



Adivasi rights in Jharkhand state, India

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INDIA



ACRONYMS

HRBA	Human rights-based approach
PESA	Panchayatis (Extension to the Scheduled Areas) Act
ST	Scheduled Tribe
UN	United Nations
UNDP	United Nations Development Programme

INTRODUCTION*

The discourse of rights offers a robust analytical framework to examine contemporary reality against a normative goal, which is a central issue with respect to the marginalized sections of society, amongst which the adivasi communities are at the forefront. One of the most marginalized communities in India, the adivasi communities have suffered deprivations of myriad kinds, despite special provisions for them in the Constitution,¹ a legal framework for the implementation of these provisions and several targeted public policy initiatives. This study therefore focuses on an adivasi state of India – Jharkhand – to assess the status of adivasi rights.

The importance of Jharkhand lies in the fact that it was created as a separate State of the Indian Union in 2000, in recognition of a century-old demand premised on the distinctiveness of adivasi heritage and culture. Simultaneously, it was inextricably linked to the question of development. Both of these premises reinforce each other and lead to a distinctive content to the concept of adivasi rights in Jharkhand.²

The Constituent Assembly of India broke new grounds when it incorporated a chapter on

Fundamental Rights³ wherein “equality of status and of opportunity” and “justice, social economic and political” and “dignity of the individual” were guaranteed.⁴ Simultaneously, it also created certain groups of rights, wherein the right of all citizens to have “a distinct language, script or culture of its own” and the “right to conserve the same” were also guaranteed.⁵ This simultaneous privileging of both individual and group rights has been operating in a socio-economic and political context, wherein a number of historically disadvantaged communities such as tribes have continued to suffer a variety of handicaps – social, economic and political, with the result that the rights guaranteed to them by the Constitution are far from being realized. This tension lies at the root of both the problems in the assessment of rights of marginalized sections and the political contestation for the realization of these rights in a resource-deficit political economy. Both these substantive aspects of adivasi rights are under threat from the processes of development adopted by the Indian state, which lead to pressure on the space necessary for a negotiation of these rights in their correct context. Thus, a politics of development and identity is generated, which has perhaps formed the leitmotif of all contestation for adivasi rights in India.

* This paper is an abridged version of the full study: Amit Prakash, *Tribal Rights in Jharkhand*. Much of the arguments presented in this paper are therefore premised on the analysis presented in the full study, which will henceforth be referred to as ‘Companion Paper’.

¹ Particularly, Part X of the Constitution. Schedules V and VI were incorporated into the Constitution to provide for particular responsibilities of the state with respect to administration of areas inhabited by the adivasi populations, apart from a variety of enabling provisions for the betterment of individuals belonging to adivasi communities.

² See for instance the debates on the Bihar Reorganization Bill, 2000 (which created the State of Jharkhand) on its introduction in Lok Sabha on 25 July 2000 and follow up discussions in Lok Sabha on 2 August 2000. There was a general consensus amongst the members that ‘development’ was the main issue left to be realized after the State recognising the Jharkhandi identity was created. *Lok Sabha Debates*, XIII Lok Sabha, 25 July 2000 and 2 August 2000.

³ See Companion Paper for a detailed discussion of the Constitutional provisions.

⁴ ‘Preamble’ to the *Constitution of India* (as of 1 January 2001), New Delhi: Lok Sabha Secretariat, n.d., Article 366.

⁵ *Constitution of India*, *Ibid.*, Articles 29 (1) & (2).

THE RIGHTS FRAMEWORK

Adivasi rights can be seen as part of the larger discourse on human rights which emanates from the Universal Declaration on Human Rights of 1948, and is constantly being developed and refined through the means of political contestation, international debates, and discussion to include a wide array of rights that are fundamental to a dignified human existence.⁶

Rooted in the Universal Declaration on Human Rights of 1948, mediated through the ILO Conventions No. 107 and No. 169 and closely interacting with a growing literature on the right to development, adivasi rights have acquired a distinctive content and meaning. This content is also anchored in the academic debates on multi-culturalism.

Adivasi rights and how they operate

While significant attention has been paid to the issue of the rights of the individual, particularly those of marginalized communities such as the adivasi communities, the meaning and contents of these rights has branched out as they evolves via the avenue of changing discursive structures of the international debate on Human Rights. Guided by the human rights-based approach to development promoted by UN agencies, it is now widely recognized that development processes involve “the development of the capacities of ‘duty-bearers’ to meet their obligations and/or of ‘rights-holders’ to claim their rights.” Furthermore,

the agreement lays down six principal components of human rights, all of which are central to development programming:⁷

- 1 Universality and inalienability;
- 2 Indivisibility;
- 3 Interdependence and inter-relatedness;
- 4 Non-discrimination and equality;
- 5 Participation and inclusion;
- 6 Accountability and the rule of law.

Therefore, the key factor in any delineation of adivasi rights is participation, without which all listed goals would have little substantive content.⁸

Within the human rights framework, the substantive content of adivasi rights in India may be conceptualized as follows:

- Right to preservation of their socio-cultural distinctiveness;
- Right to socio-economic development.

These two sets of rights are not exclusive of each other but are closely linked with the help of: (i) politics of development and identity; and (ii) claims for structures for participation in decision-making (e.g. local governance). Furthermore, if development benefits (e.g. livelihood, literacy, health facilities, etc.) to the adivasi communities and individuals is marginal, the right to participate in the development process is being violated, and thereby the adivasi rights are under threat.

⁶ See Companion Paper for a more complete discussion on the international and academic processes of the discourse of adivasi rights.

⁷ *Towards a Common Understanding Among UN Agencies* as agreed at the *Second Interagency Workshop on Implementing A Human Rights-based Approach to Development in the Context of UN Reform* held at Stamford, 5-7 May 2003, and endorsed by the UNDG Programme Group is available at http://www.undp.org/governance/docs/HR_Guides_CommonUnderstanding.pdf, p.2.

⁸ See Companion Paper for a detailed discussion.

CONTEXT AND BACKGROUND

As per Census 2001, 8.2 percent of India's population (8.08 percent in the 1991 Census) are scheduled tribes (STs),⁹ whose population continue to be at the margins of the development process: "Incidence of poverty was higher among tribals in 1999-2000, at 44 percent, while among 'others' (e.g. non-Adivasi, non-Dalit), it was 16 percent. Between 1993-1994 and 1999-2000, while the poverty ratio among Dalits fell from 49 to 36 percent, and that of 'others' (non-Dalit, non-Adivasi) fell even more from 31 to 21 percent, that of adivasis fell from 51 to just 44 percent."¹⁰ Thus, the tribal population has recorded not only a higher rate of poverty but also a slower rate of decline in poverty.

The study and its geographical focus

With the creation of Jharkhand State, the question of recognition of adivasi rights to autonomy has been recognized.¹¹ Due to intermingling of the issue of adivasi rights and a development-deficit oriented approach to the Jharkhand region, a politics of development determines the limits of the framework of tribal rights in Jharkhand. Additionally, the STs are only about 27 percent of the total population of the State, severely limiting the scope of tribal rights-oriented political contestation.

Methodological note

The study has adopted a combination of methodological tools. Background library work and desk research were conducted to provide a context for the study, but much of the research materials for addressing the questions of adivasi rights were collected with the help of field research in the State.

An important issue in any study evaluating the status of adivasi rights is the absence of coherent and consistent data sets. Keeping this in mind, the study has tried to collate and analyze data sets derived from a variety of sources: government publication, non-governmental organizations, individual scholars, activist organizations, individuals and others.

Much of qualitative assessment of the status of tribal rights in Jharkhand was made with the help of targeted interviews, using the snowballing technique with informed and relevant individuals during the field study. Special efforts were made to interview a cross-section of tribal individuals across the State, with particular attention to the inclusion of women in the sample. The interviews were conducted in the following districts: Gulma, Latehar, West Singhbhum, Simdega, Lohardagga and Hazaribagh. In addition, individuals in adivasi groups were interviewed in Neterhaat, Latehar (hydel project), Sikni, Latehar (mining project) and Ranchi district (industrial mega-projects).

⁹ While a number of terms are used to refer to the tribal population, such as tribes, *Adivasi*, aborigines, or autochthones, social science has "not examined the term 'tribe' in the Indian context rigorously", Ghanshayam Shah, *Social Movements in India: A Review of Literature*, New Delhi, 2004, p. 92. Hence, the discussion about tribal population in India has largely followed the government categorization of Scheduled Tribes (STs).

¹⁰ Pius Anthony, Harishwar Dayal and Anup K. Karan, *Poverty and Deprivation Among Scheduled Tribes in India*, New Delhi, Institute for Human Development, 2003 quoted in Dev Nathan, 'The Future of Indigenous Peoples' in *Seminar*, vol. 537, May 2004.

¹¹ For full details, see Amit Prakash, *Jharkhand: Politics of Development and Identity*, New Delhi: Orient Longman, 2001, especially chapters 2, 3 and 6.

STATUS OF ADIVASI RIGHTS IN JHARKHAND

Right to preservation of socio-cultural distinctiveness

Jharkhand adivasi population's claim to the right to preservation of their socio-cultural distinctiveness has a long, complex and fluid history. While most proponents of the Jharkhand Movement claim intellectual ancestry to the adivasi revolts of the 18th and 19th Centuries, any articulation of adivasi rights in the modern sense (however loosely interpreted) cannot be traced beyond the early part of the 20th Century. Through a complex series of processes, the region was created as a separate State of the Indian Union in 2000.¹² The new State of Jharkhand clearly depends on the adivasi identity for legitimizing its administrative and legal apparatus.¹³ On the other hand, with the creation of a separate State, a new experiment in participative and deliberative democracy is underway.¹⁴ Whether this new arrangement contributes to the realization of adivasi rights, particularly due to the developmental content of such rights, is another matter.

It must be pointed out that almost no respondent interviewed in Jharkhand in February 2006 stressed that there was any institutional or structural issue in the full realization of this component of adivasi rights. Most respondents underlined the fact that adivasi rights regarding the traditional utilization of local natural resources are under threat and constitute the most significant challenge to adivasi rights in Jharkhand. Clearly, the right to development was a more serious concern since the right to autonomy has been achieved.¹⁵

Right to socio-economic development

The status of the right to socio-economic development of the adivasi population of Jharkhand is perhaps the lynchpin in the realization of adivasi rights in Jharkhand.

¹² See Prakash, Op. Cit., Chapters 3, 6 & 7.

¹³ As can be noticed in the debate involving the Jharkhand Panchayati Raj Act, whose implementation has been pending. Some actors have been arguing that the Act in its present form violates the traditional rights of the adivasi population, and the State government does not wish to be seen as ignoring the rights of the Adivasi.

¹⁴ For instance, local newspapers carry these issues with a great deal of passion on a daily basis. Also noticed during the field study were public rallies of various scales and coherence on a number of such issues, ranging from implementation of the PESA to the script that must be adopted for the adivasi languages.

DEMOGRAPHY

All rights are inherently contestable politically, and, in any democracy, demographic patterns determine the outcome. The ST population have shown a long-term pattern of decline, accounting for only a little more than a quarter of the total population of the State in the 2001 Census.¹⁶ Democratic contestation for tribal rights must therefore account for the majority of the population of the region, which is not of tribal origins, severely limiting claim for adivasi rights and determining the contours of re-negotiation of adivasi rights.

STs are widely dispersed over all districts of the State but are a majority in three districts: Gumla, Lohardagga and West Singhbhum (Table 1). Given the acute poverty in Jharkhand,¹⁷ the worst sufferers of a developmental deficit are the tribal populations of the State – seriously undermining the realization of their right to development and also affecting their socio-cultural rights.

One of the standard assessments on the well-being of the ST population of the State and the status of realization of their right to development is to compare the consumption levels with those of the rest of the population.¹⁸ The data on consumption (Tables 2 and 3) show that the expenditure on consumption by the ST population in Bihar was the lowest amongst all social groups surveyed – consumption expenditure on non-food items in rural areas was about a fifth lower than the average for all social groups. Similarly, expenditure by ST

populations on food in urban areas was about 10 percent lower than average for all social classes, except that of Scheduled Castes.

Literacy

Literacy again is a central component in realizing all the developmental as well as socio-cultural rights, which has also been legislated as a right for all citizens of India, STs included.¹⁹ While some progress of primary education in Jharkhand can be noted, vast ground still needs to be covered as the literacy rate in primary and secondary education is abysmal. Rural impoverishment, particularly amongst STs, low levels of literacy and use of non-mother tongue (Hindi) as the medium of instruction constitute the central determining factors in perpetuating this trend.²⁰

Overall literacy rate of the ST population in Jharkhand in 2001 was a mere 40.7 percent, compared with 53.6 percent for all the population of Jharkhand. More importantly, the literacy rate for ST women in Jharkhand was only 27 percent, compared with almost 39 percent for all Jharkhand population.

In the three districts with largest ST populations – Gumla, Lohardagga and West Singhbhum – there seems to be some correlation between numerical presence of ST in the district and higher literacy attainments.

¹⁶ See Prakash, *Jharkhand ...*, Op.Cit., especially chapters 4, 5 & 6.

¹⁷ Nitya Rao, 'Jharkhand: Vision 2010: Chasing Mirages' in *Economic and Political Weekly*, 03 May 2003, p. 1756.

¹⁸ Such data for the Jharkhand State is still to be computed but the available data for STs in undivided Bihar continues to be relevant as more than 90 percent of the ST population of the undivided State of Bihar resided in the erstwhile Jharkhand region. Thus, data for ST population of Bihar can safely be projected to apply to the majority of the ST population in the present State of Jharkhand.

¹⁹ The Constitution (Eighty-Sixth Amendment) Act, 2002 inserted Article 21A into the Fundamental Rights chapter of the Constitution, which states that "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

²⁰ Kumar Rana and Samantak Das, 'Primary Education in Jharkhand' in *Economic and Political Weekly*, 13 March 2004, p. 1, 176.

In Gumla district, the gap between ST literacy rates and district averages was a little narrower, as was the case for ST women, in which the urban-rural gap in literacy followed the State averages. In Lohardagga district, the gap in literacy among general ST populations was larger with skew against ST women. The same pattern with a starker skew against STs and ST women was present in West Singhbhum (Table 4).

In such a grim picture, the availability and access to educational infrastructure, such as schools and staff, becomes central. The largest number of schools was in Ranchi district, the State capital. Gumla, with the largest ST population, was ranked 13th (out of 22 districts) with 1,458 schools. Furthermore, Gumla had only 780 education guarantee schools (EGS) – about half that of the capital, Ranchi. West Singhbhum was at the seventh place in terms of total number of schools but at 13th position in terms of EGS schools, while Lohardagga had the lowest number of all schools and was ranked 19th in terms of EGS schools. It can therefore be surmised that the prospects of realizing STs' right to education is not very bright.

Furthermore, it was noted in the field study that many of these schools are in a poor shape and are barely functional.²¹ The poor educational infrastructure for ST population of Jharkhand is, however, not underlined by the teacher-pupil ratio in the districts of the State (Table 6). Gumla district has a substantially lower average pupil-teacher ratio in primary schools, while at the middle and secondary school levels, the ratio was in accordance with the State averages. Similar patterns can be noticed for the other two districts

with STs as the majority – West Singhbhum and Lohardagga. The pupil-teacher ratios for both these districts were either lower than or around the State averages. These averages mask certain important issues which might undermine the right to education of the ST population. The better teacher-pupil ratio averages for districts with ST as the majority population may simply be a result of lower enrolment rate or demand for primary education. It could also be that such schools are not sufficiently dense on the ground, leading to serious problems of access for the pupils.

