

# report

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## Traditional Customary Laws and Indigenous Peoples in Asia

By Raja Devasish Roy



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By Raja Devasish Roy

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# Summary

*Traditional Customary Laws and Indigenous Peoples in Asia* aims to fill a gap in our collective knowledge on the traditional customary laws of indigenous peoples of Asia.

The report introduces the reader to the concept of ‘indigenous peoples’ in the Asian context and outlines some of the relevant provisions from the Draft Declaration on Indigenous Peoples. It goes on to distinguish customary law from custom, explaining that the scope of customary law is wider, and that it is of a higher status, and, importantly, seeks to describe customary law from an indigenous peoples’ perspective. For example, the author describes how customary law is formed – i.e. that it is what indigenous peoples say it is. It is of immense practical value to them, for example, to regulate their resource allocation and to settle disputes.

The formal legal status of customary law is also discussed. There are some, albeit limited cases, where customary laws are respected with strong protective measures supported by the Constitution, as in Nagaland and Mizoram, India. There are also similar situations with somewhat weaker constitutional safeguards, as in Sabah and Sarawak, Malaysia and the Philippines. Further, there are situations where the customary law practices range from strong to moderately strong, even though the constitutional provisions in support of customary law are weak or absent, as in the Chittagong Hill Tracts (CHTs), Bangladesh and Jharkhand, India. There are also situations where constitutional safeguards and customary law practices are both weak, as in Orang Asli, west Malaysia. The report also discusses those situations where customary law practices have been severely eroded, as with the Ainu in Japan, and peoples in northern Thailand.

The report also provides an overview of the application and practice of customary law in different parts of Asia by discussing several different situations. It must be borne in mind that the prevalence or erosion of customary law practices cannot be understood in isolation from relevant social, political and economic developments in the country or area concerned. There is a discussion on the impact of changing economic, political and social conditions on indigenous peoples’ customary law practices, including a few brief references to historical events. Mizoram in India and the Cordilleras in the Philippines are discussed as examples of situations with very strong customary law practices, which also can count on constitutional safeguards; and these situations are contrasted with those of north-west Bangladesh and north-east Thailand, which have weak or eroded systems and prac-

tices. In the latter situations, the author links the socio-political marginalization of the peoples concerned to the state of their eroded laws and institutions. (Further studies are needed to help us understand how such erosion affects these peoples, in contrast to those with more robust customary law systems.)

There are also hybrid state-indigenous legal and justice systems. For example, autonomous councils in indigenous peoples’ territories in north-east India retain both legislative powers and the prerogative to decide customary law cases through the courts, councils or other institutions, which have been established or recognized by these councils. The hybrid justice system in Sabah, Malaysia is also briefly described.

The interface between customary laws and mainstream legal systems, including both positive and functional relationships, and examples of tension or conflict, are included. For example, there is a conflict between provincial (state) law and customary law. In Jharkhand state, India, there is a tension between federal and provincial (state) law. The conflict centres on the composition of the formalized justice system for indigenous peoples within the state, with indigenous peoples claiming that recent provincial legislation de-recognizes, and thereby subordinates, indigenous leaders, and undermines the traditional indigenous system. More positive examples are included, with the hybrid systems in the CHTs and Sabah, where indigenous leaders directly administer justice in a more or less autonomous manner at the community level, while more formalized state-appointed courts exercise revisional powers over the indigenous chiefs.

The report also shows how customary law practices can be the most appropriate way to resolve conflicts and disputes between indigenous people, since it resolves the conflict while retaining social cohesion and unity. The author suggests that many of the non-adversarial dispute resolution mechanisms and penal or reform measures may offer models for possible replication within mainstream justice and penal systems.

The author discusses some of the major challenges faced by indigenous peoples today in protecting their customary laws. Examples are drawn from the CHTs, which has a hybrid state-indigenous justice system, and is currently undergoing fundamental socio-cultural changes. These changes are also being faced in many other parts of the world, including in Asia. Among these are: occasional conflicts between customary law and the

rights of indigenous women with regard to familial and inheritance rights; difficulties faced by indigenous courts in enforcing their decisions, on account of the absence of adequate support from executive agencies of the state;

differing opinions on whether and how to record or 'codify' indigenous customary personal law; and the erosion of customary land and resource rights, and the reluctance of governments to adequately recognize or respect them.

# Asia



# Introduction

Among the most distinctive features of indigenous peoples are their unique ‘cultural patterns, social institutions and legal systems’.<sup>1</sup> These features vary in different parts of the world according to different social and political systems. The system of government of the states within which indigenous peoples live, whether at the local or the national level, varies enormously in Asia, from highly centralized unitary systems to decentralized federal systems.

Although indigenous peoples throughout the world live within state systems with formalized constitutional and legal systems, many of their social and cultural practices continue to be regulated by traditional law (referred to as customary law). Of course, this is only where their institutions, laws and practices have not been totally eroded, or assimilated beyond recognition. Indigenous peoples’ customary laws and institutions continue to suffer from de-recognition and policy neglect due to discriminatory or assimilationist state policies. Like indigenous peoples in other parts of the world, indigenous peoples in Asia have been subject to social, political and economic marginalization, especially through conquest and colonization. In only a few cases have Asian indigenous peoples been able to retain a substantive level of political and legal autonomy. Most indigenous peoples’ systems and practices have been eroded to an extent. In between are those cases where their customary laws and legal systems are partially recognized by formal state law. The challenge in each case is different; in some, the highest priority is to reverse the policy neglect and strengthen indigenous peoples’ legal systems and customary law institutions. Such struggles often form part of an autonomy or

self-determination movement. In other cases, the greatest challenge is to cope with the changing social dynamics within indigenous societies, whether or not these have happened through choice. Such exchanges are inevitable, and many would say desirable, since ours is a world where peoples and nations are dependent on each other for a variety of reasons.

Information about indigenous peoples’ lifestyles and social systems is generally scarce due to their social, political and economic marginalization, and their relatively ‘remote’ locations. Moreover, formal and informal writings on such matters are sometimes restricted to indigenous or local languages. In addition, because indigenous peoples’ customary laws tend to be in oral form, little information about these laws is available in an easily retrievable format, even among the people or community concerned. This report hopes to fill a small part of the huge gap in our collective knowledge of indigenous peoples’ customary laws in Asia.

This report does not intend to cover all the major sub-regions of Asia, or all the possible aspects of the practice of customary law. The report concentrates on family or personal laws, and land and natural resource law. Examples will be included from regions and countries the author has visited: the Cordilleras, Philippines; Hokkaido, Japan; India; and Sabah and Sarawak, Malaysia. These are in addition to examples and India from the author’s native region of the Chittagong Hill Tracts (CHTs) in Bangladesh, where he is an advocate, a social activist and traditional chief, which entails judicial and administrative responsibilities in CHTs semi-autonomous governmental system.

# What is customary law?

## Indigenous peoples

There is no universally accepted definition of the term 'indigenous peoples'. The International Labour Organization (ILO) Conventions No. 107 and 169 contain subjective and objective criteria to identify indigenous and 'tribal' peoples and populations, without clarifying, however, the meaning of the term 'peoples'.<sup>2</sup> The World Bank, for example, adopts a broad perspective and recognizes certain identifying criteria, including: attachment to ancestral territories, self-identification and unique *customary* institutions and languages, to distinguish indigenous peoples from others.<sup>3</sup> The Bank accepts the term 'indigenous peoples' as well as terms such as 'aboriginals', 'hill tribes', 'indigenous ethnic minorities', etc.<sup>4</sup> A more elaborate definition, which has attained considerable respect within the UN system, is provided by José Martínez Cobo. Cobo was appointed as a UN Special Rapporteur to study the discrimination suffered by indigenous peoples. His definition reads:

*'Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.'*<sup>5</sup>

## Indigenous peoples of Asia

The question of who is 'indigenous' in Asia is far from settled. Some Asian governments hold that the term 'indigenous peoples' does not apply to many of the population groups within their boundaries who regard themselves as indigenous, or have suggested that the term applies equally to all the major population groups within their countries.<sup>6</sup> The question of indigenous identity is still hotly debated in much of Asia.<sup>7</sup> However, in recent years, a small number of Asian countries have gradually shown greater tolerance towards, if not unequivocal acceptance of, the term 'indigenous'.<sup>8</sup> A variety of terms

are favoured by different Asian governments to refer to the peoples concerned. These include: 'aboriginal tribes' (Taiwan), 'aborigines' (peninsular Malaysia), 'cultural minorities' (Philippines), 'hill tribes' (Thailand), 'minority nationalities' (China), 'natives' (Malaysian Borneo) and 'scheduled tribes' (India).<sup>9</sup>

## Defining customary law

There is no universally accepted definition of customary law. Nevertheless, it may be regarded as:

*'an established system of immemorial rules which had evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the memories of the chief and his counselors, their sons and their son's sons (sic), until forgotten, or until they became part of the immemorial rules...'*<sup>10</sup>

Many customary laws of today are not ancient, nor are all customary laws administered by chiefs. Nevertheless, the definition provides a basic idea of what is generally understood by customary law, especially from the perspective of non-indigenous legal scholars.

## Customs and customary law

English law, for example, held that 'local' custom was a source of law that was distinct from other branches of common law.<sup>11</sup> Customs, or customary rules of law, were not formally recognized until settled by a legal decision, and the burden of proving the existence and validity of the custom lay upon the person invoking it.<sup>12</sup>

In most Asian countries, unless formal legislative or judicial recognition is already established, the existence of customary law may need to be proved by the person invoking it. The nature and extent of the burden and the standard of proof may vary from situation to situation. Customary law is administered by indigenous peoples' institutions, and the validity of such laws and their contents, including the related procedures, is generally known about, at least by the older members of the community.

The formal status of customary law in most Asian countries is usually subordinate to written laws; and if it

comes into conflict with written legislation – especially, but not limited to, constitutional legal provisions – customary law usually has to give way. There are, however, a few notable exceptions. Foremost among these are the customary laws of the indigenous Naga and Mizo peoples of the Nagaland and the Mizoram states in north-eastern India. Measures to safeguard against interference with these peoples’ customary law, procedures and land-related matters are firmly entrenched in the Constitution of India. To amend or do away with the relevant constitutional provisions requires not only a special majority of the country’s bicameral houses of parliament, but also the consent of the state assembly concerned, which is now controlled by the indigenous peoples of the state.<sup>13</sup>

## Customary law from the perspective of indigenous peoples

Regardless of the formal status of the customary laws or legal systems concerned, indigenous peoples generally regulate their internal customary legal and social matters, including any reforms to these, in a manner of their choosing, unless expressly barred or otherwise prevented from doing so. Such systems form an integral part of their identity, as observed by Cobo.<sup>14</sup> For an insider’s understanding of indigenous peoples’ customary laws and systems, it is important to look at the functional side of the institutions and laws concerned. Where customary law-based disputes arise, generally both the complainants and respondents, along with those who are the adjudicators or arbitrators, are indigenous. The rules and procedures of the customary laws in question are generally known by all who are involved in the litigation or complaint (or by the senior members, at least). In such cases, the question of having to prove the existence and applicability of the concerned custom or law does not arise. Issues related to the status and validity of such laws generally only arise if such issues are invoked by party to a dispute.

Customary law may be distinguished from statute law by being ‘more closely attached to a people’s culture.’<sup>15</sup> A study on an Ibaloi community in the Cordillera region of the Philippines saw customary law as something that is ‘evolved, defined, transformed or innovated by the people/community over time’.<sup>16</sup> Such a perspective applies equally to indigenous peoples in other parts of the world. Therefore indigenous peoples’ customary laws are not necessarily of ancient origin, or from a totally oral tradition, and are generally adopted over time. The important thing is that these laws are accepted by the community, whatever their source. It is difficult to pinpoint the date

or period of the adoption of, or amendment to, any particular customary law.

Since customary laws are adopted through a gradual process, this also provides an opportunity for the concerned community to test them out while still in embryonic form, and of localized application, so that they can amend them, as necessary, before large-scale harm is done. This would be unthinkable in the case of formalized legislation by ‘modern-day’ state entities. ‘Innovations over time’ to pre-existing customary laws are an integral part of customary law. It is unfortunate that these subtle nuances of customary law-making and law reforms are often lost on most national-level policy-makers and jurists, who instead tend to regard indigenous peoples’ customary laws as somewhat static, and consequently, outdated, and sometimes even as irrational or socially regressive. The prevalence of such distorted and discriminatory perspectives hinders the continuing practice of these modes of dispute resolution among indigenous peoples, and erodes the greater acceptance and wider application of such systems and processes. Indigenous modes of law-making and dispute resolution have many positive features to offer to mainstream legal systems, on account of their participatory nature, and because of lessons that they offer in the case of arbitration, conflict resolution and the post-dispute rehabilitation of the disputants. Some of these features will be discussed further later in the report.

