practices of the IPs. The potential for IPs' participation in local and environmental governance through ADSDPP can only be realised to the extent that the people are able to articulate their interests and develop effective responses to their concerns, and the plan is integrated in plans of LGUs and government agencies and is respected by business and assisting organisations. Many communities still need the assistance of government beyond the NCIP. Government agencies and partner NGOs could help lobby and ensure that the management plan is respected and implemented accordingly by the partner agencies.

Millennium Development Goals are poorly achieved in indigenous community areas and need immediate and focused attention. The new regulations on education allow for mother tongue based education and development of the curriculum with greater regard for the local context and if seriously undertaken could do much over time to strengthen cultural identity particularly of marginal cultures in Mindanao. The Department of Education needs to allocate serious resources to the different cultural areas to develop curricula and to respond to the educational needs of increasing numbers of out of school indigenous youth.

Strengthening mechanisms to ensure genuine FPIC are needed in decision-making capacity, ensuring full disclosure of plans and the indigenous structures and processes involved, the weighing of risks and consequences, and in ensuring an informed engagement. Strengthening the capacity of indigenous communities is key.

Livelihoods opportunities beyond forest management need support. In the recognition of IPs' rights to their natural resources, the implementation of the IPRA could address with DENR a review of policies on access to resources by communities that are very different to those policies focused on corporate or illegal activities. Community livelihood options that are well managed and contribute to sustainable resource management need much greater attention.

Creating incentive and financing schemes for forests' ecological services present a workable option to forest conversion into agriculture or unsustainable extraction. These mechanisms are as significant as livelihoods projects, but must be designed to recognise indigenous forest

management systems at work. Payment for ecosystem services where communities can sustain the quality of water from their domain need to be compensated and engaged in water management from 'ridge to reef'. Efforts to develop REDD+ (REDD plus the conservation of forest carbon stocks, sustainable management of forests, and enhancement of forest carbon stocks) need to focus around the role of IPs in much of the uplands of the Philippines. The process is very slow and the NCIP is far from taking a lead in developing the mechanisms to serve the people or in making sure the benefits do not get snagged at the national level. What is being spoken of internationally is not yet linking up with communities and is an opportunity that could be developed so that as the mechanics emerge the benefits flow directly to communities and do not get entangled in outdated national procedures that thwart the very people who still have a deep sense of ecological responsibility.

Strengthening existing indigenous forest management practices, as a strategy of the community-based forest management system, should translate into tangible benefits for the communities. Simplifying and streamlining requirements on IPs' access to timber and non-timber resources will benefit thousands of IPs depending on forest resources. The multi-stakeholder formulation of implementing guidelines for specific indigenous forest management system should allow for flexibility to specific contexts and for innovations in mediating national policies and customary and local practices.

ENR policy review and harmonisation discussions between the NCIP and the DENR and other government agencies are addressing IPRA's overlaps and conflicts with ENR and forestry laws and provisions on resource access and tenure, which are creating confusion and contribute to conflicts on the ground. Efforts at national-level policy harmonisation need to keep pace with local realities. Related to policy review is the need for an assessment of land use and development priorities and plans for coherence and clarity in priorities, with recognition of IPs' rights.

Policy operationalisation as in the generic law like the IPRA cannot respond to complexities and particularities of local contexts and IPRA's implementation requires flexibility in guidelines appropriate to cultural diversities. There is a need to clarify rules and simplify administrative requirements for IPs to have more control over consultations, decision making processes, livelihoods and resource management. Such efforts need not reduce socio-cultural dynamics to standardised bureaucratic procedures.

Capacity building for the NCIP will require sincere leadership selection and consultative process in its policy making and planning. Given the limitations in its budget and lack of staff capacity and skills (transitioning from agencies with completely different tasks), the NCIP should pro-actively link with partners to tap support in staff skills and capacity development, funding assistance and resources sharing. Accountability mechanisms in the NCIP are needed to restore the confidence of the people in the agency. The NCIP should allow for flexibility in its policy making and implementation, as standardised procedures may not be relevant for all indigenous communities and can even marginalise or disempower them. The effort to address the lack of systems in its operations, which hindered the NCIP from effectively carrying out its role in the past, tends to create another problem with the increasing bureaucratisation of the NCIP.

Partnerships with civil society groups have been critical in responding to the issues and concerns of IPs. Civil society groups, espousing diverse agenda (IP empowerment, biodiversity conservation, CBFM, protected areas management), have been key partners in pushing for policy changes in IPs' rights and forest management. Ultimately, however, IPs have to stand up for themselves and external groups will be secondary. Assisting a community is a generational process and NGOs can only do so much to help empower communities as they usually have to work through projects and meet agency deadlines on a short term basis. On the other hand, there have been NGOs that "used" communities, for which there needs to

be greater accountability and responsibility. Accompanying IPs in consolidating and standing up for their interests, and ensuring that the process is just, is where IPs need support and assistance.

Partnership with LGUs is critical in empowering IPs through better delivery of basic services, recognition and integration of IPs' territorial claims and management plans in their land use and development plans, broadening IPs' participation in environmental governance and resource management, mediating IPs' interests and external interests and setting up effective mechanism for conflict resolution and accountability.

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