Gumla represents a case of declining enrolment rate among ST pupils and a rising Gross Enrolment Rate (GER), which indicates that not only fewer pupils from the ST were being enrolled, but there also was a rising trend of pupils not joining schools at the right age, and/or a substantially large proportion failing to pass their respective grades.²² Similar patterns can also be noticed for Lohardagga. The rising trend for GER in West Singhbhum district is much less steep than in the other two districts, indicating a better overall education profile.

Overall, the realization of the right to education by the tribal population of Jharkhand is a distant goal yet. Unless this goal is realized, the rest of the tribal rights will not bear fruit in Jharkhand.

Socio-economic status

The discursive literature on adivasi rights and the right to development stresses the importance of achieving a higher living standard for the adivasi population.

²¹ For instance, in Gumla district, it was noted that a number of schools have physical existence but are poorly maintained and run.

²² The gross enrolment rate is the total enrolment in a specific level of education, regardless of age, expressed as a percentage of the official school-age population corresponding to the same level of education in give school-year and is widely used to show the general level of participation in a given level of education. It indicates the capacity of the education system to enrol students of a particular age-group. While a high GER generally indicates a high degree of participation, whether the pupils belong to the official age-group or not, GER can be over 100 percent due to the inclusion of over-aged and under-aged pupils/students because of early or late entrants, and grade repetition. In this case, a rigorous interpretation of GER needs additional information to assess the extent of repetition, late entrants, etc.

Employment

The degree of participation of the ST community in productive economic activity is a good proxy for both socio-economic empowerment as well as central factor influencing many of the other parameters of the right to development, such as literacy, education, consumption (which is related to the issue of nutrition and well-being) and health attainments, etc.

The employment data for STs in Jharkhand did not present a rosy picture. While the State average for work participation was 37 percent in 2001, the same average for ST population in Jharkhand was 46 percent, which may not necessarily indicate more productive employment, particularly when compared with poorer literacy and consumption figures as it would indicate poorly paid work or working in the fields. The field study also indicates that higher work participation in rural areas would mean toiling in the fields with little or no infrastructural support and/or participating in lowly remunerative traditional livelihood strategies, such as foraging for food or gathering and selling non-timber forest produce. In urban areas, the ST population report a work participation rate of 34 percent, compared with a marginally lower 32 percent for the State average. The near equal work participation by STs and all communities in urban areas hide the disparities where most STs are engaged in low-paid, unskilled labour in urban areas.²³

A significant gender gap in work participation is also present, albeit such gap was smaller for the ST population. While the work participation rate for ST women was almost 45 percent, the same figure for all social groups in the state was 25 percent. This data presents a fallacy that ST women were more economically empowered in Jharkhand. In fact, ST women are often recorded as 'workers' on account

of their poor economic conditions and not otherwise – engaged as they are in hard labour, including collection of minor forest produce and manual labour, to ensure daily food for the families. This pattern was also noted to be widespread during the field study and it can be confidently asserted that the higher work participation by ST women is not a reflection of greater economic independence and empowerment.

ST work participation rate in Gumla at 50.5 percent was slightly higher than the state average at about 49 percent. Lohardagga showed similar patterns while West Singhbhum's patterns were in consonance with the State's averages.

Overall, there are only small differences in work participation rates for the ST population of the State compared with the average figures. Thus, there seems to be little handicap for the ST population as far as work participation is concerned, save the already mentioned fact of low-level, non-skilled jobs coming to STs.

Health patterns and development

Access to quality health facilities leads to improvements in quality of life and well-being. The health indicators, such as birth rate, infant mortality and death rates, are another important facet of the realization of adivasi rights.

Birth rate in Jharkhand closely follows the national average, although the rate of decline is lower, primarily owing to no decline in the rural birth rate. On the other hand, the death rate for Jharkhand has risen during 2002 and 2003 due to the rise in rural death rates, while there has been a small decline in the national death rate figures for the same period. Keeping in mind the fact that more than 90 percent of the ST population reside in rural areas, this rise in death rate would impact the ST population (Table 9).

²³ Due care should be taken while interpreting the work participation rates owing to the constantly changing definitions of 'work' in the censuses as well as the low threshold level in classifying any individual as a 'worker'. See Companion Paper.

The same pattern is also evident in the infant mortality patterns for Jharkhand. While the national infant mortality figures have shown a decline over the two years, the same figures for Jharkhand have been constant with a marginal rise

for urban areas and a marginal decline for rural areas. Natural growth rates for Jharkhand have therefore shown a sharper decline than the national average, led by a decline in rural natural growth rates but a rise in the same figures for urban areas, indicating sub-optimal access to health facilities for

the STs.

LAND AND FORESTS

Land has been a central question in the contestation for rights in most parts of the country, adivasi areas included. Besides, land has acquired an added dimension in adivasi Jharkhand – both economic and socio-cultural. “The long association of the adivasi with the forests and their lower levels of socio-economic development have resulted in a higher dependence of tribal communities on forests for a livelihood than other population groups.”²⁴ The importance of land in the socio-cultural conscience of the tribal society of Jharkhand is also highlighted by the issue of acquisition of land by the state ‘in public interest’, which not only threatening the adivasi’ livelihood and socio-cultural autonomy, but also creating the misery of displacement and social fracture in Jharkhand.

Alienation of adivasi land has historically been disallowed by law since the colonial times under the Santhal Parganas Tenancy Act and the Chota Nagpur Tenancy Act.²⁵ However, transfers do happen, but the informal and non-legal nature of these transfers makes it difficult to assess the scale and intensity of the issue. Transfer of adivasi land between individuals of tribal origin is allowed, which captures the changing nature of adivasi society.²⁶

The proportion of land area under various uses in Jharkhand, which provides an overview of the utilization patterns as well as underlining the centrality of the forest in the State. At the level of the State, a mere 9.9 percent of total land area was under non-agricultural use, while forests comprised more than 29 percent of the land, and net cultivated area of the State stood at about 23 percent. These figures are in consonance with the hilly terrain of the State as well as the dependence of vast adivasi populations on forest produce (Table 10).

The dependence of adivasi communities on forest resources is also highlighted by the fact that a mere 3.27 percent of the land area was cultivated more than once. Since adivasi communities mostly reside in rural areas, this poor agricultural profile of the State cannot but have a significant impact in the realization of their rights.

In Gumla, only about 15 percent of total land area was under forests, while the net cultivated area was at about 29 percent. However, area cultivated more than once was a mere 0.83 percent of the land area. Together, these figures describe a situation in

²⁴ Suhel Firdos, ‘Forest Degradation, Changing Workforce Structures and Population Redistribution: The Case of Birhors in Jharkhand’ in *Economic and Political Weekly*, 19 February 2005, p. 773.

²⁵ See Nandini Sundar, ‘“Custom” and “Democracy” in Jharkhand’ in *Economic and Political Weekly*, 8 October 2005, p. 4,430-4.

²⁶ The latest published estimates available for such transfers are dated 1974, making it of little use for contemporary analysis. See *Bihar Statistical Handbook 1978*, Patna: Directorate of Economics and Statistics, Government of Bihar, n. d.: 192.

which the rural population, particularly tribal communities, have poor knowledge of carrying out productive agriculture, which leads to greater dependence on the forests.

Lohardagga, on the other hand, roughly follows the State averages with a slightly lower land area under forests and under more than one crop but a little higher net cultivated area. West Singhbhum shows a substantially larger area under forest cover, at 40.4 percent, and also a higher net cultivated area of about 25 percent. Area cultivated more than once was at about three percent, which was close to the State average.

The above discussion, besides highlighting the risks to the livelihood of adivasi communities in Jharkhand, underlines the central role of the forests – both, in terms of the large coverage and their impact on livelihood.

The forests, however, have also been dwindling to about half of the State average, which seriously compromises the tribal communities' ability to generate a reasonable livelihood. The changes in forest cover in Jharkhand offer a mixed picture. While on the one hand, overall forest cover in Jharkhand showed a positive change over the 2001-2003 period, the total area under dense forests showed a small decline, from 11,787 square kilometres to 11,035 square kilometres. This decline will also affect the availability of forest produce, which, as was argued earlier, is central to the preservation and realization of the socio-cultural as well as economic rights of the tribal population. The rise of areas classified as 'open forests' from 10,850 square kilometres in 2001 to 11,035 square kilometres in 2003²⁷ indicates a depletion of forest cover.

Gumla showed a small net increase in forest cover of about 0.8 percent in 2003 when compared with the figures for 2001. Dense forests recorded a decline from 1,231 square kilometres to 1,161 square kilometres, while open forests rose from 1,255 square kilometres to 1,402 square kilometres, reflecting a net decline in forest cover in the district. Lohardagga, on the other hand, recorded a decline of total forest cover by 2.75 percent in the year 2003 when compared with the 2001 figures in both dense forests as well as open forests (Table 11). West Singhbhum followed the Gumla pattern, wherein there was a depletion of area under dense forest cover but a rise in the area under open forests.

Along with commercial exploitation and increasing human activity, large developmental projects are also a major cause for the depletion of forest cover in Jharkhand, which also induces large-scale displacement of (mostly adivasi) population. Although the proportions of displaced persons are not unreasonably large (Table 12), two factors should be kept in mind when interpreting this data. Firstly, intensive exploitation of mineral wealth of the State has been active for at least 200 years, and a large number of projects (many of which involved destruction of large forest areas) were already in place by the time India gained independence. Secondly, many of the projects that saw large-scale destruction of forests and displacement of population were started before the period for which the data became available (Table 12). For instance, the Koel Karo hydel project, initiated in the 1970s, led to constant protests and activism over environmental and social costs. Such patterns of change in forest cover undermine not only the autonomy of socio-economic processes of tribal life in Jharkhand, but also seriously impact the security of livelihood of the tribal communities.

²⁷ Classification of forest areas, with their intricate connotations of access rights for various sections of adivasi population as well as utilisation of resources from reserved, protected, and open forests is another area of serious contestation in Jharkhand. This issue is not a focus of this study and hence, the scheme of classification used here is that developed by the Forest Survey of India is as follows: Very Dense Forest: All lands with canopy density over 70 percent; Moderately Dense Forest: All lands with canopy density between 40 percent and 70 percent; Open Forest: All lands with canopy density between 10 to 40 percent; Scrub: All lands with poor tree growth mainly of small or stunted trees having canopy density less than 10 percent; Mangrove: Salt tolerant forest ecosystem found mainly in tropical and sub-tropical inter-tidal regions; and, Non-Forest: Any area not included in the above classes. *State of Forest Report 2003*, New Delhi, n.d., Box 1.1.

DEVELOPMENTAL INFRASTRUCTURE AND SOCIO-ECONOMIC RIGHTS

Realization of socio-economic rights is crucially dependent on the availability of developmental infrastructure, such as roads, electricity and, in the case of largely rural population, irrigation facilities. Detailed data for many of these indicators for Jharkhand are not yet available, except two crucial ones: village electrification and irrigation potential. The degree of village electrification in Jharkhand continues to be dismal. Only 31.4 percent of the inhabited villages were electrified by the end of the fiscal year 2004-2005, including those whose electrification was contracted out to M/S Rites. Even this meagre figure reflects a significant improvement since the end of the fiscal year 2000-2001, when only 14 percent of the total number of inhabited villages in Jharkhand was electrified (Table 13). This is likely to have a significant impact on the developmental scenario of adivasi communities in Jharkhand.

On the contrary, in the three tribal majority districts, the growth in village electrification after the creation of Jharkhand in 2000 cannot be noticed. At the end of the fiscal year 2004-2005, only 18.4 percent of the inhabited villages had been electrified in Gumla district, of which about 11 percent were already electrified by the end of the fiscal year 2000-2001. Similarly, in Lohardagga district, only 20.5 percent of the inhabited villages had been electrified by the end of the fiscal year 2004-2005, of which more than 12 percent had been electrified before the new State of Jharkhand. Compared with the State totals, this scenario is rather bleak. On the other hand, West Singhbhum district broadly follows the patterns noticed at the State level.

The irrigation potential for Jharkhand is central to agricultural development of a largely rural ST

population, and perhaps the most important factor in economic empowerment. At the State level, 'other sources' (primarily rain-fed) remain the largest source of irrigation in Jharkhand and account for 21 percent of the total irrigated area. Government and private wells are second and account for more than a third of the total irrigated area in the State. Tanks and canals account for about 15 percent and 13 percent, respectively, of the total irrigated area. Modern devices such as tube wells (electric as well as diesel) account for only about 12 percent of the total irrigated area. Lift irrigation, which perhaps has the best application in the socio-cultural as well as geographical terrain of the State, accounts for merely two percent of the total irrigated area (Table 14).

In the district of Gumla, the dependence on rain for agricultural activities was much higher, at 47.5 percent of the irrigated area, while government wells accounted for about 29 percent of the irrigated area. When combined, government and private wells irrigated more than 48 percent of the irrigated area with no significant hectare being irrigated by modern devices such as tube wells. Lift irrigation accounted for only 0.5 percent of the irrigated area in Gumla. As far as the Lohardagga district is concerned, dependence on rain was lower, with only six percent of the area being irrigated by 'other' sources. The largest source of irrigation in Lohardagga was tanks, which accounted for 34.6 percent of the total irrigated area in Lohardagga. Wells (government and private) accounted for 43.9 percent of the total irrigated area of the district, with government wells accounting for 27.4 percent of the irrigated area. Canal irrigation in Lohardagga was also significant, at 15 percent, while tube wells and lift-irrigation

techniques had no significant share. Irrigation in West Singhbhum district was largely dependent on canals (58.7 percent of the irrigated area), and the rest of the area was rain-fed (almost 30 percent). Unlike Gumla and Lohardagga, well irrigation was marginal in West Singhbhum, while tanks accounted for about 9 percent of the total irrigated area. Significantly, electric tube wells accounted for almost 2 percent of the total irrigated area.

Overall, the irrigation potential in Gumla and Lohardagga was not very heartening while West Singhbhum seemed to be better off, as evident in many other indicators. Irrigation in Jharkhand seems to be very much dependent on the vagaries of rain, which does not augur well for economic empowerment of the adivasi population in these districts, as they are in rural areas with low consumption levels and high dependence on agricultural activities.

DISPLACEMENT AND REHABILITATION

The issue of displacement (and aligned issue of rehabilitation) is a crucial facet of much of the critical developmental discourse, and many of the individuals interviewed during the field study voiced this issue.²⁸

Of the few scientific studies conducted on the issue in Jharkhand, the one by Alexius Ekka is noteworthy. His study estimates that more than 1,546 thousand acres of land were acquired for projects between 1951 and 1995, which is about 8 percent of total land area of Jharkhand and displaced at least 1,503,017 persons, of which about 41 percent were tribal population. Only a third of these lands were resettled, in many cases only nominally.²⁹ Other authors have estimated a much higher figure (Table 15), of which about three-quarters are yet to be settled. The fuzziness about size of the problem

notwithstanding, there is agreement that sufficiently large numbers of population in Jharkhand, particularly tribal population, have been displaced without sufficient attention to their rehabilitation, which seriously undermines their rights. The importance of the issue lies in the fact that “the process that begins with the announcement of the project and continues long after the people have lost their livelihood... cannot be limited to the narrow concept of physical ouster from the old habitat.”³⁰ Further, the benefits that are purported to flow to the displaced populations due to the projects are often doubtful and often accrue only to the elite in the local communities, adivasi population included.³¹ More often than not, “the situation of women is worse than that of men. Adivasi women, for example, depend on the NTFP [non-timber forest produce] more than men do

²⁸ Interview with Sanjay Bosu Mulick at his offices in Ranchi on 24 February 2006 and PNS Surin at his residence at Ranchi, 22 February 2006.

²⁹ Alexius Ekka and Mohammed Asif, *Development Induced Displacement and Rehabilitation in Jharkhand, 1951 to 1995: A Database on its Extent and Nature*, New Delhi, 2000, p. 134. See Companion Paper for full details.