## Personal laws and natural resource-related laws

Customary laws may be divided in various ways. For our purpose, they are divided into two broad categories. The first includes personal laws, such as those governing a people’s or a community’s rules on marriage, divorce, inheritance, child custody, etc. The second includes laws concerning different types and levels of tenurial rights over forests, lands, water bodies and other natural resources. The nature and extent of the formal state recognition of customary laws of both kinds varies from case to case, from country to country, within different regions of a country, from people to people, and from one clan or other sub-group of the same people to another. In the case of personal laws, some of the highest variety within Asia is to be found in south Asia and Malaysia, both of which share a common history of British colonization and an inherited legal system that is based upon English common law traditions. In the case of custom-based natural resource laws, among the most extensive legislation and formal jurisprudence is to be found in certain parts of India, especially in the north-eastern states, and in Malaysian Borneo (Sabah and Sarawak).

## Case study – Chittagong Hill Tracts

Various examples of customary laws are provided from the semi-autonomous Chittagong Hill Tracts (CHTs) region in Bangladesh, the home of this writer and the traditional homeland of indigenous peoples sometimes collectively known as the Jumma. This frontier region, bordering Burma and India, has a customary law system that is somewhat in between those that are highly structured and constitutionally recognized (e.g. Sabah and Sarawak), and those that are relatively unstructured or eroded (as in north-western Bangladesh; Ainu-inhabited areas of Hokkaido, Japan; and northern Thailand). The CHT system will be mentioned in different sections of this report as if it were a standard of reference; therefore, it is important to have a basic understanding of its main features.

The CHTs have a two-tier system of indigenous courts of head people (usually referred to as head men, though wives or daughters of incumbents may sometimes succeed to this position) and chiefs. However, unlike in Sabah, where chiefs and head people are appointed for a fixed term of office, those in the CHTs hold office on a largely hereditary basis, and usually for life. The government-appointed District Magistrates and the High Court exercise jurisdiction to review the judgments of the head people and chiefs, although fully fledged appeals against the chiefs' decisions are not allowed. The most important distinction between revision and appeal is that the scope of interference in the case of review is much smaller, usually being restricted to procedural and legal issues rather than the facts of the case.<sup>17</sup>

The exercise of the judicial authority of the chiefs and head people in the CHTs – especially those over indigenous peoples' personal or 'family' law matters – is expressly recognized in a number of laws, and the general courts of law are now barred from trying matters that fall within the jurisdiction of the chiefs and head-people, except for the more serious criminal offences.<sup>18</sup> The process of adjudication is based upon local customs and practices, since state laws on civil procedure do not apply to the CHTs, especially in the indigenous courts. Up to the first half of the twentieth century, government policy strongly discouraged undue outside interference in indigenous customary practices, even by the governmental revisional authorities.<sup>19</sup>

The most common issues of dispute that reach the courts of the head people and chiefs concern complaints by fathers seeking restitution of daughters who have eloped or 'run away', complaints by wives of their husbands' continuing battery or desertion, and complaints by husbands or wives seeking divorce or child custody. These

cases are then tried by the head person or chief – usually sitting in a council with local elders. They apply customary laws to the dispute before them and rule on the complaint: declaring a runaway marriage valid or, conversely, restoring 'guardianship' of the eloped daughter to the father; penalizing a husband guilty of domestic violence or allowing the wife a divorce; declaring a father or mother, as the case might be, entitled to child custody rights, or maintenance payments; etc.

On many occasions, disputes in the CHTs are settled 'out of court', whereupon the complaint is withdrawn, on payment of a fine to the community, if so ordered.<sup>20</sup> Most of the laws are still orally handed down. A small number of the region's indigenous peoples have reduced the larger part of their personal law rules and procedures into writing. These are gradually acquiring the status of a formal code, at least internally, within their people.<sup>21</sup> In the case of some of the other indigenous peoples, the question of whether, to what extent, and in what manner, these peoples' customary personal laws should be recorded, or codified, is one of the most hotly debated legal issues of the region. Some of the differing perspectives on these issues will be discussed in more detail later in the report.

The system of adjudication varies from court to court, and from people to people, and sometimes even from clan to clan. Examples of the procedure of hearings from the region are included later in the report. As discussed, in the first instance the village chief (*karbari*) sits with the elders and leaders, and attempts to resolve the dispute in the form of 'arbitration'; the focus being on bringing about reconciliation and mediation, rather than apportioning blame and fault or punishing someone. However, depending on the nature of the dispute, the matter may be more 'adversarial' at times. The proceedings in the head people's courts are similar, although the chiefs' courts are more formal. Testimony is usually oral, although disputes are generally initiated through a written complaint. The trend nowadays is to keep written records of the judgment and the penalties, especially in the chiefs' courts.<sup>22</sup>

In addition to resolving personal law disputes, head people and chiefs in the CHTs also resolve customary law disputes over wild game – although quite rarely, nowadays – and, much more frequently, disputes over customarily held forest and swidden commons. Some of these rights have been partially acknowledged by statute law, which generally has the effect of both protecting and safeguarding, and at the same time, of limiting and reducing, the right concerned. Thus some traditional rights of the indigenous peoples of the region, including the right to occupy and use untitled lands for homesteads,<sup>23</sup> and to cut, carry and use forest produce for domestic purposes (house-building, etc.) are now expressly recognized

through statutes.<sup>24</sup> The CHTs examples are typical of a growing body of statute law in different parts of the world, such as in the Philippines, Sabah and Sarawak, and South Africa, where certain aspects of customary law are recognized by statutes, thus somewhat freezing the customary law concerned, but also at the same time providing state support towards its enjoyment.

## Status of customary law in Asia in the context of the state

The formal legal status of customary laws in Asia varies, ranging from those that enjoy constitutional recognition to those that are not formally acknowledged by the Constitution or by other national laws. One would expect that states with federal systems containing autonomous provinces or states (however they may be termed) would also contain the highest degree of accommodation and protection of indigenous peoples' customary laws. This is borne out in, for example, the Nagaland and Mizoram states of north-east India and Sabah and Sarawak states of Malaysia, where highly formalized laws, the administration of justice systems, and the procedural rules of the state, coexist with indigenous peoples' custom-based laws and dispute resolution institutions and processes.

Conversely, one would expect, that unitary states (in which the governmental and legal systems are generally centralized and uniform) would tend to be more assimilationist, and consequently less accommodating towards indigenous peoples' legal systems and customary laws. This is indeed, the case for many countries in Asia, and elsewhere, with Japan and Thailand being prime examples.

To conclude, however, that all, or even most, indigenous peoples in federal systems are able to maintain, protect and practise their customary laws in a freer manner than in centralized or unitary states, would be a mistake. There are examples of Asian indigenous peoples within federal states suffering from state policy neglect and the consequent erosion of their customary laws – for example the Orang Asli in peninsular Malaysia, and several extremely marginalized groups in India – as there are examples of indigenous peoples within formally *unitary*

states with a reasonably high level of state recognition and protection of their custom-oriented legal systems, for example, the Igorots in the Cordillera region of the Philippines, at least with regard to their rights over lands and other natural resources. However, regarding customary personal laws, the influence of traditional indigenous institutions in the Cordilleras seems to have declined a great deal, as disputes on family law matters increasingly go to the state courts and arbitration systems, rather than to the indigenous elders or family councils, whose status remains formally unacknowledged by law.<sup>25</sup> Yet in the case of the forest reserves in the CHTs, where the indigenous peoples' customary resource rights are unacknowledged, their customary family law practices seem stronger than in the Cordilleras.<sup>26</sup>

The greatest plurality and strongest protection for personal laws of indigenous peoples is generally found in those countries that were formerly British colonies, including in Asia: Bangladesh, India, Pakistan and Malaysia. However, regarding indigenous peoples' prerogatives over land rights in areas outside the forest reserves in the CHTs, the indigenous majority hill district councils have the final say.<sup>27</sup> Therefore, there is an interesting range of strengths and weaknesses in the practice of customary land and resource laws on the one hand, and personal law on the other.

The main reasons behind the continuation of the practice of legal pluralism in some Asian countries is not so much the concerned governments' respect for or tolerance towards the indigenous peoples' customary personal law systems, but the legacy of the inherited British colonial legal systems. During British rule, the colonial government recognized a plurality of laws of different peoples based upon religion (e.g. Muslim and Hindu law) or ethnicity (e.g. tribal law). Since Hindus and Muslims, for example, were governed by their own personal law systems with regard to marriage, inheritance and related matters, it was no extra burden for citizens of indigenous descent to regulate their family and other personal law matters in accordance with their traditional practices. However, where customary resource rights laws were involved, the same states were extremely reluctant to recognize indigenous peoples' claims and rights.<sup>28</sup>

# Different situations in Asia

In this report, it is not possible to cover the situation of all the peoples concerned across the different countries of the continent. Therefore, a selective approach has been adopted, focusing on family law and natural resource law. The following sub-sections attempt to describe some of these differing situations.

## High constitutional status and strong protective measures

Among the highest forms of formal recognition of customary laws are the provisions in the Constitution of India concerning the customary laws of the indigenous Naga and Mizo peoples in north-eastern India, including both personal laws and resource rights. In accordance with the Constitution, no acts of the federal parliament of India concerning the religious or social practices of the Nagas and Mizos, their customary laws and procedure, administration of civil and criminal justice involving their customary law, and ownership and transfer of land and its resources, are to apply to the states of Nagaland and Mizoram, unless agreed upon by the legislative assembly of the state concerned.<sup>29</sup>

## Constitutional recognition with moderate safeguards and strong practices

There are some countries where the formal status of indigenous peoples' customary laws is not as high as that of the Nagas and Mizos in India; nevertheless, there is unequivocal constitutional recognition of such laws. The Philippines, especially regarding natural resource rights, and the states of Sabah and Sarawak in Malaysia, both with regard to personal law and natural resource rights, are examples. The current Philippines Constitution contains provisions on the recognition and promotion of the rights of indigenous peoples,<sup>30</sup> and on the protection of their ancestral domains.<sup>31</sup> The Federal Constitution of Malaysia provides for the King of Malaysia to be responsible for safeguarding the special position of the 'natives' of Sabah and Sarawak states<sup>32</sup> and also provides for special quotas for indigenous peoples of these states with respect to jobs and licences.<sup>33</sup> Similar provisions are echoed in provincial laws, such as in the State Constitution of Sabah.<sup>34</sup> The special dispensations for the Sabahan and

Sarawakan natives, which include affirmative action or 'positive discrimination' provisions, are protected against being regarded as a violation of the equality clause of the Federal Constitution of Malaysia.<sup>35</sup>

Among other examples are the 'tribal areas' in north-western Pakistan, where customary law disputes, especially those concerning personal law, are internally administered by 'tribal *jirga*' (traditional councils). Although legislative authority is formally vested in the President in the federally administered tribal areas, and in the state Governor (with the consent of the President) in the provincially administered 'tribal areas', these prerogatives are very rarely used, leading, through design or default, to the continuation of strong traditional institutions dealing with customary law matters.<sup>36</sup> This has helped protect many ancient traditions and usages that are an integral part of the cultural integrity of the peoples concerned. However, in some areas, tribal customs have been wrongly invoked or misinterpreted by tribal *jirgas* to justify severe instances of violation of the dignity and basic rights of women.<sup>37</sup> There is a need, for the government and the people to speak out so that women's rights are no longer trampled in the name of tradition.

Some Asian countries have reasonably strong safeguards for indigenous peoples' customary laws, but these are not expressly protected by their constitutions. The customary personal laws of the indigenous peoples of the semi-autonomous CHTs region in Bangladesh are a good example, where the existence of such laws is recognized, and partially safeguarded, by a number of ordinary Bangladeshi laws.<sup>38</sup> However, although the national Constitution of Bangladesh indirectly acknowledges custom and customary laws – by providing that pre-existing laws other than those inconsistent with the fundamental rights of the Constitution will continue to exist after the adoption of the Constitution – it does not expressly mention either customary law or the indigenous peoples of the country.

Other examples of moderate safeguards are the situations of various indigenous peoples in India other than those of the Nagas and Mizos, such as the situation of the indigenous Munda and Santhal peoples in the new Jharkhand state in east-central India. Although this state came into being due to the political leadership of the indigenous Jharkhandis' movement, the latter's indigenous representatives make up no more than one-third of the state assembly. This has led to the neglect of their views

and concerns over the state's administration of justice in the traditional indigenous-majority areas. Many of these areas are regarded as 'scheduled areas', in accordance with the Fifth Schedule to the Constitution of India (Article 244 [1]), where the general laws of the state do not apply or apply only in a limited manner. Jharkhand state is also a good example of conflict and tension between various statutes dealing with customary law, including conflict between federal and state law.