³⁰ Ibid.

³¹ Ibid., pp. 135-7.

since it is their responsibility to ensure the regular supply of food, fodder, fuel and water. They are less literate than men," which means that the chances for them to find an alternate employment are quite limited and, therefore, "continue in the informal sector that is often poorly paid and without

infrastructural support mechanisms."³² The net result of this process has been gross violation of the rights³³ of the adivasi communities, as they have often lost their land, liberty, livelihood and, sometimes, even their lives.³⁴

PARTICIPATION, PANCHAYATI RAJ, PESA AND ADIVASI RIGHTS

The crucial link between the two components of adivasi rights and their realization is participation. Political acceptance of rights and their legal creation is of little value if they cannot be exercised by the individuals of the group concerned, in this case the STs.

Jharkhand has had a long tradition of customary institutions of local governance, the legitimacy of which was recognized by various enactments in the pre-independence era, such as the Chota Nagpur Tenancy Act 1908, Santhal Pargana Tenancy Act 1949, among others.³⁵ The introduction of the provisions of the Panchayatis (Extension to the Scheduled Areas) Act, 1996 (commonly known as

the PESA)³⁶ was an attempt to extend modern democratic institutions of local governance amongst the adivasi population in scheduled areas, while not totally replacing the traditional institutions. This has created a sharp divide between the votaries of traditional systems premised on customary adivasi headmen and the statutory panchayats elected democratically – a divide noticed during the field study. To make matters more complex, the constitutional validity of Jharkhand's enabling act, the Jharkhand Panchayati Raj Act 2001, has been challenged before the courts, while elections for Panchayats are yet to be held.

³² Ibid., p. 139.

³³ See Companion paper for full discussion of the impact.

³⁴ For instance, the tribal communities of Kalinganagar, Orissa contested the government's decision to allot 2400 acres of their land to a corporate for establishment of a steel plant. The adivasis, protesting their displacement and fearing inadequate compensation and rehabilitation measures, assembled to prevent the bull-dozer from destroying their houses and taking over their lands on 2 January 2006. Through a contested narrative of events, what is clear is that police opened fire killing 12 adivasi protesters. While this particular event occurred in the neighbouring State of Orissa, countless similar incidents of a smaller and less reported nature have occurred in Jharkhand as well.

³⁵ Sundar, "Custom" and "Democracy"...! Op. cit., p. 4,430. Also see Nandini Sundar, 'Laws, Policies and Practices In Jharkhand' in *Economic and Political Weekly*, 08 October 2005, p. 4,459-62 for a discussion of the tension between customary law on local governance and the statutory panchayats.

³⁶ For a full discussion of the provisions of the PESA, see Arbind Kumar, 'Tribal Participation' in *Seminar*, vol. 514, June 2002 and for a discussion of the relationship between various legal provisions for local governance in adivasi areas, see Nandini Sundar, 'Tradition' and 'Democracy' in Jharkhand: A Study of Laws relating to Local Self-Governance', New Delhi, n. d.

CONCLUSIONS: CHALLENGES AND OPPORTUNITIES

The foregoing analysis highlights a mixed picture with respect to the status of adivasi rights in Jharkhand. As far as the question of autonomy of local politics and recognition of the adivasi identity are concerned, the creation of the State of Jharkhand is a positive step. The principle of adivasi political autonomy has been accepted, and along with the already extant Constitutional provisions concerning socio-cultural rights, there is little formal threat to adivasi rights.

However, the exercise of these rights by the adivasi population is another story. Formal rights are of little use in the absence of structural conditions for their enjoyment. The issues of land, water, forests and local resources, which are central to the adivasi communities for both preserving their livelihood and socio-cultural identity, are under constant threat from various quarters. There are significant threats to the realization of the adivasi population's socio-economic rights. As far as their socio-economic development and participation in economic activity are concerned, the adivasi members are considered the weakest performers in the community. In such a situation, the possibility of the adivasi population exercising their rights appears bleak. However, what is positive is the intense and vigorous public debate that has emerged on various aspects of adivasi rights. This indicates a degree of democratic contestation, which can only strengthen adivasi rights in Jharkhand.³⁷ The announcement by the Planning Commission that provision is being created for allocation of 25 percent of all plan funds to the development of scheduled caste/scheduled adivasi population³⁸ is a step in the direction of securing adivasi rights.

Possible policy programming initiatives

The steps taken by various agencies involved in development policy at all three stages – planning, implementation and evaluation – attain centrality in realization of adivasi rights. A crucial capacity-building role can and has been envisaged for international agencies, such as the UNDP and the UN. Such an inter-twined two-fold role would include leading the discursive change as well as actual development programming in terms of augmenting capacity of both the rights-holders and duty-bearers to enable realization of adivasi rights in Jharkhand.

Capacity-building of the rights-holders and duty-bearers will succeed only if a partnership can be built with the civil society organizations working at the grassroots. Alongside, the importance of state machinery should not be under-estimated. Within the framework of programming initiatives set forth above, some specific suggestions and avenues are as follows:

Leading discursive change

First and foremost, international (as well as national) development agencies, such as UNDP and the Planning Commission, must play a central role in pushing forward the issue of adivasi rights in the public discourse for development planning and implementation. Many policy tools are available for the purpose, such as combining the issue of adivasi rights within the human development framework; capacity-building of both the right-holders and duty-bearers to understand the importance of focusing on adivasi rights; technical assistance in translating existing policy initiatives to address the issue of promoting adivasi rights, etc.

³⁷ Two examples of this new environment of public debate are the Scheduled Tribes (Recognition of Forest Rights) Bill, 2005 & a Draft National Policy on Tribals. While both these documents have been severely criticised for what they fail to address, the debate and battle for the realisation of tribal rights has been joined.

³⁸ 'Now, 25 percent Plan funds sought for SCs & STs' in *Indian Express*.

Strengthening participation

The central link in the preservation and promotion of adivasi rights in Jharkhand is participation in both decision-making as well as in the processes of socio-economic development. Such an approach is also consistent with a HRBA, which is one of the central conceptual anchors in the realization of adivasi rights. In this respect, policy programming can play a central role in terms of:

- Offering support – technical as well as substantive – to the right-holders (the tribal population) to claim their right to participate in all aspects of public policy;
- Giving support to the duty-bearers to resolve implementation issues;
- Supporting newly elected *Panchayat* functionaries, particularly women and the marginalized communities to discharge their function of ensuring full and free participation of all sections of the local population;
- Forming initiatives, such as training programmes for local-level elected functionaries (the rights-holders) and providing technical support for development planning, implementation and infrastructural issues.

Building awareness about rights

As has been noted earlier, much of the adivasi population surveyed in the field study were grossly under-informed about their rights – both as citizens of India as well as members of the tribes. Towards this end, available policy options must:

- Harness the avenues offered by civil society organizations and support their initiatives to raise awareness amongst the remotest of adivasi areas of Jharkhand;

- Take advantage of radio-based information dissemination, including community radio, which is a low-cost avenue with the potential for high policy impact.

Contributing to socio-economic development

Many of these issues require small investments in local structures and civil society organizations – an issue which programming initiatives must look at closely. Some avenues which may be examined are:

- Support for traditional adivasi livelihood patterns and technical assistance to improve yields from them;
- Developing potential for commercialization of tribal produce through the avenues of co-operative tribal-owned organizations;
- Training programmes for tribal youth to empower them to make full utilization of their capability (including programmes for literacy and education);
- Supporting public-private partnerships for creation and sustenance of micro-credit structures;

Supporting civil society action in this area.

Advocacy for policy change

There are some other areas which require advocacy for policy change, some of which are:

- Policies governing utilization of land and forests by adivasi communities;
- Issue of realigning the development model to ensure adivasi rights are upheld and promoted;
- Issues of displacement/rehabilitation of adivasi population, the policies for which require substantial re-working.



The interface between formal and informal systems of justice: a study of Nari Adalats and caste Panchayats in Gujarat state,
India

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INDIA



OVERVIEW

The concept of decentralized, local alternative dispute resolution systems in the area of social justice in India has evolved from the traditional and existing forums of village *Panchs* and caste *Panchayats* (hereafter referred to as *Gynati Panch*) to more recent platforms such as *Nari Adalats*, which are focused on 'justice for women'. The increased participation of women in the public arena and in political governance in India has been accompanied by increased entitlements to legal rights for women. It has also been accompanied by an increased rate of violence against women in both the private and the public spheres. These two phenomena have led to interesting forms of alternative courts, such as the *Nari Adalats*, which attempt to carry constitutional rights to the poor and, in particular, to victims of gender-based violence. Such forms of redress have not been constrained by legal particularities, or by rigid rules of evidence and procedure; they give priority to approaches that are both practical and gender-sensitive. In this homegrown arena of 'social justice', the propriety of the law is not really an issue, nor is the cost or venue. The most complicated cases of fact and law are resolved in a few days, and the methods of enforcement are built into settled agreements.

Increased entitlements and constitutional rights for women, and their growing abilities and acceptance into political governance, must necessarily be integrated with the increase in legislated forms of decentralized participation in judicial governance. This study, therefore, attempts to study two forms of decentralized dispute resolution systems in tandem – the traditional caste/tribe/community *Panchs* and the *Nari Adalats* of Gujarat. The study seeks to understand the functioning of these alternative legal mechanisms

at the grassroots level, largely through the lens of gender justice and the participation of women in both of the systems. In addition, while the *Nari Adalats* themselves emerged in the 1990s as a spontaneous response and reaction to domestic violence and gender-based abuse, the study also tries to track their legal and socio-political lineage through the women's movement and within the ambit of judicial reforms in India.

Towards social justice: Attempts to institutionalize alternative and decentralized forms of justice delivery and dispute resolution

In the late 19th Century, the Indian Government under British rule established the *Panchayati Adalats* in rural areas to serve as decentralized judicial tribunals and to hear small cases at the local level. The formal legal and judicial system adopted the British model of adjudication, with its insistence on procedural technicalities and adherence to adversarial systems of litigation. Until India's independence, the regulation of family relationships under the British regime was devolved to religious, caste and community heads. In 1950, however, the concept of a *Nyay Panchayat* was revived once again to ensure a more decentralized and locally acceptable form of justice deliverance. Unlike the traditional *Panchayats*, *Nyay Panchayats* were designed to apply statutory laws rather than indigenous norms. Their membership was also chosen through elections from geographical constituencies rather than through the nomination of upper-caste men. In essence, they were meant to combine the formality of official law with the political malleability of caste tribunals. This combination, however, failed, and

efforts were made to set up a Legal Service Authority in 1950. However, it was the socio-political and legal turmoil during the Emergency, two and a half decades later, which marked a discernible shift from legal centrism to a recognition of the merits of legal pluralism.

Legal reform in the post-Emergency era led to relatively informal, conciliatory and alternative institutions existing alongside the formal judicial mechanism. This in turn led to the introduction of public interest litigation in the early 1980s and the establishment of the Legal Services Authority in 1987, the *Lok Adalats* in 1982 and Family Courts in 1984. Today both the *Lok Adalats* and Family Courts suffer from delays and have been reduced to dispensing low-quality arbitration and conciliation. The Family Courts, in particular, have compromised the rights of women within marriage because of their need to conciliate. In the post-Emergency era, the Public Interest Litigation Act became, to a large extent, the symbolic vehicle through which the dispossessed and oppressed began to understand the judicial system as an instrument of socio-economic change, and which has also given rise to a measure of social justice.

The journey towards gender justice

It is interesting, but not surprising, that the move to introduce judicial reforms in the late 1970s and early 1980s was paralleled by the events that led to the contemporary women's movement in India. Even during the International Year of Women in 1975, the subversion of justice in the now-famous *Mathura* rape case provided further evidence of the need for the nascent women's movement. The failure and inadequacies of the criminal justice system triggered the first assertive anti-rape campaign in the country. The protests and demands for justice that marked the years preceding the Emergency period saw women take

to the streets and spearhead the price-rise movement, as well as participate extensively in the movement for land reforms, peasant movements, etc. By the time the Emergency ended and the anti-rape campaign began, the women's movement had begun to take on a more assertive and organized form. This participation by women in political movements led to their engaging more actively in women's and development issues through various platforms.

In 1986, the National Education Policy articulated this progressiveness through its policy of 'Education for Women's Equality'. The *Mahila Samakhya* Programme, which began in three Indian States in 1989, was a direct consequence of this policy. The concept of the *Nari Adalats* was first put into action by rural women belonging to the *Mahila Samakhya* movement in Gujarat.

By the late 1980s, the feminist agenda in India was redefined and enriched by thousands of rural women who embarked on a complex journey – questioning notions of both rural development without women and feminism without rural development. Incidents of domestic violence, marital abuse and other forms of gender-based violence were brought into the public eye, which took different forms in different Indian States. It is critical to understand here that despite the global influences of international treaties on gender-based violence, and the country's own legislative, judicial and institutional reforms, little would have been achieved had these not been accompanied by a huge grassroots movement to empower rural women. Through the 1980s and early 1990s, the women's movement's focus moved from an emphasis on shelters, counselling and social service to influencing national laws against domestic violence, enhancing the criminal justice response and raising public consciousness on the issue of violence against women.

The evolution and subsequent spread of the *Nari Adalat* concept by rural women's collectives thus carries with it a vibrant socio-political legacy, as well as a fertile socio-legal landscape within which marginalized rural women continue to contest established notions of gender justice. While '*Nari Adalat*' was the particular nomenclature given to women's courts, different versions of the same concept, with different names, were simultaneously mushrooming in different states and throughout the country. In an effort to broaden and validate the patterns in our findings in this study, we have included two other women's organizations which have similarly sponsored women-run 'courts' and legal redress mechanism.

Nari Adalats

Run entirely in a spirit of volunteerism, the *Nari Adalats* operate as informal, conciliatory, non-adversarial courts with lay participation, which seek to extend constitutional rights to the poor and particularly to victims of gender-based violence. When assessing the extent of injustice to which the victim has been subjected, they retain their emphasis on ensuring the rights of women *within* the framework of marriage, rather than outside it. Their priority is on 'finding a solution' for the woman within the ambit of social justice, rather than applying more generic principles of judicial procedure or universal human rights. Nevertheless, it is important to question whether the *Nari Adalats*' attempt to mirror the values and attitudes of those they work for has led to the administration of justice becoming a subversion of human rights, or whether they have, in fact, 'indigenized' the formalism of official law and justice, in the process demystifying it and making it more easily accepted.

The study undertook an analysis of all of the 3,514 'cases' handled by six *Nari Adalats* in the past decade. First, it sought to understand who was and

who was not accessing the system. Direct meetings and interviews with 30 clients revealed their perceptions, expectations and experiences.

The *Nari Adalats* are clearly petitioned mostly by women who have been beaten, physically and psychologically abused and harassed in their marital homes. Eighty-nine percent of the cases brought before the *Nari Adalats* in the past decade fall into these categories. Ninety-two percent of the 'clients' are *sangh* members; nearly 35 percent of the women whose cases are heard by the *Nari Adalats* of Mahila Samakhya go there after having already knocked on the doors of the traditional *Panch*.

By and large, women and families who are economically vulnerable and not bound by the censure of the traditional *Panchayat* use the *Nari Adalat* mechanism. There seems to be a direct correlation between an increase in court use and economic development. While this aspect requires a more thorough study, we found that the higher the economic security of families/communities, the more litigious they seem to become. Inversely, in areas of extreme poverty, the hold of the *Gynati Panchs* over the community is decidedly higher. However, as the normative control of the community falls among those communities which are poor but upwardly mobile, or when community norms become diffused due to economic exigencies/opportunities, the tendency of communities and women to become litigious appears to increase, even though the cost, time and stigma attached with going to the police or courts remain. The *Nari Adalats* seem to be the most accessible option for women in these communities.

However, it is also quite clear that economic considerations alone do not determine whether a woman will go to the *Nari Adalat* or to the courts, even though they may be a critical factor. The shared gender identity of the 'client' and the 'judge',

the comfort of being in an environment which resembles your own extended family of mother, aunts, sisters, elders, and the non-intimidating spaces and culture of fearless communication all count for a lot more to a battered woman than economic considerations. It would appear that women who go to the *Nari Adalats* want resolution more than justice.

The popularity of the *Nari Adalats* also lies in the relatively high sense of control that the petitioner experiences there, compared with the familiar traditional *Panchs* and the courts. Cost, time, and venue are critical aspects in sponsoring a sense of control in the woman. The *Nari Adalats*, on average, take 3-8 months to resolve a case and do not cost the petitioner more than a thousand rupees. More important to the petitioners, though, is the fact that the *Nari Adalats* place them at the centre of the negotiations.

There are no obvious caste, class or religious hierarchies in the judicial process of the *Nari Adalats*. Women from the privileged castes do not seem to be restrained by the fact that women from the underprivileged caste will preside over their case and vice-versa. In the interest of both the client and the judges, though, the women of the *Nari Adalats* do make strategic alignments to ensure that during the proceedings of a 'higher' caste woman, 'higher' caste members are present in larger numbers; a similar alignment would apply in the cases of 'lower' caste women. However, it was consistently observed that the *Nari Adalat* members were more constrained in taking harsh or objective stands if the complainant and defendant belonged to the same caste or the same village as they do. Contesting their own community, at times, jeopardized their survival as members of that community. This goes back to the fact that in an attempt to strengthen their identity as a

women's collective across caste, religious and community lines, the *Nari Adalats* have refrained from fundamentally challenging or even questioning basic caste, religion, or class structures within their society.

Out of the 3,514 cases that were studied, 10 percent (363) were from a minority community. This brought up a number of questions. How did the *Nari Adalats* handle issues of dual minority – that of women who belong to a minority religion? How did they reconcile issues of gender justice with personal laws? What were the contradictions they faced? How did they proceed with the application of law: did they draw on the personal laws or on constitutional law – or did they draw upon both, based on circumstances? It was repeatedly found that there was an absence of studied dialogue or public discussion among the women of the larger collective, or the *Nari Adalats*, on the various merits and drawbacks for women of both the personal and the common laws. It seems that they functioned according to what came naturally to them, or would attract the maximum acceptance from society.

Meetings with some of the *Nari Adalats*' 'clients' were enlightening and provided critical feedback on the informality of the *Nari Adalats*, as practiced within the *Mahila Samakhya* programme in particular. The following issues were raised as constraints:

- The lack of formal and standard legal documentation had posed serious problems;
- The absence of a basic understanding of legal procedures and provisions meant that the client was not empowered with information about the laws, and was not fully able to take informed choices *vis-à-vis* the outcome;

- The inability of the system to comprehend and interpret revenue and legal documents – such as property documents – held by the client, and the absence of a support mechanism (such as lawyers) meant that the advice or resolutions provided by the *Nari Adalat* were vulnerable to legal disputes and procedures of law;
- The *Nari Adalat* system operates entirely through the will and courage of the volunteers and *sangh* members; this tends to give rise to a personality-oriented system. In the absence of any legitimate mandate, or structured partnership with state enforcement agencies or the formal judicial system, the ‘fear’ induced by the *Nari Adalat* is short-lived in the eyes of the violator.

The dialectic of being ‘just’ and ‘right’

It is necessary to understand how, without the constraints and rigidity of legislated procedures and norms, the alternative ‘courts’ remain consistent with the dual need to be both ‘just’ and procedurally ‘correct’. How is ‘correctness’ defined in a gender context within both the *Nari Adalats* and the caste *Panchayats*? A further question is whether there is a gender difference in the way ‘just’ and ‘right’/‘correct’ are defined in these structures, one largely patriarchal and the other leaning towards feminism.

The formal justice system invariably adheres to the correct use of legal and judicial procedures. Similarly, in the *Gynati Panchs*, justice can only be applied if social norms, procedures and behaviour are perceived to be ‘socially correct’. However, for the *Nari Adalats*, the act of a woman seeking justice and the circumstantial evidence of her being a victim of injustice is in themselves the ‘correct’ justification to trigger a movement towards justice.

Here, the need to be just, based on the circumstances and context, precedes the confirmation of what is ‘correct’. The *Nari Adalats* do not concern themselves with providing a verdict and punitive action. Instead, they are more concerned with being ‘just’ by making men compensate women in a manner that protects women’s rights and, more importantly, facilitates a change in their situation towards a more violence-free life. In deciding how violations should be compensated, they concentrate on the circumstances, rather than on a stipulated, well-laid-out norm or law. In many ways, this is a more humanitarian way of securing rights and ensuring compliance.

In the see-saw act between ‘being just’ and ‘being correct’, however, the *Nari Adalats* do at times falter. Their relatively low levels of understanding of laws, legal provisions and procedures, coupled with unconscious slips into patriarchal ways of judging and seeing – both of which were evident during the study – occasionally lay them open to the kind of mistakes made by both the *Gynati Panchs* and the formal justice system.

Nari Adalats – justice for women or women for gender justice?

An analysis of the 3,514 cases received and handled by six women’s courts reveals that all of the cases pertain to marital disputes and to gender-based violence – primarily domestic violence. The dominant image of the *Nari Adalats* remains that of a forum where women facing violence within marriage can seek support or justice. However, while more than 89 percent of the cases pertain to marital disputes and violence within the marital home, the *Nari Adalats* no longer deal only with women victims. In 20 percent of the cases (714 out of 3,514), men have for different reasons approached the *Nari Adalats* for justice.

Men who believe that the 'errant' ways of their wives can be 'sorted out' by the women of the *Nari Adalats* have filed complaints against their wives. The *Nari Adalats* look at the specificity of each case, often also taking into consideration the man's economic condition before deciding on a maintenance amount.

The *Nari Adalats* do not apply the legal provision for maintenance or facilitate court dispensations in a uniform manner. While maintaining and protecting the rights of women, they arrive at what most of their 'clients' perceive as a set of pragmatic, implementable solutions to the problem, often to the satisfaction of both parties. However, this could mean a 'lesser' verdict than that which the courts may offer through the more progressive legislated provisions for women. In some cases, where women are more aware of the laws, and are more determined to seek a decision expressed in a verdict rather than resolution, they do tend to approach the courts directly. In addition, and ironically, the defendant husbands approach the *Nari Adalats* which belong to their socio-economic milieu in the hope that they may give a more considerate verdict. While this has extended their 'client base' to men and gradually exploded the popular perception that *Nari Adalats* only work in the interests of women, it does raise a more fundamental question about the reasons for the *Nari Adalats'* departure from the formal legal provisions. Are the *Nari Adalats* fully aware of the legal provisions, are they primarily governed by them and do they only interpret these provisions within the overall context and specificities of the case? Or are they, like *Gynati Panchs*, governed by a set of normative rules and laws set by their socio-political contexts? The answer lies somewhere in between. The *Nari Adalats* do use the statutory principles but they interpret them according to circumstances.

While all six women's courts are embedded within a larger movement for women's empowerment, the study revealed that none of them received, or proactively took up, a single case of sexual harassment, nor did they hear sex workers' cases, or cases dealing with women's labour contracts, female foeticide, women victims of inter-caste or communal violence and disputes, etc. While acknowledging that these forms of gender-based violence and exploitation were endemic, the *Nari Adalats* had clearly developed and acquired the image of a local informal 'family court', whose predominant role is to protect the rights of the woman within the framework of marriage.

The lack of a clear institutional mandate, the absence of well-crafted links with formal structures and an inadequate understanding of the legal and judicial procedures and systems have ensured that only five percent of the cases (169 out of 3,514) that are heard are related to rape, homicide or sexual harassment. Similarly, while there is a demand for action on, and awareness on the issue of, women's rights to inheritance, only four percent of the cases pertain to this issue. Thus, while *Nari Adalats* enjoy high levels of credibility within their own collectives and in their geographical blocks or *talukas*, they have yet to make the step towards a more comprehensive form of gender justice or to become a more generic social justice mechanism governed by women. However, it would be unfair to view this lack of development within the *Nari Adalats* in isolation. A fairer approach is to place these developments within the larger context of the women's movement in Gujarat. While the rural women's movement has improved rural women's abilities to organize themselves as collectives, to form pressure groups within their regions and to express and assert their rights within the family, the movement's willingness to take up gender issues outside its ambit – be they violations of pre-natal

sex determination tests, the rights of sex workers, the violation of labour laws to the detriment of women or the trafficking of women – have been relatively low. The *Nari Adalats* merely reflect the pattern which exists within the wider grassroots rural women's movement in different parts of India, including Gujarat.

Interface with the traditional Panch

The study team met with 11 traditional *Panch* members from as many communities in four districts of Gujarat. Interestingly, it seems that the *Nari Adalats* have emerged more as an alternative to the patriarchal caste *Panchayats* than as a decentralized alternative to the formal judicial system. While the *Panchayats* protects the patriarchal social order of the community, the *Nari Adalats* by and large protect the rights of women within that social order. In so doing, they have neatly appropriated the format and 'methods' of the *Gynati Panchs* in more ways than one – whether it is by using a public 'space' to hold 'court', using the technique of 'naming and shaming' or involving lay participation in the dispensation of justice. The *Nari Adalats* also draw their presence and power from a shared 'gender identity' – much as the *Gynati Panchs* derive theirs from a shared 'caste' or community 'identity'.

As judges, the *Nari Adalat* respond according to their emotions, with responses to male complaints/victims being fairly gendered. In fact, it was interesting to observe that the attitude of the *Nari Adalats* towards men was completely adversarial when they were defendants, but when a man was the aggrieved party, his perceived vulnerability would draw a fairly maternal response. This response is similar to that of members of traditional *Panchs*, whose attempts to be just and fair towards 'passive' and 'vulnerable'

women wronged by their husbands at times translate into patriarchal protectionism.

Any similarities end there. The costs and expenses involved with *Gynati Panchayats*, which come together if they are appealed to or 'moved' by a complainant from their caste/religion/sect, are extremely high. The mounting transaction costs of the *Gynati Panchayats*, the lack of interest or care they increasingly display when trying to find a resolution, the speed with which a separation is executed for financial gains and the existence of alternative dispute resolution systems, such as *Nari Adalats*, *Mahila Panchs* etc., have all contributed to the diminished credibility of the *Gynati Panchs* in Gujarat. Today, even men seeking justice in marital matters are more willing to approach the *Nari Adalats*, despite the perception that they are biased towards women, or the Family Counselling Centres run by the State Social Welfare Board, rather than their caste *Panchayats*.

The breakdown of the ability of *Gynati Panchs* to 'govern the community by control' is due both to their ineffectiveness and to the increasing urbanization of villages, the nuclearization of families and migration into towns. Of course, levels of control differ between communities. We found that caste or tribal communities whose livelihoods continue to be closely linked and dependant on common property resources; migrant pastoral communities which tend to live in close proximity for long periods in alien environments; communities with relatively smaller populations; or those living in remote, marginalized geographical regions, are governed and controlled by the traditional *Panchs* to a far greater extent than others.

Traditional *Panchayats* vary greatly in their normative principles and methods for protecting the rights of women. Those *Panchs* that have a better institutional framework, and that seem to have

better procedures for protecting women, have no need for or interest in the *Nari Adalats*. Despite being as regressive as most other *Panchs* on the issue of women's rights, they maintain their credibility with women and men in the community because of their strong emphasis on the welfare of both women and the poor. The Muslim community *Jamaats* fall into this category. However, where the traditional *Panch* is faced with a fragmented community, principally due to shifts in livelihoods, education and location, and are less able to overcome the diminishment of their role in community governance, we found that willingness to accept the *Nari Adalats* as a credible 'quasi-judicial' system was considerably higher. In communities such as that of the Rathwas of Chota Udaipur, where the *Panch* continues to exert a significant hold over the community, but is disorganized and localized, the decision-making process of the *Panch* is hijacked by village-level political leaders from within the community or by power-holding elites. Women in these communities are perhaps the most disadvantaged, in terms of their low levels of access to justice or resolution outside the community and the absence of well-organized caring mechanisms within their own community.

The *Nari Adalats* have evolved different strategies in different areas, and all of the *Nari Adalats* have formally invited the traditional *Panchayats* to their hearings – or at least involved some of their leaders informally. This is partly to influence and educate the *Panchayats*, and partly to keep them happy. Where the *Nari Adalats* are treated as a 'higher court' by the women of the *sanghs* – who first succumb to family and community pressure and take their issues to the *Gynati Panchayats*, and bring their cases to the *Nari Adalat* when these are unresolved or the women are harassed – the *Gynati*

Panchayats are faced with a visit by *Nari Adalat* members or are quite literally obliged to come to the *Nari Adalat* court to explain their verdict.

Ongoing efforts to engage and influence the *Gynati Panchs* are therefore made by the *Nari Adalats*, although these efforts are neither structured nor consistent. Interestingly, the traditional *Panchs* have reciprocated in some cases by inviting *sangh* members into their forums when handling a case. Fifteen to twenty members of the *Mahila Samakhya sangh* in all three districts, but especially Vadodara and Rajkot districts, are regularly invited to sit in on the *Panch*. However, it is also evident that the invitation to *Nari Adalat* members does not extend to all cases seen by the *Panchs* but is limited to those where a marital dispute or complex gender problem is involved. The *Nari Adalat* women seem to vacillate between pride in being invited to the traditional *Panchayats* – interpreting this as evidence of an increase in their influence within the community – and a sense of the futility of influencing the traditional *Panchayats*, which are themselves on the decline. Nevertheless, 8-10 women from the *Mahila Samakhya sangh* membership who are also on *Nari Adalat* councils are also permanent members of their caste *Panchayats*, and are silently transforming the patriarchal modes of decision-making within the *Panchs* from within.

While all of the *Nari Adalats* members were unanimous in stating that they detested the patriarchal verdicts of their traditional *Panchayat*, most felt that a traditional *Panchayat* as a community system had an inherent value for the community. They paradoxically observed that, in an increasingly homogenized world, the *Panchayat* reflected their diversity and protected different forms of governance.

The *Nari Adalats* were also clear that despite their adversarial position *vis-à-vis* the caste *Panchayats*, they have largely chosen the path of cooperation rather than confrontation. They also admitted that they often accept reconciliation as the only option because of the absence of a safe shelter for the victim. In fact, our study revealed that the outcome in 49 percent of the cases relating to marital abuse/disputes and domestic violence was reconciliation. While the lack of safe alternative domestic arrangements for a victim does seem to be a predominant consideration in finalizing the outcome of cases for all of the *Nari Adalats*, leading to more reconciliations than may be appropriate, the weight given to sustaining the family and marriage framework is equally strong.

The success and limitations of the *Nari Adalats* thus lies in the fact that they position themselves between the discriminatory norms of the traditional *Panchayats* and a formalistic and antiquated justice-dispensing system. They do not challenge the social order fundamentally, neither do they apply the statutory provisions fully. Rather, they interpret both to redefine a pro-women social order. They are more flexible in their adhesion to procedural rules than the formal system and the caste *Panchayats* – both of which have well laid out procedural protocols – and are considerably cheaper and faster than either.

An alternative justice dispensing mechanism?

Is the *Nari Adalat*, then, a *supplementary* forum focusing on pre-litigation conciliation and settlements or is it a *complementary* system which has defined an equally just, and perhaps culturally more acceptable, way of dealing with the issue of women's rights? Interestingly, while *Nari Adalats*

seem to have emerged as an alternative to the traditional *Panchs*, they now judge their achievements and failures in comparison with the formal justice system, just as the self-help rural women's groups in India, which emerged in reaction to exploitation by traditional moneylenders, today make the mainstream banks their reference points.