An important recent development for these Fifth Schedule areas (including 'tribal areas' other than in north-east India) was the passage of the Panchayats (Extension to the Scheduled Areas) Act, 1996. This federal law set out parameters for establishing village and district level *panchayats* (councils) in the scheduled areas to undertake developmental and legal responsibilities. The composition of these councils however, was left to the legislative prerogative of the provincial or 'state' governments. Several state governments, including those of Andhra Pradesh, Chattisgarh, Gujarat, Jharkhand, Madhya Pradesh, Maharashtra and Tamil Nadu, passed corresponding state laws, which aroused little or no opposition in most of these states yet caused a huge controversy in Jharkhand state.<sup>39</sup> The Jharkhand State Assembly passed the Jharkhand Panchayati Raj Act ('JPR Act') of 1996 for the establishment of village, 'block' and district level councils. This, in effect, de-recognized the traditional role of indigenous justice in governance and administration, affecting the Hos, Mundas, Santhals and Uraons, among others.<sup>40</sup>

According to indigenous leaders, the JPR Act has continued 'the imposition of top-down and mainstream structures of governance upon indigenous territories, without their consent and participation', a practice repeated in other areas of governance and administration of indigenous peoples' territories in Jharkhand.<sup>41</sup> Since the indigenous peoples of the state have only a minority of seats in the state legislative assembly, they are now powerless to change the law, and thus protect their traditional system of governance and practice of customary laws. Jharkhand is another example of the link between marginalization and the threat to the cultural integrity of peoples through the denial of their customary rights.<sup>42</sup>

## Weak constitutional provisions and safeguards

In some countries, the national constitutions formally provide certain safeguards for their indigenous peoples' social and cultural integrity, including their customary laws; but in practice, these have been quite inadequate to protect the indigenous peoples' rights. A striking example would be the case of the Orang Asli people in peninsular Malaysia.<sup>43</sup> Although these people are theoretically enti-

tled, along with ethnic Malay people, to the coveted status of Bumiputra citizens (who enjoy primacy over other citizens with regard to certain political offices, land rights and economic opportunities), the economic and social situation of the Orang Asli is not only many times worse than that of the peninsular Malays, but is also, in many respects, far worse than that of the indigenous peoples in Malaysian Borneo (Sabah and Sarawak states). Several recent judicial rulings offer some hope for strengthening these people's land rights, but their overall situation still gives cause for serious concern.<sup>44</sup> Thus, in Malaysia, the safeguards on indigenous peoples' customary laws vary throughout the country.

## Eroding customary law practices

Finally, there are those situations where the practice of customary law is weak or eroded, or in the process of severe erosion. These situations often coincide with a constitutional and legal system that provides little or no constitutional recognition to indigenous peoples or their rights. This is the case for the Ainu in Japan. Years of strong assimilationist policies have forced them to give up their distinct legal system and to suffer the appropriation of their ancestral lands. Yet Ainu leaders and activists are increasingly asserting their identity, and taking action to revive, revitalize and practise their unique way of life based upon traditional customs and usages, and to vigorously defend their rights.<sup>45</sup> A recent decision of the District Court of Sapporo held that the construction of the Nibutani Dam in Sapporo, Hokkaido – on what was acknowledged by the Court as traditional Ainu territory – was unlawful. The Court did not, however, focus upon restitution or restoration, and therefore the dam is to remain. The Court also declared that the Ainu are an 'indigenous minority' of Japan.<sup>46</sup> This can certainly be expected to help focus greater attention on Ainu issues, including on their land rights, but its implications for the Ainu people's official status, and on legal and administrative measures, remains to be seen.

Compared to the situation of the Ainu, the customary law practices of the indigenous peoples of northern Thailand are stronger, but this is only regarding personal or family laws.<sup>47</sup> However, these laws are not formally recognized by the government. Moreover, discriminatory state practices in other spheres of life have led to a weakening of the customary law practices. Large sections of the indigenous population of northern Thailand are struggling with such basic issues as citizenship rights, and measures to resist and prevent eviction from traditional lands that are regarded as state forest reserves.<sup>48</sup> Personal law disputes or other familial or social disputes among indigenous communities in the rural areas are still largely

settled by indigenous elders. However, their decisions are not backed by the state. Consequently, indigenous youths have been known to go against their customary laws, with some regarding their social systems as ‘antiquated and without substance’.<sup>49</sup> However, in other areas, customary law practices are still reasonably strong, especially where the indigenous elders have been able to provide dynamic leadership. Until recently, the Thai Constitution had no special safeguards for its indigenous peoples, who were generally regarded as ‘hill tribes’. However, the Constitution of 1997 recognized the special role of ‘traditional communities’ in natural resource management.<sup>50</sup> Although this recognition is not expected to directly influence indigenous peoples’ practice of customary personal laws, it could strengthen their advocacy work on the direct recognition of their customary land and forest rights.<sup>51</sup>

## **Eroding family law practices in areas with strong resource rights**

The above-mentioned examples show that the erosion of political and administrative autonomy usually accompanies the erosion of customary law practices and institutions. However, there are exceptions to this trend. For example, the Cordilleras has been included within those systems that have a relatively high degree of constitutional protection; the focus is on land and other natural resource rights rather than on personal or family law. Therefore, in the Cordilleras, there has been a far higher level of integration of customary family law into the mainstream system, than, for example, in the CHTs.

# The current situation

## The impact of changing economic, political and legal conditions

We have seen that there is a wide variety of situations of constitutional and legal recognition and protection of indigenous peoples' customary laws. Quite apart from the question of their legal status, and the presence or absence of protective measures, the general state of customary laws of indigenous peoples within Asia also varies on account of the nature and extent of their application, and the manner in which these laws are invoked and adhered to. Some aspects of these laws have continued to persist – despite the widespread practice of discrimination against indigenous peoples – indicating the concerned peoples' resolve to maintain their way of life. Elsewhere, certain aspects have ceased to be practised, or are being eroded due to developments over which the indigenous peoples have had little or no control.

Several factors have been historically important in affecting indigenous peoples' practice of customary laws. These include the colonization of the indigenous peoples' territories in the eighteenth and nineteenth centuries (whether by adventurers from overseas or by neighbouring empires, kingdoms, etc.), the exclusion of indigenous peoples from the colonizer's political process, the appropriation of their common lands and forests through military campaigns or the use of various legal fictions; and the eviction of indigenous peoples from their lands and territories (a process that continues in many places), forcing them to retreat to 'remoter' hill, mountain, forest and coastal areas, which the colonizers considered inhospitable. Lastly, indigenous peoples' continuing marginalization is also sometimes accelerated by the rapid integration of their regions' economies into the national and, increasingly, global, economic systems. The main problem is that indigenous peoples generally find themselves within these economies as mere producers or manual labourers at worst, or very marginal producers or traders at best. Thus they can be exposed even further to the pressures of political, economic and cultural assimilation, which also threatens the integrity of their customary laws and institutions.

The aftermath of colonization, empire-building and modern state-building led to the drawing of arbitrary borders, dividing indigenous peoples over several countries,

such as Chakma, Garo, Mizo-Chin, Naga, Santhal and Tripura between Bangladesh, Burma (Myanmar) and India; and the Cham, Hmong, Karen and Shan between Burma (Myanmar), China, Laos, Thailand and Vietnam. The political partition of indigenous peoples' homelands and territories, without their consent, has severely weakened their political, social and cultural integrity. For example, attempts by leaders of the Chakma people within Tripura state in India to consult Chakmas in the CHTs in Bangladesh regarding proposed legislation on Chakma customary law, was rendered extremely difficult due to restrictive travel arrangements between the two countries.<sup>52</sup> The recent phenomena of 'globalization' and 'marketization', bringing a rapid process of integration of the hitherto subsistence-oriented micro-economies of the indigenous peoples and other marginal groups into the national and, consequently, global, economic systems, continues to expose these peoples to economic exploitation, since they are either excluded from the processes of trade and governance, or are at best very marginal actors in it.

Foremost among these developments has been the relocation of swidden-cultivating indigenous communities through forceful means, or through inducements to abandon swidden cultivation in favour of market-oriented agriculture or horticulture (i.e. growing fruits, rubber, timber trees, vegetables, etc.).<sup>53</sup> The objective is also to sedentarize these peoples' lifestyles and integrate their livelihood systems into the market economy. This has happened in Bangladesh and Vietnam, and elsewhere in Asia.<sup>54</sup> Such interventions were often disruptive, and paid little respect to the indigenous peoples' customary land rights. Moreover, these interventions were based upon misinformed notions that this form of cultivation is an 'unproductive, unscientific and environmentally unsound form of land use'.<sup>55</sup> Such a view fails to appreciate the subtle nuances of these cultivation systems. Expert studies on swidden cultivation in Bangladesh, India and Thailand, among others, state that, in most cases, swidden cultivation practices are appropriate to the geo-physical limitations and social situations of the territories and areas concerned.<sup>56</sup>

In addition to widespread programmes of discouraging swidden cultivation and denying indigenous land rights, other spheres of the 'development process' have also harmed indigenous people, or brought them very little benefit. Wherever possible, indigenous peoples have taken advantage of opportunities for education and human

development, but their voice in government has generally remained small. Therefore, it is no coincidence that the greater the economic and political autonomy exercised by the indigenous peoples, the greater their freedom to protect their cultural integrity, including their customary laws.

While a truly autonomous legal system may be among the highest aspirations of certain indigenous groups, that is not to say that the protection of the customary law practices of peoples with less autonomy or no autonomy is necessarily doomed to failure. With regard to some aspects of customary law – such as those related to rituals for weddings and other occasions, and rules on sharing

wild game, etc. – it is the conscious choice of the community concerned, rather than external pressure or inducements, that has led to the weakening of the concerned practices. The erosion of certain customary law practices, such as the observance of marriage ritual and ceremonies, is happening even in the highly autonomous territories of north-east India and in Malaysian Borneo. Then again, in territories where indigenous autonomy and land rights have been severely eroded, basic struggles to meet livelihood needs and to prevent land alienation have made it much more difficult for indigenous peoples to continue with their rituals and ceremonies, upon which a great many customary practices and laws depend.

# Comparing strong and weak practices

In the context of this report, customary law has been broadly divided into personal law and resource rights. This chapter will discuss in greater detail these two broad areas, comparing strong situations with those where practices have been eroded. In addition, these situations will be compared with those prevailing in the CHTs. These examples should help researchers, legal practitioners, indigenous leaders, policy-makers and human rights activists, to facilitate legal reforms and programmes.

## Strong safeguard measures

### Mizoram, India

Along with Nagaland, Mizoram stands out among India's states due to its constitutionally entrenched safeguards for its peoples' customary laws and procedures, including the administration of civil and criminal justice involving its customary laws, system of ownership and transfer of land and its resources, and religious and social practices. These safeguards are contained in Article 371G of the Constitution of India.<sup>57</sup> Since the overwhelming majority of Mizoram's population is of indigenous descent, these legal safeguards are also quite strong in practice. Another special feature of Mizoram state that has helped protect its indigenous peoples' cultural integrity is the application of certain restrictions for entry into the state for non-natives, unless they have the express consent of the state government. This system, of what might be regarded as an 'internal visa', is contained in the Inner Line Regulation, 1873, adopted during British rule (and still valid in many parts of north-east India), to control immigration into these areas and protect the social, cultural and economic integrity of the indigenous peoples.<sup>58</sup>

Mizoram is also among those states in north-east India where the Sixth Schedule to the Constitution of India applies. This Schedule provides for another type of autonomy at a level that is lower than that of a state; namely, autonomous district and regional councils, usually drawn from one or more ethnic groups that are distinct from those in other parts of the state. Thus, Mizoram has several district and regional councils drawn from indigenous peoples who do not belong to the majority Mizo group (who are also indigenous). One such council is the Chakma Autonomous District Council, which has jurisdiction over an area with an overwhelming majority of indigenous Chakmas, who are

also the largest indigenous group in the neighbouring region of the CHTs in Bangladesh.

The Sixth Schedule district and regional councils have jurisdiction over various matters, including: administration of justice, land and limited legislative powers. They are partially autonomous from the state government (although the Governor of the state, a federal government appointee, retains certain legislative prerogatives), and enjoy the power to make laws on such subjects as allocation of lands (other than reserved forests), management of forests (other than reserved forests) and the regulation of 'jum' (swidden) cultivation, among others.<sup>59</sup> In addition, these councils are empowered to regulate the levying of interest rates above a certain percentage, money-lending and trading by those not native to the state.<sup>60</sup>

These councils are extremely important for the safeguarding of indigenous peoples' rights, and Mizoram, for example, was elevated from an autonomous district council to a state within India.