In dealing with domestic violence, the formal legal and judicial system has relied primarily on the criminal justice system, which is itself limited when dealing with domestic violence cases. The vulnerability of victims and a law enforcement system, which is marked by complex rules of evidence and incomplete solutions (e.g. with regard to maintenance and custody issues), create the need for multiple avenues through which an abused woman can seek justice. All this has ensured that the fight against injustice is overtaken by an even more painful fight for justice. To expect a physically, emotionally and economically abused woman to seek justice through a system in which most would prefer not to litigate is a travesty of hope. The situation has also made the increasingly progressive provisions of law for women appear hollow. This question has vexed the women's movement at the macro level and voluntary movements such as the *Nari Adalats* at the local level: how can we reconcile the methods of access and application of the progressive nature of our legal reforms with the regressive nature of our judicial system?

It is now recognized and acknowledged that victims of domestic violence require a plurality of socio-legal remedies to ensure that they can live in a more secure physical, emotional, psychological, economic and social environment. They are not only victims of crime, but also primarily victims of

their family milieu. Clearly, strategies to achieve violence-free lives for women have to go beyond legal interventions to encompass confidence-building measures, the restoration of filial relationships, the mobilization of community support and the education of the victim about her rights as an individual and within the family. No one system can achieve all of these. Multiple systems of support and plural forms of resolution and justice delivery with a gender justice perspective are necessary to address the complexities of domestic violence cases. The *Nari Adalats* are in a strong position to participate fully in this process.

The *Nari Adalats* must make a more concerted effort to develop and to work towards being accepted as a complementary system to the mainstream. However, some of the above-mentioned drawbacks of the concept and its operations need

to be addressed at a broader level before the *Nari Adalats* can be incorporated into a pluralistic legal framework in India. For the *Nari Adalats* to be accepted as a parallel institution and retain their values, approach and methods, they require an authorized institutional mandate – they are presently perceived as being too informal and ‘voluntary’, which reduces the impact of their work. Clearly, they have to evolve a more standardized form of documenting records and evidence. They need a more comprehensive and systematic understanding of the formal legal and judicial system, as well as the human rights framework, so as to engage with other forms of justice delivery for women. For the *Nari Adalat* mechanism to be relevant locally and legally, members need to learn ways of introducing a public discussion about social justice based on rights, rather than merely on reconciliation or responsibility.

GLOSSARY OF TERMS

Gynati or Jati	Caste
Gynati Panch	Caste council – its members are normally nominated and not elected
Jamaat	Community Council of Muslim communities
Lok Adalat	People’s courts
Mathura	A town in Uttar Pradesh
Mahila Samakhya	Education for Women’s Equality (a national government-sponsored programme which mobilizes grassroots rural women, raising their awareness of equity issues and women’s equality)
Mahila Samakhya Society (MSS)	The official name of the organization
Nari Adalat	Women’s court
Nyay Panchayat	Councils of Justice at the village level
Panch	Traditional council of five members
Panchayat	Jurisdiction of villages based on population and the primary level of governance
Panchayati Adalat	Village (decentralized, local) court
Sangh	Group (village-level women’s groups formed by Mahila Samakhya are known as <i>mahila (women) sanghs</i>)
Taluka	Administrative block within a district



Access to justice: the case of women in Iran

Shahla Moazami

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IRAN



ACRONYMS

CEDAW	Committee on the Elimination of Discrimination against Women
NGO	Non-governmental organization
UNDP	United Nations Development Programme

1. OVERVIEW

Women in Iran are a marginalized group. Despite the fact that the constitution of Iran defines all individuals as equal, the established legal frameworks have not only failed to provide women with equal access to justice, but have also perpetuated a system of inequality between the female and male populations. Under the legal system of Iran, Islamic precepts govern the definition of equality, rendering it conditional, and consequently hindering the realization of the egalitarian nature of the constitution. It is within this context that the story of women in Iran and their difficulties in accessing justice unfolds.

Approximately 20 percent of Iran's population of 65 million live below the poverty line; disparities run inter-provincially (CCA, 2003). While increases in literacy rates have been achieved, high unemployment rates and a large population of young people have further pushed the population, particularly women, into the poverty trap. Given the vulnerabilities of the daily lives of women, their access to justice plays a central role in enhancing their ability to make informed choices, to contest and escape from private and public forms of violence and to feel that the justice system is accessible and empowering.

Women in Iran must have, as an inherent right, the ability to exercise choice regarding the issues that most affect their lives. As the duty-bearer, the state is responsible for ensuring that all social groups have adequate information about, and easy access to, existing legal frameworks. This entails creating an environment that fosters proper legal literacy, information sharing, access to legal aid and, most

importantly, a cooperative system that is not only aware of and responsive to the needs and interests of the most disadvantaged, but that is also willing and able to provide sound and effective remedies to these groups' concerns. This will enable people to act as full participants in their society and to find remedies to their problems and/or grievances without hindrance.

This case study aims to give precedence to the lived experiences of Iranian women as a marginalized group. Specifically, the objectives of this study are as follows:

- To examine gender discrimination in penal law and identify the intersections among the jurisprudential, legal and social reasons for the existing bias;
- To present the ideas and experiences of women implicated in the judicial system – female judges, attorneys, offenders and claimants;
- To acquire information on the activities of NGOs working to protect women's legal rights;
- Using a human rights-based approach, to identify ways to effect positive change and develop concrete approaches to programming on inclusive governance.

It is anticipated that this study will contribute to the formation of gender-sensitive legal frameworks and programmes that will provide opportunities for women to become legally empowered as active participants in their society.

2. ANALYSIS OF THE KEY FINDINGS

According to the findings, minimal progress has been made in terms of women's access to justice in Iran. Evidence indicates that the governing laws discriminate against women. The legal inequality of women, however, originates not only from shortcomings in rules and regulations, but also from the unwritten rules contained within social norms and customs, which are saturated with gender bias.

Article 49 of the Islamic Penal Law stipulates that juveniles be exempt from criminal liability; however, the legal age of maturity is 15 for boys and nine for girls. Islamic Penal Law also places greater value on the testimony of men. For example, cases involving lesbianism, consuming alcohol, speaking out against the government, larceny and murder require only the testimony of men. In cases requiring proof of adultery, a man's testimony is equivalent to the testimony of two women.¹ The penal system needs to reflect the realities and concerns of women today; if no changes are introduced, little progress could be made in terms of women's access to justice through either the formal or informal media. Laws need to reflect current social realities, or they have no meaning.

Women in general have become increasingly aware of their condition due to their exposure to higher education, especially in the humanities and social sciences, to their engagement in civil society, and to increased international discussion on the situation of women in Iran. Female claimants and offenders have become aware of their condition through their involvement with the justice system.

Of the 56 female claimants participating in the study, 47 believed that governing laws do not adequately support women, and 29 believed that they did not receive proper support because they were women. As one woman indicated:

"Of course, because I am a woman, my words went unheard. They did not even call me to court, and my husband, because he had married another at that point, simply divorced me."

The effectiveness of legislation and the success of civil and governmental institutions in protecting female claimants require legal reform, appropriate cultural transformations and awareness-raising for women about their rights, which will encourage them to take a more proactive role as social actors. Since there is a deep correspondence between penal law and dominant cultural ideologies, any legal changes require equal transformations at the level of culture in order to change normative prescriptions about what is deemed appropriate for women and men in Iranian society.

Female offenders, who make up 3.41 percent of all prisoners, expressed their dismay at the way in which women are treated in the criminal justice system – a system they identified as unethical and biased. There was a common perception that female offenders are treated differently based on their gender, offence, appearance and age. Of the 54 women interviewed, 35 believed that a double standard existed, as women are charged with greater severity than their male counterparts for similar crimes. Women in prison may also be

¹ Many discriminatory laws have been addressed in detail in the case study.

sexually abused or tortured, especially if they are regarded as being licentious or “too sexual”. Of the 54 participants, 10 affirmed that prisons are unsafe, and 24 felt that the prison environment encouraged promiscuity and greater susceptibility to prostitution. Of the former prisoners, 23 confirmed experiencing violence in the prison, and 22 affirmed that they had experienced violence committed by a prison guard.

Committing acts of violence against female offenders while they are incarcerated is not only inexcusable, but also a severe violation of their human rights. What can we assume when such women are released from prison? What can we expect from their reintegration process? It is safe to assume that there is a probability that these women will reoffend. Both the courts and the prisons need to be guided by a standard code of ethics informing them of their obligations and responsibilities. A shift in attitude also needs to take place. There needs to be room to voice concerns and to encourage government and legal institutions to take a more proactive approach in ensuring that human rights standards are always upheld.

Furthermore, it is difficult for women to seek safe spaces for support – resources are lacking. The government has yet to create widespread and accessible support services for women who have been victimized. Only one governmental organization, *Behzisti*, has established several safe homes in the city; these, however, are limited in number, and knowledge of their existence is minimal. The few non-governmental bodies providing support to female victims are limited and under-funded, and while charity institutions offer temporary financial support to women,

they do not provide any intellectual or physical protection from recurring harm.

Female representation within the courts has encouraged small but meaningful changes and progress within the justice system as a whole. Female lawyers and judges advocating for legal reform within the framework of human rights have created slight changes in attitudes, particularly with regard to the involvement of women in decision-making institutions. By arguing for a more equitable and just system, women in the courts have encouraged others to ‘think outside the box’ and have energized their colleagues into improving their understanding of the paradoxes and double standards currently prevailing the system. Links have also been created between women working within the courts, providing them with mutual support within their highly male-dominated and rigid work environment.

Many of the impediments women face in attempting to gain acceptance within the judicial system are a result of dominant gender stereotypes that reinforce negative attitudes and behaviour. Female lawyers and judges have worked very hard to resist these stereotypes and barriers, and to create a reputation within the justice system as capable, trustworthy and attentive.

Women need a venue in which they can break the silence, voice their concerns and share their experiences as actors and agents of change. One of the fundamental problems in Iran is that women have little permission to organize and advocate for reform. Their authority to be proactive and influence the decisions that most affect them is contingent on their increased participation in national government.

3. KEY LESSONS LEARNED FROM APPLYING A HUMAN RIGHTS-BASED APPROACH

Protecting the rights of women is part of promoting, respecting and protecting the rights of all human beings. As a methodology, a human rights-based approach works not only to create an enabling framework in which people can exercise freedom of choice and expand their capabilities, but also towards developing an empowering environment in which people are involved in both the decision-making and development process. Using a human rights-based approach in the study meant that a participatory process was required: one that was empowering for the women involved and that addressed their marginality in such a way so as to provide options for the improvement of their daily lives. It was important to seek participation from the women who were most exposed to the justice system in Iran, since the research began with the supposition that those implicated in the system (in the capacity of duty-bearers and rights-holders) had the experience and information to provide details on the current challenges and needs of women accessing justice.

In this study, translating the experiences of women meant that they were acknowledged as active participants and recognized as agents of positive transformation. Although numerous legal studies on women's rights have been conducted during the last three decades, they have not provided the space to hear women's stories and make public the experiences of women involved in accessing justice.

The study applied both qualitative and quantitative research methods to collect statistical data and to gather experiential information from individual interviews and focus group discussions. Desk and literature reviews and survey assessments were

used to gather data. Individual interviews and focus group discussions were held with the groups represented in the study: female judges, attorneys, offenders and victims.

To engage the participation of women within the courts, formal letters were written to a focal person within the courts, which were then distributed to other judges and attorneys. Attorneys willing to participate in the study were met in their own offices, and judges were visited in the courts. Female claimants were also solicited in the courts. The research team approached the participants and provided them with information on the background and purpose of the research project. All interviews with female claimants, judges and attorneys were conducted behind closed doors in the court. Without prior notification, it would not have been possible to meet with representatives from the courts. More importantly, without connections it would have been impossible to meet with the women because of the sensitive nature of the study. The research group knew key people in the courts, and their familiarity with our previous work enabled us to carry out this study.

Female offenders were solicited in the Women's Prison. Women who had been recently released but lacked shelter were staying in a centre for newly released prisoners near the prison, and they were also approached to participate in this study. Non-governmental organizations (NGOs) working on women's legal issues also participated and provided information on their activities.

The study aimed to ensure the participation of both rights-holders and duty-bearers. Although

both groups provided meaningful insights, challenges did exist given the sensitive and political nature of the topic being addressed. Contesting a system takes courage, especially when that system is institutionalized and supported at a political level. The women who were addressing their concerns and sharing their experiences were engaging in a political act: one that was empowering but also, if dealt with unethically, could have invited harm. Each participant had her own concerns about engaging with the research study. Female attorneys had much at stake, as they openly shared their views on Iran’s governing laws, justice system and their own experiences as women in a largely male-dominated sphere of work. In the past, women who had expressed their concerns within the legal system had faced serious repercussions; and in this instance, they worried that their jobs would be on the line. Ensuring confidentiality and anonymity was crucial in order to provide the necessary confidence to participate in the study.

Many of the female offenders questioned the study. Women in the prisons were disheartened by

the fact that this was not the first research being conducted where their lived experiences were surfacing on paper. Despite these studies, their fate had not changed nor had they ever been provided access to the final research findings. They questioned the nature of ‘participatory research’ and identified it as a process that ended once data was collected. In the light of this, the participants of this study were assured that they would be given a copy of the report so that they could see how they had contributed to the study and take note of the recommendations made for future programming.

Using surveys, which respondents in the prisons completed at their own convenience as interviews were prohibited, reduced the level of fear since the offenders were submitting answers in total anonymity. We found that this ‘neutral’ medium created space for better and more detailed data gathering. While the written questionnaires provided no room for increased engagement, the interview process was less structured and focused on being open-ended and sensitive to the condition of the respondents.

4. RECOMMENDATIONS

The purpose of this research was to provide the opportunity for marginalized women to voice their lived experience and, in doing so, to exercise greater influence over the decisions that most affect their lives. With the information gathered, we hope to create positive change and ultimately offer the space for women, as rights-holders, to feel more empowered and, while doing so, hold duty-bearers increasingly accountable.

The women in this research study were able to evaluate their condition within the existing legal, social and economic context. Their experiences and knowledge feed into our recommendations in relation to human rights based approach programming. The following recommendations are proposed:

Human rights education

There appears to be a large gap in the justice system *vis-à-vis* knowledge about and application of human rights. In order to stop current practices that deny the need for a human rights-based approach, capacity-building initiatives targeting those implicated in the system are crucial. The issue of human rights needs to become more prominent within the courts and Iranian law. This will disrupt traditional assumptions, and possibilities for collective learning will emerge. It will be particularly useful to make linkages between human rights and Islam and to integrate them within the legal context.

Traditional leaders, judges, lawyers and students of law should engage with human rights education and understand how to apply it effectively in their work. This will enable greater consistency and adherence to human rights principles and impact on the decisions they will make. Key partners in this process are academic and research institutions, the judiciary and key human rights centres in Iran.

Increased involvement of non-governmental organizations

There is a critical need for service programmes that provide women at risk with support and access to information. Specifically, this study identified a lack of shelters for battered women, sexual assault support agencies, legal aid and information centres where women can seek information about their rights. Enabling NGOs to provide such services would contribute to bringing taboo subjects that have been restricted to the private realm into the public domain. Developing such centres will serve to support women who have had the courage to speak out against the various forms of violence they have encountered and to seek support, legal aid and redress.

In addition to support services for women at risk, female offenders finishing their sentences would also benefit from integration services aimed at better preparing them as they re-enter the social and economic world. The purpose would be to prevent further offences while also providing therapy for any trauma they may have encountered while incarcerated.

Government backing is required for NGOs to operate on a safe and long-term basis. So far, this support is minimal. UNDP needs to play a more proactive role in building the capacity of civil society to meet the needs of the population, while also working with the government to support the creation of social institutions and networks. This would be a positive step towards strengthening the social response for women experiencing harm, while also acknowledging that victimized women who speak out provide the catalyst needed both to create support services and to encourage legislative change.

Legal reform

It is important to acknowledge that legal reforms are necessary to bring about effective change aimed at inculcating a stronger sense of accountability to gender, equity and justice in all its true forms. Our research indicates that certain laws discriminate against women and that collective advocacy and action are required to change them. While we cannot expect to see radical changes in a short period, we can begin to inform and advocate on issues that can be changed over time. Working with legal practitioners, members of the judiciary and courts as well as with educators, we can begin to address laws that overtly discriminate between the sexes. Forums, high-level conferences and roundtables can be held to engage in dialogue and

open debate on the laws of concern. This will pave the way for collective lobbying and open discussion on the topic.

Drawing on the strengths of their experiences, women, as a disadvantaged group, can contribute to these forums and enable others to identify the need for change, since they have been subject to the laws that are deeply in need of transformation.

Change in cultural attitudes

Our research has indicated that formal systems are not fully accountable to women, and the structural limitations embedded in cultural and social discrimination against women increase their vulnerabilities and impede their ability to become better integrated in the development process. Shifting cultural attitudes, and challenging socially constructed notions of the category of 'woman', is necessary to disentangle power relations and provide women with opportunities for creating social change. Many of the obstacles that women encounter in their daily lives, and many of the reasons women do not contest their situation, are largely due to the cultural repercussions they expect to face.

Education on gender equality and the deconstruction of the social categories of 'woman' and 'man' at community levels are important initial steps towards changing cultural attitudes for the betterment of all social groups – but women in particular. Sessions which target community leaders and other community members, and where gender is deconstructed and linkages are made between the improvement of the status of women and society in general, are essential for addressing the current situation and for finding a way forward. UNDP can play a lead role in conducting community

training sessions that open up debate and challenge dominant normative thinking on what it means to be a man and what it means to be a woman.

Increased international engagement

There needs to be greater involvement between Iran and the international community. Specifically, existing international measures aimed at promoting and protecting the rights of women need to be ratified. This would oblige the government to improve measures to decrease women's vulnerabilities and the discrimination they encounter at institutional levels. This calls for increased advocacy and dialogue between the North and the South. Critical engagement with both Islam and feminism would contribute to arguments regarding the adoption of CEDAW and provide the building blocks for increased collaboration and effective change.

Reforms in the prison system

A stronger chain of accountability needs to exist for prison workers. Prison workers need to be guided by a code of conduct and ethics. They would also benefit from receiving training to enhance their awareness of their responsibilities and the rights of female prisoners. More effective monitoring of what occurs in the prisons also needs to be conducted.

The practice of research and writing insists on exposing realities on the ground. It is our responsibility as advocates and practitioners for change to take this work and effect positive change through the framework of a human rights-based approach. The proposed changes are not revolutionary but provide possible alternatives that can have a meaningful impact on the lives of women in Iran and, ultimately, on all of society.



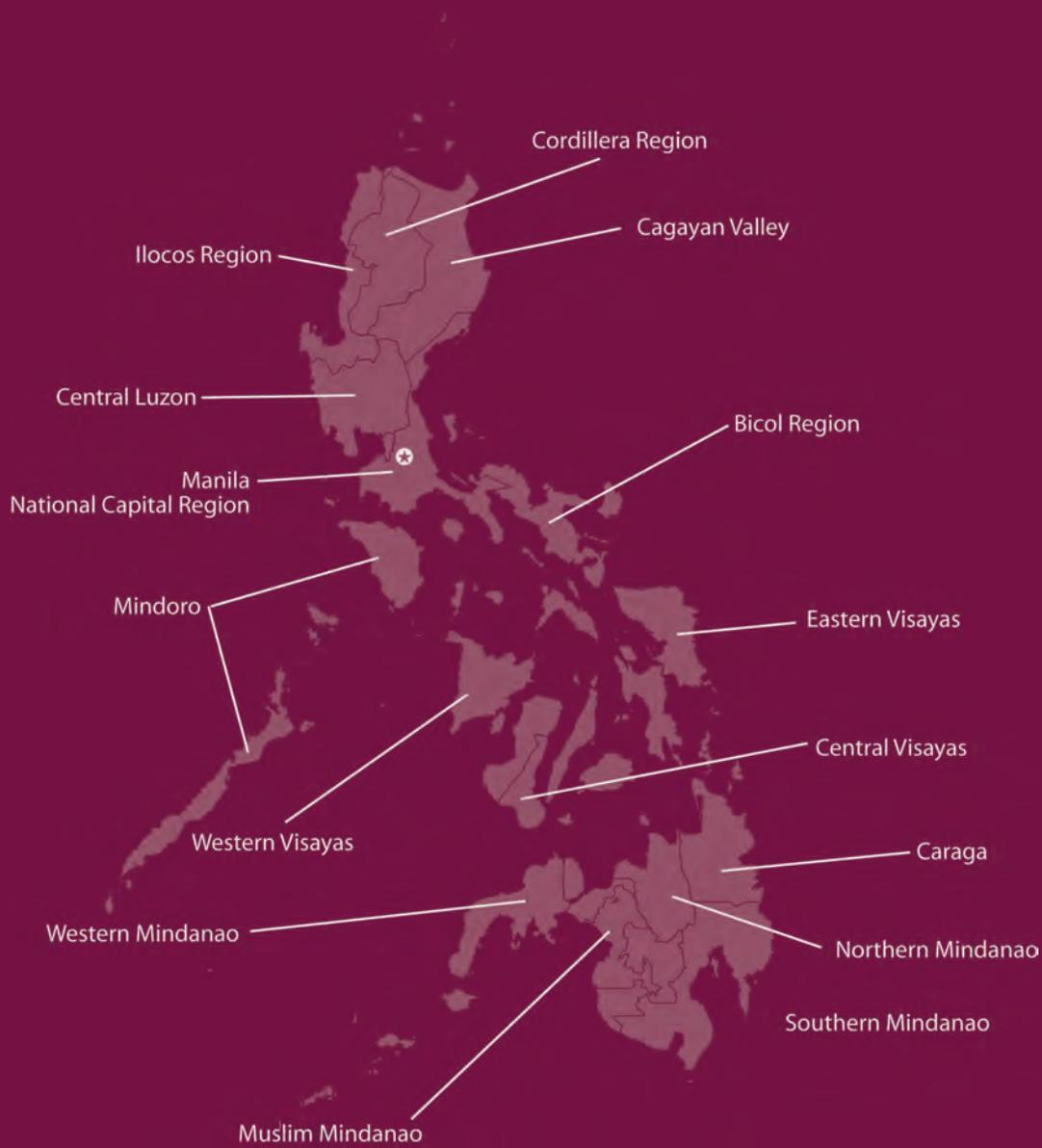
The irony of social legislation: reflections on formal and informal justice interfaces and indigenous peoples in the Philippines

Prof. Marvic M.V.F. Leonen

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PHILIPPINES



ACRONYMS

AMME	Asian Ministerial Meetings for the Environment
DENR	Department of Environment and Natural Resources
ICC	Indigenous cultural communities
IFMA	Integrated forest management agreement
IP	Indigenous peoples
IPRA	Indigenous Peoples Rights Act
NCIP	National Commission on Indigenous Peoples

INTRODUCTION: THE HEURISTIC

Cayat, an *Ibaloi*¹, was fortunate to have been found languishing in the jail by a young enterprising lawyer. He was convicted of violating Philippine Act No. 1639. That law made it unlawful for any native of the Philippines who was a member of a 'non-Christian tribe' to possess or drink intoxicating liquor, other than native liquor. Cayat was inebriated and possessed A-1 gin, which was liquor produced in the Philippines but not native to the *Ibaloi*.

His lawyer challenged the discriminatory act legally by promptly filing an original petition for *habeas corpus* with the Philippine Supreme Court. The legal argument was simple. Act No. 1639 violated the equal protection clause of the Philippine Constitution.² Therefore, it was null and void *ab initio*. Thus, the continued detention of Cayat, albeit under warrant of a final judgment, was really without any legal justification.

In *People v. Cayat*³ the Supreme Court, recalling established doctrine in the Philippines and in the United States, concluded:

"It is an established principle of constitutional law that the guaranty of the equal protection of the laws is not violated by a legislation based on reasonable classification. In resume, therefore, the Legislature and the Judiciary, inferentially,

and different executive officials, specifically, join in the proposition that the term 'non-Christian' refers, not to religious belief, but, in a way, to geographical area, and, more directly, to natives of the Philippine Islands of a low grade of civilization, usually living in tribal relationship apart from settled communities."⁴ Theoretically, one may assert that all men are created free and equal. Practically, we know that the axiom is not precisely accurate. The Manguianes, for instance, are not free, as civilized men are free, and they are not the equals of their more fortunate brothers. True, indeed, they are citizens, with many but not all the rights which citizenship implies. And true, indeed, they are Filipinos. *But just as surely, the Manguianes are citizens of a low degree of intelligence, and Filipinos who are a drag upon the progress of the State*" (emphasis added).

The resulting discrimination was obvious. Even those who are uninitiated in the process of formal legal reasoning can easily unmask the decision.⁵ Yet the legal foundation for the State's paternalistic attitude to indigenous groups persisted, affecting the allocation of rights of individuals belonging to these communities.

The irony, however, is that the very advanced principle on non-discrimination enshrined in no

¹ The *Ibaloi* is an ethnolinguistic grouping composed of different communities, organized by clans and found in the lower portion of the Cordillera mountain range of Luzon, Philippines.

² "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the law."

³ 68 Phil 12, 18 (1939). Unless specified otherwise, citations of cases refer to reports of Philippine Supreme Court cases.

⁴ *Rubi v. Provincial Board*, 39 Phil. 660.

⁵ See for instance the statement made by noted Philippine Historian Dr. William Henry Scott, Sagada, 29 May 1986, where he says: "I have always rejected the term 'cultural minorities' because it seems to divide the Filipino people into two groups: the majority and the minority. I consider it harmful for two different reasons... In the first place, human nature being what it is, it invites exploitation of the one group by the other; and in the second place, it disguises the real division of the Filipino people into two groups: the rich and the poor, the overfed and the undernourished, those who make decisions and those who carry them out."

less than the Philippine Constitution was construed to limit the freedoms of significant populations of indigenous groups.

This paper examines the notions of interface between formal and informal justice systems in the Philippines, as well as the necessary trade-offs in working these two systems with the interfaces that have been mandated by several statutes. It ends with tentative proposals for future directions, not only for

considering interfaces between these two systems, but also future projects that would enrich this interface. For obvious purposes, the goal of this analysis is to enrich the opportunities of marginalized populations in the Philippines and invoke the coercive powers of the official national legal system in their favour. In order to focus the inquiry, this paper concentrates on the problems of indigenous peoples.

WHO ARE THE INDIGENOUS PEOPLES IN THE PHILIPPINES?

The best way to define who indigenous peoples are would be to ask them. But then, when this is done, the common retort, from those who consider themselves as indigenous, would be to ask why the question was asked in the first place, and why the need for an answer?

The question assumes *a priori* that there is a difference and that the difference is significant. While this may from a certain perspective be true, development organizations need to understand some of the dangers in categorization. As Iris Marion Young warns:

“Social groups who identify one another as different typically have conceived that difference as Otherness. Where the social relation of the groups is one of privilege and oppression, this attribution of Otherness is asymmetrical. While the privileged group is defined as active human

subject, inferiorized social groups are objectified, substantialized, reduced to a nature or essence. Whereas the privileged groups are neutral, exhibit free, spontaneous and weighty subjectivity, the dominated groups are marked with an essence, imprisoned in a given set of possibilities. Group differences as otherness thus usually generates dichotomies of mind and body, reason-emotion, civilized and primitive, developed and underdeveloped.”⁶

Most of the credible work on indigenous peoples in the Philippines starts with an admission that it is difficult to define precisely who indigenous peoples are without admitting how peoples in the Philippines have been divided by its colonizers or committing some fundamental error in identities.⁷ Always, the question is for what purpose we are defining who indigenous peoples are.

⁶ Young, Iris Marion, “Together in Difference: Transforming the Logic of Group Political Conflict,” in Kymlicka, Will, *The Rights of Minority Cultures* (Oxford: 1999), p. 158.

⁷ A good discussion is found in Gatmaytan, Augusto B., “Peoples: A View of Indigenous Peoples in the Philippines,” LRCKSK, Unpublished Policy Paper, 1999.

Development agencies should be aware that devising programmes based on continuing the categorization of Filipinos into indigenous and non-indigenous is a historically- and culturally-bound act; because it is used to address historically created disadvantages, the distinction needs to be temporary. Because it is a cultural construct, we should always be aware of other relevant categorization of a collective group of human beings. There is no universal or unambiguous definition of who indigenous peoples are.

Whoever works for indigenous peoples should therefore craft an operational definition, which will be heavily informed by their work agenda. The operational definition should not be considered as a given and should be subject to periodic evaluation.

A number of criteria, however, have been developed to recognize the identities of indigenous peoples. The National Commission on Indigenous Peoples (NCIP)⁸ lists 110 ethno-linguistic groups as belonging to its official category of indigenous peoples, partly based on these criteria. NCIP believes that indigenous peoples constitute 17 percent of the total population and occupy about 5 million hectares from a total of 30 million hectares of land area.⁹

The categorization of Filipinos, based on being 'indigenous', continues to this day and only temporarily corrects the political agenda of the colonizers. Except for those who are naturalized, all Filipino citizens and their ancestors are indigenous in a sense. Officially therefore, the view of

indigenous peoples as backward and barbaric, which had been the interpretation of the Court since *Rubi v. Provincial Board of Mindoro*,¹⁰ has now been changed. The specific use of the term 'indigenous cultural communities' in the Constitution was a constitutional recognition of the intricacies and complexities of culture and its continuity in defining ancestral lands and domains.¹¹ The choice of "Indigenous Peoples" in the IPRA, as well as the recognition and promotion of their rights, was a departure from the negative stereotypes instilled by our colonizers.

In a way, maintaining the distinction between indigenous and non-indigenous people allows for affirmative action to be introduced, as an attempt to correct a historical injustice by specifically defining more rights and entitlements to those who were systematically discriminated against in the past.¹²

Following this tradition, indigenous peoples have been identified based on their general geographic origins in the Philippines. Thus, when we speak of indigenous peoples, we usually refer to peoples who inhabit the Cordilleras, the Caraballo Mountain Ranges, the Sierra Madre Mountain Ranges, Palawan, Visayas Islands and Mindanao.

However, categorization based on ethno-linguistic affiliation fails to capture discussions and debates within communities regarding the use of customary law, the relationship of indigenous communities to the culture of outsiders and the role of local government institutions *vis-à-vis* their

⁸ Created by the Indigenous Peoples Rights Act (Rep. Act No. 8371).

⁹ NCIP, National Situationer, unpublished document presented during the 2002 budget hearing.

¹⁰ 39 Phil. 660 (1939). The racial slurs have been apparent in other cases such as *U.S. v. de los Reyes*, 34 Phil. 693 (1916), *People v. Cayat*, 68 Phil. 12 (1939) and *Sale de Porkan v. Yatco*, 70 Phil. 161 (1940).

¹¹ See for instance the exchange between Regalado, Davide and Bennagen, Records of the Constitutional Commission, 33-34 (28 August 1986) during the Second Reading of P.R. No. 533.