This system has played a crucial role in preventing the alienation of indigenous lands in north-east India, including nearby Tripura state, where the indigenous population has been reduced to a minority in a state that was formerly ruled by an indigenous king or *maharaja*.<sup>61</sup>

### The Cordilleras, Philippines

The Cordilleras' safeguards on customary land rights, especially those that were initiated through legal reforms in the 1990s, are among the strongest in the world. Further, the Philippines is probably the only Asian country that unequivocally recognizes its indigenous peoples as 'indigenous'.<sup>62</sup> The Constitution expressly provides for the creation of autonomous regions in Muslim Mindanao and in the Cordilleras.<sup>63</sup> In this regard, however, no substantial progress seems to have been made. The Mindanao experience with autonomy was difficult for the indigenous peoples and the national government. In the Cordilleras, a stalemate continues after a proposed autonomy law (Republic Act 8438) was rejected in a plebiscite in the region in March 1998. A similar effort regarding an autonomy proposal in 1990 failed. In some respects, it was said to have contained even stronger provisions.<sup>64</sup>

The Philippines' Constitution contains additional safeguards for its indigenous peoples. It seeks, for example, to recognize and promote 'the rights of indigenous cultural communities within the framework of national unity and development'.<sup>65</sup> Further, it provides safeguards for indige-

nous peoples' rights to their ancestral domains, and the recognition of customary laws governing property rights regarding the ownership over and the extent of ancestral domains.<sup>66</sup> Drawing upon some of these provisions, and inspired by the International Labour Organization (ILO) Convention No. 169 and the draft of a proposed Declaration on the Rights of Indigenous Peoples the government of the Philippines passed the Indigenous Peoples' Rights Act of 1997 (Republic Act 8371), or IPRA. Among its most important provisions are those that seek to delineate, recognize and, where appropriate, to provide written titles to genuine claims over ancestral lands and domains. The IPRA provides unequivocal recognition of customary land rights. Regarding 'indigenous concepts of ownership', the Act says:

*'The indigenous concept of ownership sustains the view that ancestral domains and all resources found therein shall serve as the material bases of their cultural integrity. The indigenous concept of ownership generally holds that ancestral domains are [indigenous cultural communities/indigenous peoples'] private but common property, which belongs to all generations and therefore cannot be sold, disposed of or destroyed. It likewise covers sustainable traditional resource rights'*<sup>67</sup>

The body that has been mandated to implement the IPRA, and particularly to provide Certificates of Ancestral Land Title (CALT) and Certificates of Ancestral Domain Title (CADT), is the National Commission on Indigenous Peoples (NCIP), which is under the aegis of the President's office, and includes seven members from seven geographical regions, including indigenous leaders. However, seven years after it was established, only one CALT and 11 CADTs have been issued by the Commission, although it promised to award a total of 68 CADTs by 2004.<sup>68</sup> While funding constraints have been a major factor in the NCIP's under-achievement regarding its certificate-issuing work,<sup>69</sup> a much more worrisome development is the fear that individuals and groups may be 'recreating and re-telling their respective versions of their customary laws'.<sup>70</sup> Similar concerns have been expressed by the influential Cordillera Peoples' Alliance (CPA), and questions continue to be raised as to whether the IPRA can resolve the deep-rooted conflicts between customary law and the state's legal regime.<sup>71</sup>

Given more time, money and effort, and the opportunity to gather more experience, it is hoped that the NCIP will be able to work out acceptable solutions. However, it is important that this is done through a transparent and democratic process of dialogue.

The overall responsibility for the NCIP has recently been transferred from the Office of the President to the

Department of Land, signifying a strong focus on land-related matters. While this might help strengthen the NCIP's certificate-issuing work, the focus on other more political and social issues may suffer.<sup>72</sup> Some people in the Cordilleras feel that the most vital element for the success of the NCIP's work is the political will of the government of the day, especially its commitment to provide financial and other support to the Commission.<sup>73</sup> Problems of a lack of political will are not confined to the Philippines. The non-implementation of the provisions of the law on indigenous peoples' rights, including on land and demilitarization, in the CHTs, Bangladesh, based upon the 'peace' accord of 1997 is another example.<sup>74</sup>

### **Sabah, Sarawak and peninsular India**

Safeguards on customary land rights of indigenous peoples in Sabah and Sarawak are generally stronger than those in many countries, although generally not as strong as in Mizoram, Nagaland or the Cordilleras. Sarawak has a very rich body of land laws, including the Land Code of Sarawak, which has references to land claim systems that are rooted in customary law traditions. However, various amendments to this law have led to a weakening of custom-oriented resource rights.

In addition, in Mizoram and Nagaland, a body of land law based upon indigenous peoples' customary rules and practices has developed since the British colonial period, including express provisions prohibiting the alienation of indigenous peoples' lands, especially in the Fifth Schedule areas (areas excluding north-east India). The provincial or 'state' governments in India are generally responsible for land administration, rather than the federal government. Some state governments have recently taken legislative and administrative measures to return alienated indigenous lands, including in Tripura state (in north-east India) and, to a lesser extent, in Kerala. These are, however, the exceptions and not the rule. The more usual situation is for cases of land alienation to remain largely unaddressed by state governments. If the lands and resources are lost, the practices of use and management of these lands are also lost, possibly forever.

## **Marginalized communities, eroded customary land rights and adjudication systems**

### **Northern Thailand**

Northern Thailand is an example of the denial of indigenous peoples' customary land rights. It is a popular tourist destination and the indigenous peoples of the region are often touted in tourist brochures as 'colourful hill tribes'.

Most of these peoples have traditionally lived off swidden cultivation, through a system known as ‘rotational agriculture’, in conjunction with the use of forest produce.<sup>75</sup> The indigenous peoples of the region have suffered continually on account of two matters, among others. First, many of them – especially women – have been denied their citizenship rights, making them ineligible for state welfare benefits at best, and subjecting them to arrest and persecution, and even eviction from the country, at worst.<sup>76</sup> Second, only a small percentage of the indigenous peoples have had their land rights acknowledged, and in a very limited way. Consequently, large numbers of indigenous peoples were relocated, since the lands were declared to be the property of the state as a forest reserve, etc.<sup>77</sup> On occasion, leases of forest lands were granted to private foresters, who also pursued a policy of eviction.<sup>78</sup> These developments have severely eroded the indigenous peoples’ customary land rights, leading to a severe erosion of customary land use practices, rituals, ceremonies and other practices that are central to the maintenance of their cultural integrity.

There are fears that a five-year forestry policy, drafted in 2003 and expected to be put into action in 2006, will further erode the customary land rights of the indigenous peoples who live within the nearby proposed ‘protected areas’. Laws and policies on forests that do not adequately acknowledge indigenous peoples’ land rights, including the Forestry Master Plan and the National Parks Act of 1962, together with the scourge of drugs and AIDS/ HIV, have severely disrupted the social cohesion of numerous indigenous peoples. The situation is not uniform, and many have struggled to maintain their rich cultural traditions, even on land that national law does not recognize as their own.<sup>79</sup> The situation of their customary family laws is not as weak, but it is under threat of erosion.

### North-west Bangladesh

Once-wealthy indigenous farmers have been reduced to landless labourers and sharecroppers in north-west Bangladesh, especially within the Rajshahi administrative division. Landlessness among the indigenous peoples was estimated in the 1990s to be above 85 per cent, and literacy was, at the same period, barely 9 per cent.<sup>80</sup> Land-grabbing, occasionally coupled with violence, has continued over the last few decades, including through the misuse of wartime laws used to isolate ‘enemy agents’.<sup>81</sup> In addition, there is blatant discrimination against indigenous peoples: sometimes they will not be served in public restaurants.<sup>82</sup> Unlike the CHTs in the south-east, the self-government system of the indigenous peoples of the north-west was totally de-recognized. Although the indigenous peoples still settle their disputes through their traditional village leaders, due to the non-

recognition of their self-government and judicial systems, there are acute difficulties in their justice system.

At the national level, the Special Affairs Division under the Prime Minister’s office is responsible for the welfare of indigenous peoples in areas outside the CHTs. However, although the CHTs usually have at least a junior minister (‘deputy minister’) in the government, the indigenous population of the north-west and other parts of the country outside the CHTs do not have any direct representation, either in the Special Affairs Division or in other policy-making bodies at the national level, and demands for special representation have been ignored. The resulting social and economic marginalization is leading to the erosion of the indigenous peoples’ cultural practices, including their customary resource rights and, to a lesser extent, their customary personal laws.

## Strong customary personal law practices in hybrid state –indigenous systems

### Mizoram, India

Apart from the special constitutional safeguards on Mizo customary law mentioned earlier, other such safeguards on customary laws include the legislative prerogatives of the autonomous district and regional councils, and their authority to establish judicial and quasi-judicial bodies. The aforesaid councils may pass laws on: the appointment of chiefs and courts, the establishment of village or town committees or councils, marriage and divorce, and social customs.<sup>83</sup> Village councils or other courts so constituted by district or regional councils are empowered to try all suits and cases between indigenous people (‘scheduled tribes’), excluding grave criminal offences that carry long prison sentences or death penalties, unless the governor of the state expressly authorizes the indigenous court or person concerned to try them.<sup>84</sup> Regional and district councils hear appeals against the judgments and decisions of the village councils or other courts.<sup>85</sup> The High Court and the Supreme Court generally hear these cases.<sup>86</sup>

Compared to many other areas in India – e.g. in Jharkhand – the nature and extent of recognition accorded to the customary laws and legal systems of the indigenous peoples of autonomous district and regional council areas, along with the relevant legislative and judicial authority that has been vested upon these councils, are relatively strong. However, some indigenous peoples regard the exclusion of major criminal offences from the ordinary jurisdiction of the council-appointed courts and councils to be unacceptable, and the autonomous district and regional council system was rejected by the Naga people in

the 1950s.<sup>87</sup> However, Nagaland is in a unique situation, as the entire question of the Naga people's relationship with India is under negotiation between the government of India and the Nationalist Social Council of Nagalim (NSCN).<sup>88</sup>

Not accounting for the unique situation of the political situation of the Naga territories, at a general level, the Sixth Schedule district council system may be considered to provide a reasonable degree of autonomy for indigenous peoples' customary law-oriented communities. Of course, the nature of the exercise of the legislative authority of the district and regional councils has varied. On occasion, discontent over the appointment of chiefs of councils and courts has disrupted normal social activities, such as in Meghalaya state some decades ago.<sup>89</sup> But otherwise these courts appear to be functioning well and the village councils have been elected or chosen in accordance with 'customary practices'.<sup>90</sup> Thus it would seem that in many cases, it is not customary law that is integrating itself into a mainstream state system, but the other way round: a state-established system adapting itself to the customary norms of indigenous peoples.

### Sabah, Malaysia

Sabah is an interesting example of an autonomous state where legal, procedural and judicial autonomy is respected at the basic levels, and the judicial authority at mid-levels is shared between indigenous chiefs and head people with state judicial officers. In addition, the superior national courts retain the highest authority for appeals and revisions. All courts apply customary law, unless codified laws supersede it. The Native Courts Enactment of 1992 provides for a detailed system of courts. At the lowest level is the Native Court, which has jurisdiction over a territory below a district. A native court consists of three members, who are resident native chiefs or head people, and, exceptionally, a district chief, duly empowered by the State Secretary.<sup>91</sup> The native courts act as courts of original jurisdiction and adjudicate on personal law matters between 'native' and 'native', and between native and non-native (if the sanction of the District Officer is obtained).<sup>92</sup> They may also adjudicate on other matters if expressly authorized by legislation.<sup>93</sup> They have powers to fine and imprison (on endorsement by a magistrate),<sup>94</sup> and decisions are taken unanimously, or by majority.<sup>95</sup>

Above the native courts are the district native courts – one for each district within a state – which consist of the district officer as the presiding member, and two other members, who are appointed from among district chiefs or native chiefs.<sup>96</sup> Above the district native courts are the native courts of appeal, which are presided over by a judge (from the Ministry of Justice) and include two other members – district or native chiefs (to be appointed

by the concerned minister).<sup>97</sup> Litigants may not be represented by advocates in the native courts or district native courts.<sup>98</sup>

The Sabah district and district native courts have had to deal with a large amount of customary law litigation, generally involving personal law and property rights. Some cases have even reached the High Court of Borneo. In one case, the defendant was obliged to pay compensation for killing someone else's buffaloes, which he had thought were 'wild'. The High Court upheld the lower court's decision. The custom was that, before killing such buffalo, the hunter must inform the people of the *kampung* (hamlet) concerned regarding their intentions.<sup>99</sup> In another case, the defendant was similarly obliged to compensate his wife's relatives for not having invited them to the wedding.<sup>100</sup> There was also an interesting case concerning a baby born to an unmarried couple. The native court ordered the couple to marry or face imprisonment. However, the High Court quashed the decision, holding that a court could not order marriage.<sup>101</sup>

Today, head people and chiefs are appointed for a fixed term of two or more years. Traditionally, these offices – or at least their precursor institutions that later became more formalized and institutionalized under British colonial rule – were based upon nominations and elections, or a hereditary system of transfer of authority. During the British period, the power of appointment of these incumbents was taken over by the British-appointed district officers. This system of appointment has survived into the post-independence period and has become far more politicized. The views of the local communities are often neglected, leading to the over-politicization of the offices of chiefs and head people, who have the primary role in indigenous justice administration, especially in the case of family law disputes. Many indigenous peoples in Sabah feel that the system should be reformed to allow indigenous communities to select or nominate the chiefs and head people.