¹² See LRCKSK, Memorandum for Intervenors, *Cruz v. NCIP*, 2000 in LRCKSK, "A Divided Court" 2001.

own customary political units. The cultures of almost all indigenous communities in the Philippines are open to interactions with outsiders. In fact, it is possible to identify a number of customary norms which pertain to rules governing the treatment of 'aliens', as there has been a great deal of trade and other forms of contact with other indigenous groups both inside and outside the Philippines. As a result, cultures have been dynamic. They have evolved in various ways as a result of interaction with outsiders and changes in the economic, political and social system outside their communities.

Within their communities, there are a number of ways in which the dimensions of the interfaces between indigenous culture and the outside world are discussed. Again, there is significant variation among communities within ethno-linguistic groups as to how this discussion takes place or whether it takes place at all. For instance, younger *datu* (community leader) may debate with elder *datu* on how non-formal education institutions should be set up within their community.¹³ Community reactions

as to how gender issues are discussed with communities by outsiders (which includes NGOs) may reveal their preferences as to this interface.¹⁴

Ethno-linguistic categories identify groups but do not suggest *a priori* assumptions about the dynamics of their communities and the individuals within these communities.

Finally, the definition of what an indigenous community is should not be accepted as a fixed concept. Identities are always contested. They are always conveniently relocated by loyalties to constructed groups and the reasons why these groups become distinctive. The definition of identities is above all dictated by political agendas. Their exact definition can be left to the dominant group, if we accept the categories of the status quo, or a tool for empowerment, and if these categories are properly understood, deconstructed and used.

A lot depends on the purposes for intervention, for those who would want to define the basic unit that will receive their services or resources.

TRADITIONAL INTER-PENETRATION OF FORMAL AND INFORMAL JUSTICE SYSTEMS

Formal and informal justice systems have never been exclusive of each other. Although they exist independently, they have always inter-penetrated each other's domain.

Thus, litigants in court normally communicate with each other through their lawyer or other informal channels to arrive at a negotiated settlement. These communication channels go beyond

¹³ Intervention of Datu Tony Lumadnong, Higaonon, Focus Group Discussion, Cagayan de Oro, March 2003.

¹⁴ Focus Group Discussion, Davao City.

opportunities for negotiation provided under Court Rules.¹⁵ In addition to *People v. Cayat*,¹⁶ there have also been cases where the formal adjudicatory processes delivered results that recognized customary informal processes. We examine, as additional heuristics for this paper, the cases of *Pit-og v. People*¹⁷ and *Carino v. Insular Government*.¹⁸

Erkey Pit-og, along with three other *Kankanai*,¹⁹ gathered sugarcane and banana trunks in areas which were considered to be part of their *tayan*. The *tayan*, among the *Kankanai*, is an area owned by a collective grouping in their community and is used principally as a watershed. The *tayan* in this case was under the management of specific individuals. It was shown that Erkey Pit-og was a member of that group.

The municipal circuit trial court convicted Pit-og for the crime of theft. Reading the provisions of the Revised Penal Code, it saw that all the requirements for the crime to have occurred were present. The Regional Trial Court affirmed this decision, but the Supreme Court reversed it. In finding for the accused, the Court observed:

“We see this case as exemplifying a clash between a claim of ownership founded on customs and tradition and another such claim supported by written evidence but nonetheless based on the same customs and tradition. When a court is beset with this kind of case, it can never be too careful. More so in this case, where the accused, an illiterate tribeswoman who cannot be expected to resort to written evidence of ownership, stands to lose her

liberty on account of an oversight in the court’s appreciation of the evidence.

We find, that Erkey Pit-og took the sugarcane and bananas believing them to be her own. That being the case, she could not have had a criminal intent. It is therefore not surprising why her counsel believes that this case is civil and not criminal in nature. There are indeed legal issues that must be ironed out with regard to claims of ownership over the *tayan*. But those are matters which should be threshed out in an appropriate civil action”²⁰

Custom, as fact, was used to create a reasonable doubt sufficient to acquit. However, the allocation of rights between the parties in the conflict was not clearly resolved. At the time this case was decided, there could not have been any way that the official national legal system could decide using customary law.

*Carino v. Insular Government*²¹ provides another set of problems in the use of formal justice systems. The operative facts from which the legal issues arose were found by the court to be as follows:

“The applicant and plaintiff in error (Mateo Cariño) is an *Igorot* of the Province of Benguet, where the land lies. For more than fifty years before the Treaty of Paris, April 11, 1899, as far back as the findings go, the plaintiff and his ancestors had held the land as owners. His grandfather had lived upon it, and had maintained fences sufficient for the holding of cattle, according to the custom of the country,

¹⁵ Rule 18, Revised Rules of Civil Procedure allows amicable settlement and alternative dispute resolution as part of pre-Trial proceedings.

¹⁶ 68 Phil 12, 18 (1939).

¹⁷ G.R. No. 76539, 11 October 1990.

¹⁸ 41 Phil. 935 (1909).

¹⁹ An indigenous community that lives in the Mountain Province of the Cordillera Region, Philippines.

²⁰ *supra*.

²¹ 41 Phil. 935, 212 U.S. 449 (1909).

some of the fences, it seems, having been of much earlier date. His father had cultivated parts and had used parts for pasturing cattle, and he had used it for pasture in turn. They all had been recognized as owners by the *Igorots*, and he had inherited or received the land from his father, in accordance with *Igorot* custom. No document of title, however, had issued from the Spanish crown...In 1901 the plaintiff filed a petition, alleging ownership..."²²

In a paper written by the Cordillera Studies Programme, they point out that the *Ibaloi*, to which ethno-linguistic group Mateo Cariño belonged, had no concept of exclusive or alienable ownership. They did not 'own' land as one owned a pair of shoes. Instead, they considered themselves stewards of the land from which they obtained their livelihood. During the early part of Benguet's history however, a few of the *baknang* mined gold, which was then exchanged for cattle. This resulted in the establishment of pasture lands. Later, to prevent the spread of rinder pest disease, cattle owners set up fences. It was only with the erection of these fences that new concept of rights to land arose.

The real factual circumstances, the evidence of which may have not been appreciated by the court, are significant in that the exclusive right to use the land – ownership as we understand it – was only a relatively new development and which, by custom, applied only to pasture land.

The court focused only on the issue of "whether plaintiff (Cariño) owned the land". It did not focus on the kind of property tenure Mateo had with respect to the kind of land involved. The law, which the judge

was implementing, was simply not equipped to assist him in realizing this important point.

Cariño carved out a doctrine which is advantageous in so far as it assists in the creation of an exception to the Regalian Doctrine and, perhaps, recognizes certain legal rights of these peoples. Lynch observed that "Cariño remains a landmark decision. It establishes an important precedent in Philippine jurisprudence: *Igorots*, and by logical extension other tribal Filipinos with comparable customs and long associations, have constitutionally protected native titles to their ancestral lands."²³

The inter-penetration of formal and informal justice systems also takes place not only through judicial decisions, but also through enactment of legislation. Recently, Congress passed Republic Act No. 9285 or the Alternative Dispute Resolution Act of 2004. This law declared that party autonomy would be the guiding principle in determining the resolution of disputes.²⁴ The law recognized "alternative dispute resolution" methods as part of the officially recognized systems. However, not all disputes are covered by party autonomy. Thus, the law expresses its preference for adjudication for topics that it considers of the public interest, for example, labour disputes, the civil status of persons, the validity of a marriage, grounds for legal separation, the jurisdiction of courts and criminal liability.²⁵

Being very recent, the empirical impact of these provisions in the law is very difficult to assess. For indigenous peoples, however, the provisions of the Indigenous Peoples Rights Act (IPRA) are more relevant.

²² Id, at 936-937.

²³ Lynch, Owen J. "Native Title, Private Right and Tribal Land Law: An Introductory Survey," 57 Phil. L. J. 268, 278 (1982).

²⁵ Rep. Act No. 9285, section 6.

THE INDIGENOUS PEOPLES RIGHTS ACT

On 29 October 1997, the President of the Republic of the Philippines finally passed the Indigenous Peoples Rights Act of 1997 (IPRA); the new law came into effect in the context of a new constitution,²⁶ after more than 10 years of legislative advocacy by indigenous and non-governmental organizations. Formally, the law is the legislature's interpretation of some key provisions of the constitution directly relating to indigenous peoples.

Article II mandates that the state "recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development." Article XII particularly commands the state to "protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural

well-being." It also authorizes Congress to provide for "the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain."

The Indigenous Peoples Rights Act of 1997 implements these provisions by enumerating the civil and political rights and the social and cultural rights of all members of indigenous cultural communities or indigenous peoples. It also recognizes a general concept of indigenous property right, granting title thereto, and creates a National Commission on Indigenous Peoples (NCIP) to act as a mechanism to coordinate implementation of this law as well as a final authority that has jurisdiction to issue certificates of ancestral domain/land titles.

CIVIL AND POLITICAL RIGHTS

Foremost in the law is its recognition of the right to non-discrimination of indigenous peoples. In an unfortunately verbose²⁷ section of the law, it states:

"Equal protection and non-discrimination of ICCs/IPs²⁸ – Consistent with the equal protection clause of the Constitution of the Republic of the Philippines, the Charter of the United Nations, the Universal Declaration of

Human Rights including the Convention on the Elimination of Discrimination Against Woman and International Human Rights Law, the State shall, with due recognition of their distinct characteristics and identity, accord to the members of the ICCs/IPs the rights, protections and privileges enjoyed by the rest of the citizenry. It shall extend to them the same employment rights, opportunities, basic

²⁶ After the overthrow of the Marcos dictatorship, the government immediately moved to promulgate a constitution in 1987. The provisions of this constitution were inspired by the "people power" euphoria that was then sweeping the country.

²⁷ That the section is subject to the Constitution of the Republic of the Philippines is obvious, given the hierarchy of our rules and that this law is being promulgated by the same state. International law already forms part of the law of the land, so that it would have been best not to reiterate these international instruments, some of which already provide *jus cogens* rules. Finally, that "force or coercion shall be dealt with by law" is obviously redundant and considered as a technical oversight.

²⁸ ICCs/IPs is the acronym for Indigenous Cultural Communities/ Indigenous Peoples.

services, educational and other rights and privileges available to every member of the society. Accordingly, the State shall likewise ensure that the employment of any form of force or coercion against ICCs/IPs shall be dealt with by law.²⁹

Clearly, ethnicity is now an unacceptable basis for classification, unless it is in “due recognition of the characteristics and identity” of a member or a class of indigenous peoples. Classification now should be allowed only to provide affirmative action in their favour. Cases such as *People v. Cayat*,³⁰ where the Philippine Supreme Court leaned over backwards and placed judicial imprimatur on government action discriminating against a “cultural minority”, are now things of the past. Under the Indigenous Peoples Rights Act, such notions are not only archaic but also outlawed. Indigenous peoples are entitled to the same rights and privileges as citizens,³¹ should not be discriminated against in any form of employment³² and should receive more appropriate forms of basic services.³³

The IPRA, therefore, performs the traditional role of social legislation. It corrects an otherwise abominable judicial interpretation. The new law even goes further to ensure the rights of women,³⁴ children³⁵ and civilians caught in situations of

armed conflict.³⁶

The law also recognizes the right of indigenous peoples to “self-governance”, to wit:

“Self-governance – The State recognizes the inherent right of ICCs/IPs to self-governance and self-determination and respects the integrity of their values, practices and institutions. Consequently, the State shall guarantee the right of ICCs/IPs to their economic, social and cultural development.”³⁷

In accordance with the provisions of the Constitution,³⁸ customary law will also be the set of norms that would be used in case of conflict about the boundaries and the tenurial rights with respect to ancestral domains.³⁹ Doubt as to its application or interpretation will be resolved in favour of the ICCs/IPs.

Finally, any offended party may opt to use customary processes, rather than having the offender prosecuted in a court of law.⁴⁰ The penalty can be more than what the law provides for so long as it does not amount to cruel, degrading or human punishment. Also, customary norms cannot legitimately impose the death penalty or grant excessive fines.

²⁹ Section 21, Rep. Act No. 8371 (1997).

³⁰ 68 Phil. 12 (1939).

³¹ Section 21, Rep. Act No. 8371 (1997).

³² Section 23 and 24, Rep. Act No. 8371. The later provision makes it a crime to discriminate against indigenous peoples in the workplace.

³³ Section 25, Rep. Act No. 8371 (1997).

³⁴ Section 21, Rep. Act No. 8371 (1997). The 2nd paragraph ensures that there be no diminution of rights for women under existing laws of general application.

³⁵ Section 27, Rep. Act No. 8371 (1997).

³⁶ Section 22, Rep. Act No. 8371 (1997).

³⁷ Section 13, Rep. Act No. 8371 (1997).

³⁸ Section 5, 2nd paragraph, Art. XII, Consti.

³⁹ Section 63, Rep. Act No. 8371.

⁴⁰ Section 72, Rep. Act No. 8371.

SOCIAL AND CULTURAL RIGHTS

Section 29 of the new law lays down state policy with respect to indigenous culture. Pursuant to this policy, it requires that the education system becomes relevant to the needs of “children and young people”⁴¹ and provide them with “cultural opportunities.”⁴² Cultural diversity is recognized. Community intellectual rights⁴³ and indigenous knowledge systems⁴⁴ may be the subject of special measures. The rights to religious and

cultural sites and ceremonies are guaranteed. It is now unlawful to excavate archaeological sites in order to obtain materials of cultural value as well as defacing or destroying artifacts. The right to “repatriation of human remains” is even recognized.⁴⁵ Funds for archaeological and historical sites of indigenous peoples earmarked by the national government may now be turned over to the relevant communities.⁴⁶

RECOGNIZING RIGHTS AND TENURE TO NATURAL RESOURCES

Tenurial and ownership rights created under the new law are always subject to those rights that have been recognized under the constitution and its various interpretations.

The legal concept underlying the government’s position with regard to full ownership and control of natural resources has been referred to as the Regalian Doctrine.⁴⁷ On the other hand, private vested property rights are basically protected by the due process clause⁴⁸ of the constitution.

The Regalian doctrine proceeds from the premise that all natural resources within the country’s territory belongs to the state.⁴⁹ This dates back to the arrival of the Spaniards in the Philippines when they declared all lands in the country as belonging to the King of Spain. Since then, successive governments have mistakenly taken this as the foremost principle underpinning its laws and programmes on natural resources.

⁴¹ Section 28, Rep. Act No. 8371 (1997). Possible conflicts of interpretation might ensue between the concept of “young people” as used in this section and “youth” as used in Section 27 of the same law.

⁴² Section 30, Rep. Act No. 8371 (1997). The section, however, does not settle whether quotas or affirmative action may be given in various levels of education. It is, however, broad enough to provide the basis for such action.

⁴³ Section 32, Rep. Act No. 8371 (1997).

⁴⁴ Section 34, Rep. Act No. 8371 (1997). See also Section 36 on agro-technical development.

⁴⁵ Section 33, Rep. Act No. 8371 (1997).

⁴⁶ Section 37, Rep. Act No. 8371 (1997).

⁴⁷ Section 2, Art. XII, provides “All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated.”

⁴⁸ Section 1, Art. III, provides “No person shall be deprived of life, liberty or property without due process of law...”

⁴⁹ See *Krivenko v. Director of Lands; Gold Creek Mining v. Rodriguez*, 66 Phil. 259 (1938).

Governments have continued to assert, through legislative enactments, executive issuances, judicial decisions, as well as practice, that rights to natural resources can only be recognized by showing a grant from the state.⁵⁰ A recent case, *Cruz v. NCIP*,⁵¹ provided the Supreme Court with an opportunity to correct this perspective. Unfortunately, a sufficient majority was not attained to create the doctrine.⁵²

The constitution, however, also contains some basis for recognizing the rights of indigenous peoples over their lands; even without a law, as being private – that is - neither the public nor the government owned or controlled them.

The IPRA is the source of a different concept of ownership. By legislative fiat, there are now legitimate ways of acquiring ownership to ancestral domains and lands.

Ancestral domains are defined as all areas generally belonging to ICCs/IPs, comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by ICCs/IPs, by themselves or through their ancestors, communally or individually since time immemorial continuously to the present.⁵³

Ancestral lands, on the other hand, are defined as land occupied, possessed and utilized by individuals, families and clans who are members of the ICCs/IPs since time immemorial, by themselves or through their predecessors-in-interest, under claims of individual or traditional group ownership, continuously, to the present.”⁵⁴

The rights of holders of ancestral domains are found in the new law under an indigenous concept of ownership that sustains the view that ancestral domains and all resources found therein shall serve as the material basis of their cultural integrity. The indigenous concept of ownership generally holds that ancestral domains are the ICCs/IPs private but community property, which belongs to all generations, cannot be sold, disposed of or destroyed. It likewise covers sustainable traditional resource rights.⁵⁵

Unlike the emphasis on individual and corporate holders in the Civil Code, the Indigenous Peoples Rights Act emphasizes the “private but community property” nature of ancestral domains. Aside from not being a proper subject of sale or any other mode of disposition, ancestral domain holders may claim ownership over the resources within the territory; develop land and natural resources; stay in the territory; have rights against involuntary displacement; can regulate the entry of migrants; have rights to safe and clean air and water; can claim parts of reservations; and can use customary laws to resolve their conflicts.⁵⁶

Duties are, however, imposed on the holders of these titles.

All of these rights are subject to Section 56 of the law. This has been a difficult point of debate among advocates. The section provides that “property rights within the ancestral domains already existing and/or vested upon effectivity of this Act shall be recognized and respected.”⁵⁷

⁵⁰ See Rep. Act No. 7942 (1995) or the Philippine Mining Act; Rep. Act No. 6940 (1993); Rep. Act No. 7076 (1993) Small Scale Mining Law; Pres. Dec. No. 705 (1974) as amended or the Revised Forestry Code; Director of Lands v. Funtilar, 142 SCRA 57 (1986), among others.

⁵¹ December, 2000.

⁵² Seven justices voted to declare the IPRA as constitutional, six declared it as unconstitutional, and only one dismissed the petition on procedural grounds. The Constitution requires a majority of justices voting to create new doctrine.

⁵³ Section 3 (a), Rep. Act No. 8371 (1997).

⁵⁴ Section 3 (b), Rep. Act No. 8371 (1997).

⁵⁵ Section 5, Rep. Act No. 8371 (1997). Sustainable traditional resource rights are defined in Section 3 (o).

⁵⁶ Section 7, pars. (a) to (h), Rep. Act No. 8371 (1997).

⁵⁷ Section 56, Rep. Act No. 8371. LRC-KSK had suggested to the bicameral committee to limit its operation to only those with torrens titles and with powers of review given to the National Commission on Indigenous Peoples.

IRONY OF THE LAW

The weakness of the law notwithstanding, marginalized indigenous peoples' communities still need to have access or control over their ancestral domain. Insights can be gained from the consequences suffered by communities availing of these provisions of the law.

The growing consensus in the current literature is that their control over their ancestral domains provides the material bases not only for their

physical survival, but also for their cultural integrity. This recognition has been won in the Indigenous Peoples Rights Act.⁵⁸

Section 5 of the IPRA is a milestone, as it provides legal arguments against the prevalent notion that all resources are still owned by the state. However, it also brings with it new issues that need to be confronted when engaged in advocacy on behalf of indigenous peoples.

POLITICAL VULNERABILITY AS A RESULT OF UNDERDEVELOPMENT

Almost all indigenous leaders assert that there must be some interface between their concepts of how things are done and the technologies and insights coming from other communities. Almost no indigenous leader advocates for some degree of iconoclasm. There is no debate, and nothing in their history proves otherwise. The dynamic of local cultures is influenced by dealings with outside cultures. There is also no debate that, whatever the arrangement, it needs to start with a degree of political autonomy given to the community, the peoples' organization, the family, or clans involved. There is a growing recognition that cultural processes should also be used in order to be able to find the appropriate and acceptable interfaces between indigenous and non-indigenous cultures.

However, the current economic environment is hostile to these aspirations. It also weighs heavily against the ability of indigenous communities to make truly free and autonomous choices. The relative successes that have been made in the arena of law and policy should also be made against this backdrop. Impoverished economies of indigenous peoples experience pressure from several sources. Increasing population, environmental degradation resulting from local and commercial activities coming from varied sources, expanding costs of goods and services such as medicines and other health services, gasoline and transportation, groceries, etc., weigh heavily on different households. To start with, many of these communities already live at the subsistence level, if not below the poverty line. Many are still dependent on agriculture or related activities.

⁵⁸ Section 5, Rep. Act No. 8731.

The infrastructure needs of communities, e.g. water, electricity, roads, etc., require large amounts of capital which can only come from government investment. Other needs such as education and health may already be provided by the government but are lost to corruption, culturally insensitive and irrelevant programmes, or simply unexpended because of the inability of a local government unit or government agency to convince the Department of Budget and Management to release the necessary financial resources. It also needs to be said that indigenous peoples are not represented in these bodies.

The lack of education and political experience assured lack of representation which, in turn, kept these economic issues hidden. The cycle repeats itself with a deadly precision.

Indigenous communities are therefore very vulnerable to offers that are made by large commercial interests wanting to extract natural resources within their ancestral domains. They are also likewise vulnerable to government projects that may not be acceptable culturally but provide some relief.

To a certain extent, economic necessities also make many indigenous communities very vulnerable to becoming involved in NGO programmes which may not be culturally sensitive or that will simply exploit the uniqueness of their processes. If communities had been given a genuine choice, it is possible that they may have chosen a livelihood or educational project, rather than a community mapping exercise that will not result in the issuance of a title.

This is not to say, however, that community mapping has no intrinsic value in itself. It is just that

some of the choices made by NGOs also have to be discounted by the level of participation made by indigenous communities. Again, this is not to say that works on community mapping, resource planning and official recognition of ancestral lands and domains are not important. They are, but the question needs to be viewed in the context of a more expansive view of empowerment of indigenous peoples' communities, i.e. one that focuses not only on paper, legal or political victories, but on the whole ethno-linguistic groups as its base. Empowerment should be seen from the intervention's effect on everyday community life, the autonomy that results from more control of their local economies and whether there still is political vulnerability of a local community *vis-à-vis* commercial, governmental (and even NGO) interests.

Originally intended to recognize ownership of ancestral domains in 1988,⁵⁹ politicians took advantage of its presence to provide for a virtual *magna carta* for indigenous peoples. It is, however, too broad. Concrete mechanisms for its implementation were not adequately spelled out, except for the process of gaining paper recognition of ancestral lands and domains.⁶⁰ Thus, while some social, economic and cultural rights are mentioned broadly, no provisions for both budget and programmes are mentioned in the law.

This view of underdevelopment and political vulnerability shows that the Indigenous Peoples Rights Act may not be enough. Perhaps, laws that involve commercial exploration, development and utilization of natural resources must also be reviewed. Legal recognition of indigenous processes means nothing if economic security/autonomy is a mere afterthought.

⁵⁹ S.B. 909 or the Estrada bill originally drafted by the Legal Rights and Natural Resources Center-Kasama sa Kalikasan (LRCKSK).

⁶⁰ See Leonen, Marvic, "The IPRA: Will this bring us to a new level of Political Discourse," in *Philippine Natural Resources Law Journal* (2000).

COMMUNITY STRUGGLES

The struggles of local communities to ward off encroachments into their territory, and threaten their existence, are not new. What has become more pronounced in recent history has been the ability of peoples' organizations to act independently, or in concert with non-governmental institutions, to coordinate the use of official national and international forums with determined and creative local direct action. This has happened whether the encroachments came from public or private infrastructure projects, commercial extractive natural resource industries, or even from public or private programmes masquerading as sustainable development mechanisms.

Examples of campaigns against public or private infrastructure projects include the concerted action against the Chico River Hydroelectric Dam Project in the 1970s; the Task Force Sandawa campaign

against the Commercial Geothermal Power Plant in Mt. Apo in the early 1990s; the coalition against the Agus River Project in Mindanao; and the present day efforts to block the construction of the San Roque Multipurpose Dam in Benguet.

Examples of actions against commercial extractive natural resource industries include the campaign to declare a commercial logging ban in the 1980s; the public furor over tree plantations styled as integrated forest management agreements (IFMAs); and the present concerted efforts against the Philippine Mining Act of 1995 and its implementing rules and regulations. Projects masquerading as sustainable development projects have drawn concerted and relatively organized campaigns, including contract reforestation, the Community Forestry Programme and even the National Integrated Protected Areas Project.

THE INTERNATIONAL ENVIRONMENT

Pressure from international financial institutions mattered. Funding for projects had a lot to do with the changing attitude of the governments towards relinquishing control over large portions of the public domain and recognizing rights of upland migrants.

In 1988, the World Bank study on forestry, fisheries and agricultural resource management⁶¹ made an assertion that:

"The natural resource management question in the Philippines is inextricably bound up with the poverty problem.... The issue is also closely related to the problem of unequal access to resources, and this study concludes that any strategies for improving natural resource management will founder if they do not simultaneously address the issues of impoverishment and unequal access."⁶²

⁶¹ This study was done by Country Department II, Asia Region. The White Cover version was distributed for comment on 16 May 1988.

⁶² Executive Summary, WB, Farm, I (1988). See also p. 58, 81 which defines the core strategy.

The influence of Asian Development Bank was even more specific. A technical assistance project carried out through Department of Environment and Natural Resources (DENR) resulted in a Master Plan for Forestry Development. Like the World Bank study, it called attention to the minimal participation and benefits that reached upland farmers.⁶³ It recognized the claims made by cultural communities to their ancestral lands and goaded the government to proceed to survey, delineate and give them privileges to manage forest resources.⁶⁴

The Master Plan also proposed a policy to “recognize the right of indigenous cultural communities to their ancestral domain” and provided for a rough timetable for its accomplishment.⁶⁵

International financial institutions, such as World Bank and Asian Development Bank, have been the focus of advocacy campaigns by peoples’ and non-governmental organizations.⁶⁶ In 1994, partly as a result of this lobby, some governments – notably the United States – refused to allow a general capital increase of Asian Development

Bank unless projects addressed social and environmental concerns.⁶⁷ Obvious in the policy recommendations from these agencies were linkages between conservation or natural resource management and indigenous peoples. Very little has been said about recognizing their rights simply to correct historical injustices.

As the concerns of indigenous peoples have been closely linked with well-funded ecological concerns, it is no wonder that there has been an unfortunate prevailing view that their rights should be recognized only because they would be better ecological managers. Thus, the new law provided an obligation to reforest⁶⁸ and to condition rights recognition to a priority for watersheds.⁶⁹ The obligations to ensure ecological stability do not attach to any other private owner except those that wish to hold ancestral domains. The recognition of indigenous peoples’ rights is an aspect of human rights advocacy more than simply an environmental concern. These provisions clearly reflect how much of the environmental agenda has taken over the need to correct historical and social injustices.

⁶³ The passage read: “There is very little participation of upland farmers and community members except as labourers in the concession or processing plant. Having very minimal or no participation at all, upland farmers do not benefit or have very little benefit from the use of the resource.”

⁶⁴ Department of Environment and Natural Resources (DENR), Master Plan for Forestry Development, 324-325 (1990).

⁶⁵ DENR, Master Plan for Forestry Development, 331-332 (1990). Two years (1991-1992) were to be used to “clear the concept”; 1992-1993 for “piloting” the master plan and 1993-1995 for “implementation of the plan.”

⁶⁶ See for instance the NGO Working Group on the Asian Development Bank which started its lobby in 1988. This is housed by the LRC-KSK. There are about 210 NGOs from different countries that belong to this network.

⁶⁷ 27th Board of Governors Meeting in Nice, France (May, 1994).

⁶⁸ Section 9, Republic Act No. 8371 (1997).

⁶⁹ Section 58, Republic Act No. 8371 (1997).

INDIGENOUS PEOPLES, COMMERCIAL ENTERPRISES, GLOBALIZATION AND THE ENVIRONMENT

It is hardly surprising that it was the DENR that took the responsibility of spearheading the government's efforts to attempt to recognize rights to ancestral domains. Many of its local offices are found in upland areas where indigenous peoples are affected by commercial natural resource extractive projects.

This department, which represents the Philippines in Asian Ministerial Meetings for the Environment (AMME) is also charged with finding ways to link environment and developmental concerns. This pressure comes not only from advocacy groups, but also, more importantly, from international concerns, especially financial institutions that promise resources for ecological projects.

The result is an administration that has been eager to project its compliance with international environmental obligations, while at the same time proceeding with privatizing its assets and utilities and deregulating in order to facilitate more private transactions and engage in liberalization initiatives so that it becomes 'competitive' on

world markets. This agenda has proven to be contradictory, especially in the natural resource management sector.

This same administration promulgated the Philippine Agenda 21 and the National Agenda for Sustainable Development in the same year.⁷⁰ On the other hand, the budget of the principal agency that is supposed to carry out community-based programmes, as well as its performance, reveals an altogether different record.

This contradiction between policy rhetoric and performance bodes ill for the implementation for the challenges presented by the Indigenous Peoples Rights Act. But this should be better understood if seen through the policy imperatives that caused it to be enacted. Pressure to respond to community interests and special projects of international funding institutions may have been enough for policymakers to grant these concessions, but the pressure of continued commercial exploitation provides the strongest inertia to its full implementation.

RECOMMENDATIONS

1. Projects and programmes involving marginalized cultures by engaging the legal system must focus on those where the imminent danger is the greatest;
2. Communities that *most* need legal intervention are those in areas where there usually is conflicting commercial or governmental interest actually occupying indigenous territory

⁷⁰ See Memorandum Ord. No. 288, s. 1995 directing the formulation of the Philippine Agenda 21. Also, Memorandum Ord. No. 399, s. September, 1996 directing the Operationalization of the Philippine Agenda 21 and Monitoring its Implementation.

- or threatening to curtail use and possession. Commercial projects mostly take the form of extractive natural resource industries (logging and mining); power projects (mostly hydro-electric in nature); or real estate projects. Government interest can be in the form of already existing reservations (forest, mining, military, education), forestry projects (community forestry programmes) or even ecological initiatives (protected areas);
3. Communities that *least* need legal intervention are those where indigenous political and social institutions are still strong and where there is no threat to curtail use or possession. Legal intervention requires the use of existing law as a whole. Many of the laws that could favourably be applied to indigenous peoples (including the Indigenous Peoples Rights Act) do not entirely square with the interests of specific communities. Resorting to the law sometimes introduces a host of new issues, which are totally unnecessary for the community;
 4. The utility of informal justice systems is not only about whether there are alternative processes. It will, to a large degree, be about whether the substantive norms in the official national legal system are relevant to the needs of marginalized communities or vulnerable sectors. Hence, studies on justice systems should go beyond the procedural framework. It should perhaps just as urgently focus on the substantive clarification of norms within a legal order;
 5. A more empirical review of the impact of the alternative systems introduced in the Philippines is urgently needed. Time should be spent not only in documenting cases that have been diverted from the formal adjudicatory processes, but also on whether the expectations coming from marginalized communities are indeed addressed by the Katarungang Pambarangay system, the Alternative Dispute Resolution Act or the Indigenous Peoples Rights Act;
 6. Resources must not only be invested to allow marginalized stakeholders to engage in and test social legislation, but they must also likewise be invested to continuously examine any other legislation that may have economic or political impact. Thus, while indigenous peoples may become involved with all the processes governed by the Indigenous Peoples Rights Act, they may perhaps be more severely affected by the Mining Act or the Forestry Code. Unfortunately, they will also most certainly suffer from the misallocation of government resources.