Moreover, the role of chiefs and head people in previous times was far broader than the resolution of disputes over family law or natural resources, and included the administration of criminal justice. More importantly, they also had a vital role as social and spiritual leaders. Of course, a total resurgence of such responsibilities is perhaps neither possible nor desirable, but a more holistic role in indigenous societies is desired by many indigenous communities within Sabah.<sup>102</sup>

Two further important customary law issues in Sabah that are yet to be resolved include the interface between customary law traditions, and human rights concerns over women's and children's rights, and the issue of concurrent jurisdiction of native and state courts over criminal law matters. Certain customary law practices of indigenous

peoples in Sabah, as with peoples in other parts of the world, are in conflict with provisions of the Convention on the Elimination of Discrimination against Women (CEDAW) – such as practices on divorce and maintenance rights matters; and with the Convention on the Rights of the Child (CRC) – such as on the question of child custody rights. While one section of indigenous society feels that legal reforms should remove these inconsistencies, other more conservative sections from the same communities are reluctant to support reform.

Regarding the criminal law jurisdiction of native courts, there is strong consensus to resist the gradual transfer of authority over these matters to state courts, except for grave offences like rape, murder and grievous bodily harm, where state criminal courts are deemed to be the more appropriate forum, especially on account of their roles in incarcerating offenders whose activities may be more difficult for indigenous communities to monitor and supervise.<sup>103</sup>

## Major factors determining strong or weak customary law practices

We have discussed situations where the practice of customary law is thriving and others where it is weak. With a somewhat simplistic analysis, one could say that in the case of customary practices in relation to land and natural resources, some of the most important factors that determine whether the practices are strong or weak are the presence or absence in varying degrees of: political autonomy; constitutional and legal safeguards on land rights; demographic strength, which also determines the degree of political control over resources. Thus, customary land-related practices are stronger in autonomous systems (Malaysian Borneo, Mizoram) or in systems with strong constitutional and legal safeguards (Cordilleras). Conversely, the erosion of autonomy, and the formalized de-recognition of land rights, such as in Jharkhand state in India, north-west Bangladesh or northern Thailand, is largely responsible for the erosion of customary land rights (although private ventures, whether for logs or minerals, have also played their part in the appropriation of what was once the indigenous peoples' commons).

As for constitutional and legal safeguards, the demographic strength of the indigenous population vis-à-vis

settler or migrant groups is crucial in determining both the overall political strength of the indigenous population and the relative strength of their customary law practices. For example, the high percentage of indigenous peoples in Mizoram state (as well as in nearby Nagaland, and in another north-east Indian state, Arunachal Pradesh) has meant that the indigenous peoples have been able to retain a strong voice in government, and consequently, they were able to maintain essential safeguards on land and resource rights, including those based upon customary law. Conversely, the relatively decreasing demographic strength of the indigenous peoples in such areas as in Tripura state, India (bordering Mizoram and the CHTs), in Hokkaido, in Jharkhand and the CHTs, is believed to be directly related to the concerned peoples' decreasing political strength and, consequently, to the visibly weakened state of their customary land and resource rights. Despite the presence of special immigration laws in Sabah and Sarawak, the percentage of the indigenous population in these two states has been shrinking rapidly and probably bodes ill for these peoples' cultural integrity.

The situation of customary personal or family law within Asia is more complex. The nature of demographic changes and the relative numerical strength of the indigenous population vis-à-vis settler groups, also help determine the relative strengths or weaknesses of customary personal law practices. Custom-oriented traditions in multicultural societies, such as in cities, are generally relatively weak, due to peer pressure, especially upon the youth, not to be seen to be acting differently from others. In the CHTs, the gradually eroding influence of customary law upon urban and semi-urban communities, especially among the youth is clear.<sup>104</sup>

The influence of other peoples and societies upon indigenous peoples, especially upon the increasing number of them who live in urban and semi-urban settlements, is an inevitable consequence of urbanization, the spread of formal education, and developments in visual and other media. Therefore a crucial question facing indigenous customary law today is whether the same set of customary laws is equally appropriate – purely from a functional, rather than a moral, religious or political perspective – both urban-dwelling indigenous peoples and those who live as a part of largely mono-ethnic rural communities? While there is no easy answer, one suggestion is gaining ground: that of codifying customary law, and making it more uniform and easily understandable by all.

# Customary laws: persistence or decline?

In customary practices in relation to land and natural resources, the strongest cases seem to be confined to situations where a strong tradition and practice of formal constitutional recognition of customary land rights. The clearest examples are the north-east Indian states (at least most of them), Sabah and Sarawak. On the other hand, the number of situations with severely eroded customary land and other natural resource rights is far more common. And there are many situations in between.

Some of the most difficult situations where indigenous customary land rights have been violated or ignored include governmental programmes to induce or coerce indigenous communities to abandon swidden cultivation on their customary common land in favour of more sedentary and market-oriented modes of cultivation. The 'sedentarization' programmes in Vietnam, for example, have included the relocation of indigenous communities without their consent, and large-scale in-migration of majority ethnic Kinh people to areas traditionally inhabited by indigenous peoples, in order to 'secure' the borders; this has had disastrous effects on indigenous society. Traditional land rights of indigenous peoples, such as in the Dak Lak, Lam Dong and Gialai provinces, were disregarded while Kinh in-migrants were allotted the indigenous peoples' lands.<sup>105</sup> Similar programmes have also been implemented in the CHTs, Bangladesh by relocating indigenous communities to set up rubber plantations or fruit orchards.<sup>106</sup>

Forestry laws, policies and practices have also tended either to totally deny indigenous peoples' claims over what they regard as their forest commons, or to diminish such claims to mere usufruct status. This has been the case in Thailand, as previously discussed, Bangladesh and elsewhere in Asia.<sup>107</sup>

The few cases of protected land rights in India and Borneo pale into insignificance against the sheer scale of decline of customary land rights in other places in Asia, including indigenous-inhabited areas in peninsular India, north-west Bangladesh and northern Thailand, to name a few well-documented situations.

The alienation of indigenous peoples from their traditional lands and territories actually hurts more than their customary land laws. This is because the land is the central theme around which so many aspects of their culture, including their dance, festivals, music, poetry, religious and social systems, etc. revolve. Therefore, along with the customary rules on allocation and use of lands, many other detailed and varied custom-oriented rules and

norms have already either ceased to be practised, or are at serious risk of being completely eroded. These include rules on: the communal sharing of farm labour, the sharing of surplus harvests with disadvantaged families and people with disabilities, the sharing of wild game, taboos against the use of certain aquifers other than in certain hygienic ways, and the taboos on hunting deer (and other animals) during calving season.<sup>108</sup> As these customs and practices die, so do many other related aspects of traditional knowledge systems on sustainable hunting and fishing, and the protection and conservation of medicinal plants, preventing the extinction of numerous species of land and animal life. The erosion of customary law systems can lead to the permanent loss of many aspects of human knowledge that can never be replaced.

The differing situations of customary family laws of indigenous peoples in Asia are equally complex. For family law, too, there are situations where there has been gradual decline and erosion (a process that continues), and situations where indigenous peoples have been able to retain in their practices. However, even in the strongest case of the continuance of customary family law practices, in most cases, these practices survive partly because of the indigenous peoples' resolve to retain their culture, but perhaps more importantly because the non-indigenous political, social and economic elite of the country do not feel that the continuance of such practices threatens their rights and interests. At least, this is the case for indigenous peoples in South Asia and in Malaysia (where the majority too have their own personal laws based upon religion or ethnicity).

However, the situation in other parts of Asia is somewhat different. For the Ainu in Japan, personal law traditions are no longer strong. This seems to be a common phenomenon in other industrialized countries with large indigenous populations, such as in Canada and Scandinavia. In such situations, a uniform family code applies to the entire population of the state, indigenous peoples included. The situation in the Philippines also shows a strong trend towards a uniform structure of family law, to cover all indigenous groups. Demands for such uniform systems have been raised in many countries with pluralistic personal law systems, such as in Bangladesh, Indonesia and India, especially to remove gender inequality. However, indigenous peoples in Bangladesh to date have not responded positively to demands for a uniform family law structure.

# Customary laws and mainstream legal systems

The interface between indigenous peoples' customary laws and mainstream legal systems, at the national and international levels, is complex. There are instances of acute conflict between the systems, while there are also many arrangements in which customary law systems operate within the relatively benign oversight of the state legal and judicial systems. In addition, there are occasions where the relationship is one of mutual suspicion and disdain. Examples are offered below to illustrate the range of these relationship patterns.

## Conflicts between indigenous and state systems

Conflicts between state and indigenous customary law systems are the rule rather than the exception. The acute dissatisfaction of the indigenous peoples of Jharkhand state with the state legislation on village councils has already been referred to. The relationship between the two systems – except where relationship between the state and the indigenous peoples is based upon strong constitutional footings, as in Mizoram and Nagaland states – is usually unequal, with the state having the powers and the indigenous people being marginalized. However, sometimes there is an absence of any formal relationship at all. For example, the indigenous peoples' legal and self-government systems in north-west Bangladesh are not acknowledged by the government, and they cannot even discuss this with the government. In such cases, the highest priority for the peoples concerned in the short term is to be able to achieve the political, and later, the legal standing to talk directly with the government.

## Coexistence of state and customary laws in pluralistic or hybrid systems

Despite the existence of tensions and occasional discord, there are systems where indigenous legal systems exist, along with, or under the aegis of, the state legal system. Examples include the CHTs, Malaysian Borneo and Mizo systems. In all of these the national legal system recognizes the competence of the indigenous system up to a certain level and, ultimately, the state system assumes revisional or appellate (appeal) authority at the High Court, or somewhat lower levels. There are also variations. For example,

in the Malaysian Borneo system and in Jharkhand state, India, the government is also involved in the appointment of the indigenous officials. Such 'interference' is not accepted among indigenous activists. In the CHTs, the government usually allows the indigenous system to operate without interference at the lower levels, but is usually reluctant to strengthen their enforcement systems.

In contrast, the Sixth Schedule district council system under the Constitution of India invests legal and executive authority upon the district and regional councils. This is one of the most liberal state–indigenous relationships with regard to customary law and judicial matters. These systems have been operating in north-east India for more than three decades, which suggests that neither the state nor the indigenous peoples fears the other's misuse of prerogatives. This also shows that a form of pluralism, without assimilating the indigenous system into the state system, is perhaps the best form of coexistence. Such a system also allows state judicial systems to benefit from the consensual and rehabilitative aspects of custom-based indigenous justice systems

The interface between indigenous customary law, and human rights regimes, drawing from national systems or international law, is another area where the relationship can be both cooperative and problematic. Areas of likely tension would include gender equality and women's rights, matters of children's rights, and questions of membership of indigenous groups and related entitlements, some of which are discussed later.

## The positive aspects and legacies of customary law practices

Some of the positive legacies of indigenous legal and justice systems have already been referred to, including the consensual and rehabilitative aspects of indigenous systems. Perhaps this ought to be clarified further. In the case of dispute resolution, since the parties from rural indigenous communities must face each other in their small community after the dispute is settled, efforts are almost always made to produce two winners instead of a winner and a loser. No efforts are spared to try to reconcile those in dispute. Further, the same concern of properly rehabilitating those in dispute also prompts the judges or arbitrators to reconcile the guilty party, if there is clearly a

'guilty' party, not only with a victim, if there is one, but with the community. Animals are often used as 'fines' that are payable to the entire community, usually at feast, enabling the guilty to atone for their wrongs to society, and the community has an opportunity to bond more closely. There are many other such examples.

## The Draft UN Declaration on the Rights of Indigenous Peoples

The question of indigenous peoples' rights received a sharp focus in the international sphere with the UN International Year of Indigenous Peoples (in 1993) and the declaration of a Decade for Indigenous Peoples (1995–2004). One of the declared aims of the decade was for the UN General Assembly to adopt a declaration on indigenous peoples' rights, thereby ending more than a decade of deliberation upon a draft that was passed by a sub-commission of the UN Commission on Human Rights in 1994. The aforesaid draft was accepted by indigenous representatives as the 'lowest common denominator' with regard to the rights of indigenous peoples. A special Working Group, including representatives of indigenous nations, peoples and organizations from different parts of the world, and representatives of several

governments, has been deliberating on the draft for a decade. At the end of the tenth session of this Working Group in December 2004, only two of the 45 articles had been adopted, and severe disagreements remain over such crucial provisions as legal rights, self-determination and other rights of a collective nature. Although they accepted that indigenous peoples could freely practise their customary laws, several governments were unwilling to regard the indigenous peoples' legal and procedural systems as 'juridical' systems.<sup>109</sup> A recent resolution of the 3rd Committee of the General Assembly of the UN, while calling for the proclamation of a Second International Decade of the World's Indigenous People to commence on 1 January 2005, urged the adoption, as soon as possible, of a final draft UN Declaration on the Rights of Indigenous Peoples. This suggests that the UN is willing to allow additional time for discussions by the Working Group, but for a limited period only. It is difficult to say how the drafting process will end, but there is no doubt that if a strong Declaration that recognizes the indigenous peoples' basic rights, including self-determination, land and resource rights, and juridical autonomy, among others, is not adopted, the gains made so far in focusing attention on necessary measures at the international and national levels will have been dealt a very severe blow indeed.

# Major challenges

## Gender, equality, children's rights and other human rights issues

There are many calls for customary laws to be brought into conformity with the internationally recognized norms on women's rights, including measures to outlaw polygamy and to enable women to exercise equal conjugal, inheritance and child custody rights. However, the northern borders of Bangladesh, and the neighbouring territory on the Indian side, are home to the indigenous Garo and Khasi peoples, who also have a gendered form of inheritance law. Here, the discrimination is levelled not against the women, but at the men, since men do not usually inherit landed property and, traditionally at least, it is the women who propose marriage and the men who go and live in the woman's house. The issue of gender and indigenous peoples has been implicitly addressed in the Draft UN Declaration on the Rights of Indigenous Peoples. The biggest challenge in the case of legal reforms will be to determine how reforms could be initiated, in a way that is appropriate to the socio-cultural and political contexts of the region.

In cases where customary law practices violate women or children's basic rights as recognized in international human rights standards, strong efforts need to be made to discontinue such practices. Governments and NGOs may help raise awareness regarding these issues to enable the people themselves to initiate necessary reforms. Such a process may be more just, functional and sustainable than unilateral legal reforms by state organs. The poor implementation of the Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) in much of Asia shows the need for a broad social acceptance of the need for reform. However, sometimes it is not local practices that adapt themselves to international (or national) human rights standards, but the other way around: human rights standards being incorporated within customary law practices. Of course, where severe violations are concerned, this must be addressed through the collaboration of indigenous, state and civil society leaders. And in cases where reactionary or ultra-conservative social leaders are preventing necessary reform, the option of more 'top-down' legislative or administrative measures could be considered after consultation with the people concerned.<sup>110</sup>

## Generational and social aspects of customary law rules and practices

Instances of indigenous elders lamenting that the youth do not follow many aspects of traditional customary practices are as common in the CHTs as in any other comparable part of indigenous-inhabited Asia. Is this an inevitable part of social change, not just for indigenous societies, but for any society, at any time?

Another important intergenerational issue is that older people generally dominate decision-making processes, and the youth feel left out. This gap is narrower in urban and semi-urban centres than in rural areas. However, urban and semi-urban areas are also the places where customary law is considered of relatively little value unless a dispute involves leading members of the community concerned. This creates additional difficulties, since the elders in the towns and cities are far less informed on customary law matters than their rural counterparts. This is yet another reason why many have demanded that customary law be put into writing, whether through a compendium or through formal codification. (The differing social situations in urban and rural areas also raises the question of whether a uniform code of law would be suitable for both societies, or whether more flexible solutions based upon customary law principles would be more preferable while allowing for necessary innovations and reforms.)

## Conflicts between 'conservatives' and 'reformists'

Differences of opinion between those who wish to faithfully adhere to customary laws and those who feel that reform is necessary is another common phenomenon. Further, there may be no conventions over areas where reforms may be necessary, and in which areas it is important to protect and preserve the earlier practices. Generally, reforms to customary laws are made gradually, through minute changes spanning years rather than weeks or months. In cases where there are strong differences of opinion, the community is usually well advised to decide who should take the major responsibility for reform. While it might be easy to agree upon any given institution or group of people to decide on a matter of reform on behalf of a people or community, in practice the matter may be more complex.

With very small groups, consensual methods of consultation may be possible, through formal councils or conventions. At the other extreme, with large indigenous groups, who usually have formal representative institutions, the matter may again be relatively simple. The situation is perhaps most difficult where there are no unanimously agreed-upon institutions to take on such responsibilities, or where there is a plurality of institutions of leadership. In the case of the CHTs, there are only three chiefs from two peoples, while there are a total of 11 peoples. Some of the peoples with small populations do not have a separate member in the highest regional body, the Chittagong Hill Tracts Regional Council. Therefore, reforms to the laws of those peoples without a chief or regional councillor might require some other form of consultation or consensus. It would perhaps be best to leave the decision to the national organization of that people (most of the CHTs peoples with small populations have their own ethnic organizations). Similar problematic situations are known to be faced by other indigenous peoples in Asia.

## A written code of law versus partial reform and legal compendia

A growing number of indigenous peoples, especially those living in urban centres believe that the adoption of a written code of personal law would be desirable, since it would allow the repeal of certain outdated or otherwise undesirable or inappropriate aspects of customary law; ensure clarity regarding the principle or rule involved; and provide a uniform system of laws. While the above considerations might appear to be valid and logical, this writer believes that a total replacement of oral customary law by a written code would be a grave mistake. However, if partial reform of the laws were considered, with a partial replacement of oral rules on certain matters with written ones, while at the same time allowing an opportunity for other unreformed parts of customary laws to continue to apply, it might be a desirable development, especially in terms of promoting gender equality and other important human rights issues.

Partial legal reform could also be supplemented by putting together a compendium of laws, to encourage the compilation of law reports from the courts of the chiefs and head people, on crucial and complex matters. The compilation of the general principles of indigenous customary law (both personal or family law, and laws on land and natural resources law) into a compendia of laws would help preserve the contents of such orally transmitted rules, bring greater certainty regarding rules on the

common matters of disputes to guide indigenous and state legal officials. However, such compendia should not necessarily have the status of a formal code of law. The exact status of such compendia should be left to the peoples and their communities to decide, and they should not be binding upon indigenous judges or arbitrators, or state courts.

If a written code were to be adopted, it should be preceded by substantial research, and discussions with all sections of society of the indigenous people concerned. It is not wise to hastily change something that has developed over decades, centuries or more. This is especially so for societies undergoing fundamental social changes, with major changes in living, economic and educational conditions.

Difficulties may arise in the case of peoples like those in the CHTs, since they enjoy no more than limited autonomy, while the highest legislative authority is vested in a body in which they have less than 1 per cent representation. Since the indigenous peoples of the CHTs have little or no influence in parliament, they may find it very difficult to change the law in future. It would therefore be wiser for indigenous peoples not to surrender their self-determining right to make and reform their own personal laws.

Even if such a code were passed by a regional body of the indigenous peoples (such as the Hill Tracts Regional Council) instead of by the national parliament, there may be difficulties of political legitimacy. In the CHTs, the current regional council is a government-appointed body and not an elected one. Moreover, as mentioned earlier, not all the indigenous peoples are directly represented in it.

Many aspects of customary law require flexibility and subjective approaches to dispute resolution, which are best dealt with through oral rules. Fixed written rules are extremely unlikely to be able to predict all the relevant permutations and conditionalities of a situation, unlike consensual dialogues and discussions in different contexts. Oral rules of customary law generally allow local indigenous communities to 'craft their unique multi-dimensional approaches in dealing with personal law disputes and provide remedies to fit the situation'.<sup>111</sup> To codify the rules of any given period or place, for a people, community or their sub-groups would be to freeze the law at a certain period in time rather than to keep it dynamic and adaptive to changing circumstances (this is especially relevant to societies such as those of the CHTs that are undergoing fundamental social, economic and cultural changes). Moreover, it would most likely lead to the imposition of the views of one group upon others. Similar fears regarding codification have also been expressed in Sabah, and in other parts of Asia.<sup>112</sup>

Instead of a full written code, it would be wiser to reduce into writing the most essential and uncontroversial

aspects of the customary rules concerned, such as on child custody, marriage ceremonies, inheritance principles, etc., but to refrain from giving this the formal status of a code. There are examples in different parts of the world where only part of the customary laws has been reduced into written principles. For example, the Zulus in South Africa, and many other peoples, have a code, but it does not replace all aspects of personal laws of the people concerned. Many such aspects continue to be governed by customary law.

Nevertheless, there may be some areas of customary law that require partial reform. In the case of some peoples in the CHTs there are some practices that need to be discontinued, because they violate the rights of women as recognized under international law. For example, polygamy is still practised by some of the CHTs peoples, although demands from both women and men have been issued to outlaw it. Similarly, there are demands for the equal inheritance of ancestral property by indigenous women (at present, among the CHTs peoples, only Marma women inherit some property as of right, and women from most of the other indigenous peoples only inherit if they are allowed to do so by their fathers or brothers, etc.).<sup>113</sup>

Among the ways forward would be to seek to bring in limited legislation to outlaw certain undesirable practices, and to produce written compendia on customary law, as discussed in more detail in the following section.

## Difficulties of enforcement of processes and judgments of indigenous courts

Difficulties of producing parties and witnesses, and in enforcing judgments, are among the problems faced by the indigenous courts in the CHTs. Unlike in the British period (1860–1947) the head people and chiefs no longer exercise magistracy and certificate powers. In accordance with the CHT Regulation of 1900 the district officer ('deputy commissioner') is obliged to help the head people and chiefs in this regard, but it is not the same thing as the court having the executive power itself (comparable courts in South Africa and in Sabah and Sarawak exercise far more authority). Similarly, the authority to impose fines also needs to be updated and made flexible so that the indigenous courts in the CHTs may impose monetary fines in lieu of 'animal' fines (see earlier). Similar challenges are also faced by indigenous courts in many

other countries, some of these courts are partially recognized, while others are totally without formal recognition.

## Formal recognition of customary resource rights and customary personal laws

The recognition of customary land and resource rights is one of the most crucial challenges faced by indigenous peoples today, in the CHTs and in many other parts of the world, including Asia. Colonization and colonialist forestry policies have taken over vast swathes of indigenous lands and territories in different parts of Asia.<sup>114</sup> This historical process of appropriation needs to be at least partially corrected, as stated in the UN Draft Declaration on the Rights of Indigenous People. Article 26 acknowledges the recognition of indigenous peoples' rights over lands traditionally used and occupied by them, including the recognition of their own land tenure systems, and Article 27 provides for the restitution of lands that were taken without their consent or adequate compensation and other measures of redress, at the very least. The Indigenous Peoples Rights Act (IPRA) of the Philippines was inspired by ILO Convention No. 169 and the UN Draft Declaration. Similar legal measures need to be promoted in other Asian countries. Where countries have ratified important treaties dealing with indigenous peoples' rights, including the ILO Conventions, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, they can and should be encouraged, and pressured, into implementing these treaties.

Customary personal laws of indigenous peoples also need to be formally acknowledged by national law. Without such recognition, there is likely to be further erosion of such laws. Recognition of these laws may need to be supplemented by the recognition of the traditional and judicial institutions of indigenous peoples, which is a priority in many places. Ultimately, governments need to be encouraged to recognize the laws and systems of indigenous peoples by accepting legal and procedural pluralism as a viable legal and administrative reality. This is already practised in various forms, such as in Mizoram, India; Sabah and Sarawak in Malaysia, and in the CHTs, Bangladesh. Governments in Asia and elsewhere need to be encouraged to understand the positive aspects of pluralism and to move further towards multiculturalism.<sup>115</sup>

# Recommendations

## To governments:

1. Discriminatory views and misconceptions about indigenous laws and systems need to be addressed. National institutions should prioritize developing their knowledge on the customary systems within their jurisdiction with indigenous peoples' input. Adequate resources should be allocated for the study of models for implementing hybrid state–indigenous legal systems. Constitutional provisions and safeguard practices should be considered within this process. Technical assistance from the Office of the High Commissioner on Human Rights should be sought if necessary.
2. The collection and systemization of information relating to indigenous customary laws should not necessarily translate into the official codification of oral custom. The effective participation as well as free and informed consent of affected indigenous peoples should be sought when negotiating the framework for recognition and the possible integration of customary laws into the mainstream legal system.
3. In cases where customary law practices violate the basic rights of women and children, as recognized in international human rights standards, strong efforts need to be made to discontinue such practices. Governments are encouraged to take greater steps towards implementing the Convention on All Forms of Discrimination against Women and the Convention on

the Rights of the Child. Governments and NGOs are encouraged to disseminate information on the universal human rights of women and children, and on how these intersect with customary laws.

## To development agencies:

4. Development agencies should be aware of the effect of sedentarization programmes on indigenous peoples' customary land rights and related social institutions. The cultural integrity of indigenous communities and their systems should be held in the highest regard. As such, free and informed consent from the target indigenous communities must be sought prior to the implementation of projects. Indigenous men and women's active involvement should also be sought during the project's implementation and evaluation.

## To the international community:

5. NGOs should aim to increase the capacity of local indigenous groups, as well as national and local human rights organizations, to produce shadow reports to the relevant UN treaty bodies on customary law-related issues.
6. NGOs should assist government agencies in collecting best practices regarding legal pluralism, as well as documenting the existing examples of customary law systems.

# International instruments

## Draft Declaration on the Rights of Indigenous Peoples

### Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

### Article 12

Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures [...] as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

### Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

## International Labour Organization Convention 107

### Article 1

1. This Convention applies to:
  - (a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.

### Article 7

1. In defining the rights and duties of the populations concerned regard shall be had to their customary laws.
2. These populations shall be allowed to retain their own customs and institutions where these are not incompatible with the national legal system or the objectives of integration programmes.

### Article 8

To the extent consistent with the interests of the national community and with the national legal system:

- (a) the methods of social control practised by the populations concerned shall be used as far as possible for dealing with crimes or offences committed by members of these populations
- (b) where use of such methods of social control is not feasible,

the customs of these populations in regard to penal matters shall be borne in mind by the authorities and courts dealing with such cases.

### Article 13

1. Procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected, within the framework of national laws and regulations, in so far as they satisfy the needs of these populations and do not hinder their economic and social development.
2. Arrangements shall be made to prevent persons who are not members of the populations concerned from taking advantage of these customs or of lack of understanding of the laws on the part of the members of these populations to secure the ownership or use of the lands belonging to such members.

## International Labour Organization Convention 169

### Article 1

1. This Convention applies to:
  - (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations,

### Article 2

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
2. Such action shall include measures for:
  - [...]
  - (b) promoting the full realizations of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions
  - [...].

### Article 8

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

### Article 9

1. To the extent compatible with the national legal system and

internationally recognized human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.

2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

**Article 17**

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.
2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.
3. Persons not belonging to these peoples shall be prevented

from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

**Convention on the Elimination of All Forms of Discrimination Against Women**

**Article 5(a)**

States Parties shall take all appropriate measures:

- (a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

# Notes

- 1 Cobo, J.M., *Study of the Problem of Discrimination Against Indigenous Populations*, United Nations NE/CN.4/Sub.2/1986/7/Add. 4, 1986.
- 2 Article 1, Convention No. 107; Article 1, Convention No. 169. It may be noted, however, that ILO Convention No. 169, uses the term 'peoples' in a guarded manner, clarifying that it 'was not intended to convey any general implications under international law' (Daes, E.I., 'Striving for self-determination for indigenous peoples: Article 3 of the draft UN Declaration on the Rights of Indigenous Peoples: in Kly, Y.N. and Kly, D., *In Pursuit of the Right of Self-determination: Collated Papers and Proceedings of the First International Conference on the Right of Self-determination*, Atlanta, GA, Atlantic Clarity Press, 2001, p. 50.
- 3 Paragraph 4 of the World Bank's draft Operational Policy 4.10 ('OP 4.10'), 17 May 2004, that was distributed by a Bank representative to indigenous delegations attending the 10th session of the UN Working Group on the Draft Declaration on the Rights of Indigenous Peoples held in Geneva on 13–24 September 2004.
- 4 Draft OP 4.10, *op. cit.*, para. 3.
- 5 Cobo, *op. cit.*
- 6 Barnes, R.H., 'Introduction', in Barnes *et al.* (eds), *Indigenous Peoples of Asia*, Michigan, Association for Asian Studies, 1995. p. 3.
- 7 The most forceful and substantive debates over the issue surfaced in the mid-1990s during meetings of a working group of the UN Commission on Human Rights that was mandated to discuss the draft of a future UN Declaration on Indigenous Peoples' Rights. See Pritchard, S., *Setting International Standards: An Analysis of the United Nations Declaration on the Rights of Indigenous Peoples and the First Six Sessions of the Commission on Human Rights Working Group*, Sydney, 2001, pp. 80–7. See also, Barnes *et al.*, *op. cit.*, p. 3.
- 8 For example, the Constitution of the Philippines recognizes 'indigenous cultural communities'. In 1997, the Philippines government passed the Indigenous Peoples' Rights Act that acknowledges indigenous peoples' identities and rights to their ancestral domains. Earlier, its position was more equivocal. The government of Nepal has recently formed a committee to celebrate the UN's Decade on Indigenous Peoples, thereby signifying its growing acceptance of the term, although this is yet to be expressly reflected in its Constitution. The government of Bangladesh also seems to be more receptive to the concept, with messages of goodwill sent to Bangladeshi indigenous peoples by the current and previous prime ministers during the national celebrations of the UN Indigenous Peoples' Day in Dhaka.
- 9 Colchester, M., 'Indigenous peoples' rights and sustainable resource use in South and Southeast Asia', in Barnes *et al.*, *op. cit.*, p. 60.
- 10 Bekker, J.C., *Seymour's Customary Law in Southern Africa*, 5th edn, Cape Town, Juta & Co. Ltd, 1989, p. 11.
- 11 Walker, R.J., *The English Legal System*, London, Butterworths, 1976, p. 58.
- 12 *Ibid.*
- 13 Roy, R.D., 'The discordant accord: challenges towards the implementation of the Chittagong Hill Tracts Accord of 1997', *Journal of Social Studies*, vol. 100, April–June 2003 (Dhaka, Centre for Social Studies).
- 14 Cobo, *op. cit.* acknowledges that indigenous peoples: 'are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system...'
- 15 Ahren, M., 'Comparative study on indigenous peoples' customs, culture, traditions and customary law – Analysis from a legal perspective: The Jaamis peoples' perspective', in C. Roy (ed.), *Defending Diversity: Case Studies – Jaamis Council (Swedish Section)*, 2004, pp. 45–88.
- 16 Gimenez, L.A., *On the Basis of Custom and History: Land Resources Ownership and Access Rights Among the Igorot of Itogon Mining Area*, Baguio City, Philippines, Mining Communities Development Centre, 1996, pp. 9–11.
- 17 Roy, R.D., 'Land laws and customary rights in the Chittagong Hill Tracts', paper presented at a workshop on 'Land Rights of Indigenous Peoples in Bangladesh', organized by South Asia Forum for Human Rights (SAFHR) *et al.*, 28 December 2000, pp. 48, 56.
- 18 Rules 39 and 40, Chittagong Hill Tracts Regulation, 1900. Section 4(C)(4), Chittagong Hill Tracts (Amendment) Act, 2004.
- 19 Decisions upholding the customary law-related judgments of the hill chiefs concerned, and advising against interference with the same, are contained in several documents. These include Misc. Revision Case No. 13 of 1947 in the Court of the Commissioner of the Chittagong Division (order dated 31 March 1947), and Resolution No. 4374-j, dated 2 October 1951, of the Secretary to the Governor of Bengal (H.G.S. Biver). The latter wrote: 'With a view to preserving the social structure of the tribal people, the Governor has been pleased to set aside the order of the Board of Revenue dated 2.3.48 and direct that the order of the Chakma Chief dated 24 September, 1946 dissolving the marriage of Lakshmi Mohan Chakma and Sm. Pramila Chakma shall stand.' These references have been cited from Dewan, B.K., *Chakma Jatiyo Bichar O Uttaradhikar Pratha (Chakma National Adjudication System and Chakma Inheritance Law)*, Rangamati, Jum Aesthetics Council, 2nd edn, 2003, pp. 18, 19. For a more recent judicial view of a like nature, this time of the Bangladesh Supreme Court in the late 1990s, see *Aung Shwe Prue Chowdhury vs. Kyaw Sain Prue Chowdhury and Others (Civil Appeal No. 8 of 1997)*, Supreme Court of Bangladesh (Appellate Division), 18 BLD (AD) (1998), pp. 33–43.
- 20 Misc. Cases No. 1/1998, 7/1999, 1/2000, 6/2000 and 12/2000 in the Court of the Chakma Chief, as cited in Roy, 'Land laws ...', *op. cit.*
- 21 Interview with Zuum Lian Amlai, President, Bawm Social Council, in Rangamati, CHTs, on 24 October 2003.
- 22 This description draws upon Roy, 'Land laws ...', *op. cit.*
- 23 Rule 50(1), Chittagong Hill Tracts Regulation, 1900. This law allows indigenous families to occupy up to 30 decimals of homestead land, which can only be alienated by compulsory 'resumption' by the state, on payment of compensation for the house and standing trees and crops, but not for the land itself. (100 decimals = 1 acre)
- 24 Chittagong Hill Tracts Forest Transit Rules, 1973.
- 25 Interview with José Mencia Molintas, attorney and councilor, Baguio City Council, Baguio, Cordilleras, Philippines

- (and former chairperson, Cordillera Peoples Alliance), at Geneva, 2 and 3 December 2004.
- 26 Roy, 'Land laws ...', *op. cit.*
- 27 According to section 64 of the Hill District Council Acts of 1989, no settlements, leases, mortgages, compulsory acquisitions, or transfer of land title may be made within the hill districts without the express consent of the concerned district council. This provision was inserted after the signing of the 'peace accord' of 1997 that ended the 20-year-old guerrilla war in the region.
- 28 Lynch, J.O. and Talbott, K., *Balancing Acts: Community Based Forest Management National Law in Asia and the Pacific*, Washington, DC, World Resource Institute, 1995, pp. 34–49.
- 29 Article 371A for Nagaland, and Article 371G for Mizoram. Their provisions are almost identical. Article 371A was inserted through the Constitution (13th Amendment) Act, 1962, while article 371G was introduced through the Constitution (53rd Amendment) Act, 1986.
- 30 Section 22, Article II, Constitution of the Philippines.
- 31 Section 4, Article XII, Constitution of the Philippines.
- 32 Article 153(1), Constitution of Malaysia.
- 33 153(2). See also, Articles 161, 161A, 161B and 161E, Constitution of Malaysia.
- 34 Article 41 of the Constitution of Sabah state.
- 35 Article 161A(5) of the Federal Constitution of Malaysia. The equality clause of the Federal Constitution is contained in Article 8.
- 36 The special provisions in the federally – and provincially – administered 'tribal areas' in Pakistan are contained in Articles 246 and 247 of the Constitution of Pakistan.
- 37 Human Rights Commission of Pakistan, *State of Human Rights in 2002*, Lahore, 2003, pp. 243, 244.
- 38 Notably, the CHT Land Disputes Resolution Commission Act, 2001 and the Chittagong Hill Tracts Regulation (Amendment) Act, 2003.
- 39 Interview with Devjit Nandi, Member, National Forum of Forest People and Forest Workers, based in Chattisgarh, India, at San José, Costa Rica (attending an international meeting on forest-related issues), 8 December 2004.
- 40 Mundu, B.J., 'Challenge to the traditional customary rights of the Adivasis: The Jharkhand experience', paper submitted at 'Indigenous Rights in the Commonwealth Project, South and Southeast Asia Regional Experts Meeting, New Delhi, India, 11–13 March 2002.
- 41 Interview with Ratnakar Bhengra, advocate at Ranchi High Court and representative of JOHAR, from Jharkhand state, India at Geneva, 29 November 2004.
- 42 This information is based upon discussions with indigenous leaders from Jharkhand state, namely, Dr Ram Dayal Munda, former Vice-Chancellor of Ranchi University (Geneva, September 2003), and Mr Ratnakar Bhengra (Geneva, 22–3 September 2004 and 29 November 2004). See also, Mundu, *op. cit.* and [cpsu.org.uk/downloads/Bineet\\_m.pdt](http://cpsu.org.uk/downloads/Bineet_m.pdt)
- 43 Nicholas, C., *The Orang Asli and the Contest for Resources: Indigenous Politics, Development and Identity in Peninsular Malaysia*, Copenhagen, IWGIA, 2000.
- 44 See SUARAM, 'Grassroots voices: selected stories', in SUARAM (ed.), *Malaysia Human Rights Report, 2002*, Selangor, Malaysia, SUARAM, Komunisk Malaysia, 2002, pp. 158–59.
- 45 Sjoberg, K., 'Practicing ethnicity in a hierarchical culture: The Ainu case', in Barnes *et al.*, *op. cit.* 1995, pp. 375–81.
- 46 The judgment does not, however, directly address the question of whether their newly declared status as an 'indigenous minority' entitles them to distinct peoples' rights under relevant international law. See: Judgment of the Sapporo District Court, Civil Decision No. 3, issued - 27 March 1997, 1598 *Hanrei Jiho* 33; 938 *Hanrei Times* 75, 38 *International Legal Materials* 394 (1999); Tahara, K., 'Nibutani case', in *Indigenous Law Bulletin*, Indigenous Law Centre, Faculty of Law, UNSW, Sydney August–September 1999, International Issue, pp. 18–20; Interview of Kaori Tahara, member, Ainu Association of Hokkaido, Geneva, 29 November 2004; and <http://www.asil.org/malevin.html>. On a visit to the Nibutani dam site in October 2003, this author was told by Ainu leaders, including Koichi Kaizawa, one of the co-plaintiffs of the case, that partly as a result of the judgment, the government of Japan was somewhat more respectful towards the wishes of the Ainu people in Hidaka district. For example, the government was funding a project to assess the social and cultural impact of the proposed Biratori dam, involving local Ainu researchers.
- 47 A significant part of this section and later in the report on northern Thailand is based upon, or supplemented by an interview with Chupint Kesmanee, President, IMPECT (Inter Mountain Peoples Education and Culture in Thailand) at San José, Costa Rica, on 8 December 2004.
- 48 See IWGIA, *The Indigenous World*, Copenhagen, 2004, pp. 252–4 for recent developments with regard to the national forest policy's impact on indigenous peoples. See also, Chotichaipiboon, T., 'Socio-cultural and environmental impact of economic development on hill tribes', in D. McCaskill and K. Kampe (eds), *Development or Domestication – Indigenous Peoples of Southeast Asia*, Chiangmai, Silksworm Books, 1997, p. 101.
- 49 Chotichaipiboon, *op. cit.*, p. 103.
- 50 Article 46, Constitution of Thailand, 1997.
- 51 Interview with indigenous activist from northern Thailand (who wishes to remain anonymous), Chiangmai, Thailand, 9 November 2004.
- 52 Interview and discussions with leaders of the All-India Chakma Cultural Conference in Tripura state, India – 14–15 April 2003 and in Rangamati, CHTs, Bangladesh – 18–19 April 2004 (including Mr Chakma Ashim Roy and Mr Niranjan Chakma).
- 53 Also known as 'shifting', 'rotational' or 'slash-and-burn' agriculture, swidden cultivation involves burning vegetation and planting of mixed seeds without irrigation, ploughing or hoeing. Nowadays, it is restricted to uplands and sloping lands in large parts of north-east India and south-east Asia (as well as south China, and large parts of Africa and Central and South America).
- 54 Some of the most disturbing, and well-documented reports came from Vietnam. See for example Saleminck, O., 'The king of fire and Vietnamese ethnic policy in the Central Highlands' in McCaskill and Kempe, *op. cit.*, p. 512 and CEMMA/UNDP, *Framework for Assistance to Ethnic Minority Development*, Hanoi, 1995, p. 5 and Roy, R.D., *Social, Cultural and Economic Situation of Indigenous Peoples of Cambodia, Vietnam, Laos, Thailand, Burma and Bangladesh*, Report on a joint study on indigenous peoples submitted to the Saami Council, Sweden sponsored by the European Commission, 2000–2001.
- 55 On swidden cultivation in south-east Asia (Thailand, Laos, Cambodia) see Bass, S. and Morrison, E., *Shifting Cultivation in Thailand, Laos and Vietnam: Regional Overview and Policy Recommendations*, London, Forestry and Land Use Programme, International Institute for Environment and Development, 1994. For India, see Majumdar, D.N. (ed.), *Shifting Cultivation in Northeast India*, vol. 1, Guwahati and New Delhi, Omsons Publications, 1990, esp. ch. 11. For Bangladesh, see Ishaq, M., *Bangladesh District Gazetteers: Chittagong Hill Tracts*, Dhaka, Ministry of Cabinet Affairs, 1975, pp. 104–9; see also Sattar, M.A., 'Jhumias settlement schemes of local Forest Department: with major focus on proper village land use, planning and implementation', paper presented at the National Workshop on Development Experiences and Prospects in the Chittagong Hill

- Tracts, organized by ICIMOD and others, Rangamati, Bangladesh, 23–5 January 1995.
- 56 See Bhowmick, P.K., 'Shifting cultivation: a plea for new strategies', in D.N. Majumdar (ed.), *Shifting Cultivation in Northeast India*, New Delhi, Omsons Publications, 1990; Bass and Morrison, *op.cit.*, and Roy, R.D., 'Jum (swidden) cultivation in the Chittagong Hill Tracts', *Indigenous Affairs*, No. 1, IWGIA, Copenhagen, 1997.
- 57 Article 371G of the Constitution of India reads: 'notwithstanding anything in this Constitution – (a) no Act of Parliament in respect of – (i) religious or social practices of the Mizos, (ii) Mizo customary law and procedure, (iii) administration of civil and criminal justice involving decisions according to Mizo customary law, (iv) ownership of land, shall apply to the state of Mizoram unless the Legislative Assembly of the State of Mizoram by a resolution so decides...'. The provision was inserted via the Constitution (53rd Amendment) Act, 1986 following an accord between the Government of India and the Mizo National Front that was signed on 30 June 1986, ending two decades of insurgency and militarization.
- 58 This Regulation still applies in the Nagaland and Arunachal states of India. At one time it also applied to the CHTs of Bangladesh and to several districts in Assam state, India. It is therefore not a coincidence that indigenous peoples still make up the overwhelming majority of the population of these states (along with Mizoram), and feel far less threatened regarding their cultural integrity in comparison to areas where large-scale in-migration of non-indigenous settlers has taken place, including those areas that were hitherto within the ambit of this law, but are not so now.
- 59 Paragraph 3(1), Sixth Schedule to the Constitution of India (Article 244 [2] and 275[1]).
- 60 *Ibid.*
- 61 Based on the author's discussions with indigenous artists and cultural activists (who wish to remain anonymous) in Tripura state, India on 12–15 April 2003.
- 62 The Constitution of Nepal (1990) refers to its indigenous peoples as *janjati*, which includes indigenous and minority nationalities. In conjunction with the relevant State Directives of the Constitution with regard to nationalities, this provides, according to indigenous leaders, a reasonable basis to initiate other legislative and administrative measures for Nepal's indigenous peoples. However, the extent to which these constitutional provisions can protect the indigenous peoples' cultural and other rights is not yet clear. (Interview with Parshuram Tamang, Tamang leader and Vice-Chairperson, UJN Permanent Forum on Indigenous Issues.) In a somewhat less explicit manner, the 1997 Constitution of Thailand refers to its indigenous peoples as 'traditional communities'. This may also be regarded as a potentially positive development for its indigenous peoples.
- 63 Article X, sections 15–19, Constitution of the Philippines.
- 64 IWGIA, *The Indigenous World*, 1998, pp. 201–2, re the Republic Act 6766.
- 65 Article II, section 22, Constitution of the Philippines.
- 66 Article XII, section 4, Constitution of the Philippines.
- 67 Chapter III, section 5, Indigenous Peoples Rights Act, 1997.
- 68 IWGIA, *The Indigenous World*, 2004, p. 226.
- 69 *Ibid.*, pp. 227, 228. In an informal discussion with a member of the NCIP (who wishes to remain anonymous) in Manila in February 2002, the author was told that lack of funds, and bureaucracy were the major difficulties in the proper functioning of the Commission.
- 70 Rovillos, R. and Morales, D., *Indigenous Peoples, Ethnic Minorities and Poverty Reduction*, Final Report, ADB RETA No. 5953, 2001, p. 19.
- 71 Molintas, J.M., 'The Philippine indigenous peoples' struggle for land and life: challenging legal texts', in Roy (ed.), *Defending Diversity*, *op. cit.*, p. 227.
- 72 Interview with indigenous activist from the Cordilleras wishing to remain anonymous, Bangkok, Thailand, 10 November 2004.
- 73 Interview with Molintas, *op. cit.*
- 74 See, Larma, J.B., 'The CHT and its solution', paper presented at the Regional Training Programme to Enhance the Conflict Prevention and Peace-building Capacities of Indigenous Peoples' Representatives of the Asia-Pacific organized by the United Nations Institute for Training and Research (UNITAR) at Chiangmai, Thailand, 7–12 April 2003, among others.
- 75 See, for example, Trakansuphakorn, P., 'The wisdom of the Karen in natural resource conservation', in McCaskill and Kempe (eds), *op. cit.*, pp. 205–18.
- 76 Chotichaipiboon, *op. cit.*, pp. 97–116, and MRG/ISHR, Shimme, A., speaking at 'Gender, Minorities and Indigenous Peoples' Event, New York, United Nations, 12 January 2005.
- 77 Trakansuphalon, P., 'The Karen of Thailand', in MRG (ed.), *Forests and Indigenous Peoples of Asia*, London, MRG, 1999, pp. 13, 14.
- 78 McKinnon, J., 'The forests of Thailand: strike up the ban', in McCaskill and Kempe, *op. cit.*, p. 123.
- 79 A village in Chiangmai province that this writer visited in March 2000 showed both the community's utter dependence on the government (they relied heavily upon income from a flower project funded by the Thai queen and supervised by the military), and their proud nature, whereby they tended their flower gardens and decorated their school with pride and high aesthetic sense.
- 80 Timm, R.W., *The Adivasis of Bangladesh*, London, MRG, 1991, pp. 16, 17.
- 81 The law used was the Vested Property Act of 1974, which has been the bane of religious minorities in Muslim-majority Bangladesh. This law is based upon the earlier Enemy Property Ordinance of 1965, which was used by the government to take over lands left behind by minority people who had migrated to India (which was then in a state of war with Pakistan). The law has recently been repealed, but a number of legal loopholes still allow it to be invoked.
- 82 Timm, *op. cit.*, p. 16.
- 83 Paragraph 3(1), Sixth Schedule to the Constitution of India (Article 244[2] and 275[1]).
- 84 Paragraphs 3, 4 and 5, Sixth Schedule to the Constitution of India (Article 244[2] and 275[1]).
- 85 Paragraphs 4(2), 4(3) and 5(1), Sixth Schedule to the Constitution of India (Article 244[2] and 275[1]).
- 86 Paragraph 4(2), Sixth Schedule to the Constitution of India (Article 244[2] and 275[1]).
- 87 Nunthara, C., *Mizoram: Society and Polity*, New Delhi, Indus Publishing Company, 1996, p. 133.
- 88 A ceasefire between the NSCN and the government of India came into effect on 1 August 2004. An uneasy truce still holds, but a negotiated settlement is yet to emerge. See IWGIA, *Indigenous World 2004*, *op. cit.*, pp. 284–8.
- 89 Chaube, S.K., *Hill Politics in Northeast India*, New Delhi, Orient Longman, 1999, p. 107.
- 90 *Ibid.*
- 91 Section 3, Native Courts Enactment, 1992 (No. 3 of 1992).
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- 93 Section 6 (1)(d), Native Courts Enactment, 1992 (No. 3 of 1992).
- 94 Section 10(1), Native Courts Enactment, 1992 (No. 3 of 1992).
- 95 Section 7, Native Courts Enactment, 1992 (No. 3 of 1992).
- 96 Section 4, Native Courts Enactment, 1992 (No. 3 of 1992).
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- 99 *Siah & Ors. v. Matna & Others*, INT/NCA/No. 2 of 1971, cited in Idid, D.S.A.I., *Native Court and Customary Law of Sabah (with Cases and Definitions)*, Sabah, 1973, p. 153.

- 100 *Gulis v. Malon*, NCA/W/2/67, cited in Iddid, *op. cit.*, p. 51.
- 101 *Fred bin Edwin v. Jaayah binte Latif*, NCA/W/9/70, cited in Iddid, *op. cit.*, p. 51. A similar point was stressed by the High Court in *Bernard Miller v. Lantau*, NCA/W/10/70, also cited in Iddid., *op. cit.*
- 102 Interview with Jannie Lasimbang, Kadazan social activist from Sabah, and Secretary-General, Asia Indigenous Peoples' Pact, Chiangmai, Thailand, 9 November 2004.
- 103 *Ibid.*
- 104 Roy, R.D., 'Occupations and economy in transition: a case study of the Chittagong Hill Tracts', in ILO, *Traditional Occupations and Tribal Peoples: Emerging Trends*, Geneva, 2000, p. 106.
- 105 Salemink, *op. cit.*
- 106 Adnan, S., *Migration, Land Alienation and Ethnic Conflict: Causes of Poverty in the Chittagong Hill Tracts*, Dhaka, Research and Advisory Services, 2004, pp. 126–8.
- 107 Lynch and Talbott, *op. cit.*
- 108 These are some of the customary laws and norms that were once practised commonly in the Chittagong Hill Tracts and are now disappearing or have ceased to be practices altogether. This information is based upon discussions with head people and village elders over the years.
- 109 This writer was among those participating in this session of the Working Group.
- 110 For more on gender and indigenous peoples' rights issues in general see Banda, F. and Chinkin, C., *Gender, Minorities and Indigenous Peoples*, London, 2004, available at: [www.minorityrights.org](http://www.minorityrights.org)
- 111 Roy, 'The discordant accord', *op. cit.*, p. 121.
- 112 Interview with Jannie Lasimbang, indigenous leader from Sabah, and Executive Secretary, Asian Indigenous Peoples' Pact, Chiangmai, Thailand, 10 November 2004.
- 113 Article 32 of the Draft Declaration on the Rights of Indigenous Peoples acknowledges that indigenous peoples have the right to promote, develop and maintain their institutional structures and juridical customs, traditions, etc., with the caveat that they must do so 'in accordance with internationally recognized human rights standards'.
- 114 Lynch and Talbott, *op. cit.*
- 115 See for example, Anaya (2004), where the eminent indigenous jurist makes an eloquent plea for states to further multiculturalize and accept legal and juridical pluralism as a viable legal and administrative reality.

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