

In Search of Recognition



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Forest Peoples
Programme

In Search of Recognition



World Agroforestry Centre (ICRAF)
Indigenous Peoples Alliance of the Archipelago (AMAN - Aliansi Masyarakat Adat Nusantara)
Forest Peoples Programme (FPP)

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Our hope is that this book can be one of guides for indigenous peoples in finding answers for themselves based on the questions posed in this book.

Foreword

Restoring Original Autonomy

The conditions and challenges encountered by indigenous peoples vary from one country to another, even from one region to another within a country. However, there are fundamental similarities among them as marginalized peoples subject to repression, exploitation, expropriation, and marginalization for extended periods under the power of majority and predominant groups. Indigenous peoples become marginalized not just because of their small populations, but because of their conditions as groups that hold distinct and local-specific ideologies, socio-cultural and political systems. These distinct characteristics are drawn from and build on similarities of ancestral inheritance and common living space.

Way before the concepts of monarchy or sultanate were known, there were autonomous socio-political units across the archipelago governing and administering themselves and managing land and natural resources within their own respective jurisdictions. These communities developed regulations as legal expressions of their customary laws and self-governing institutions in order to sustain harmonious relationships among community members and between the communities and their living environment. These kinds of communities, who live based on the customs inherited for generations from their ancestors, are today known globally as indigenous peoples. In Indonesia, the terms used to describe these groups are varied and include *masyarakat adat* (customary society), tribal community, and native peoples. There are many differences between the communities. Indeed, diversity of local systems is often found within one ethnic or sub-ethnic group that speak the same language and share original religions or beliefs.

The names customary societies give for their distinct socio-political systems differ in each area. For example most areas in Aceh call their communities Kemukiman or Gampong, in Tanah Batak Toba communities are known as Huta or Horja or Bius, in Minangkabau as Nagari, in Siberut on Mentawai Islands as Laggai or Uma, in central and southern Sumatra as Marga or Kebatinan or Negeri. In inner Borneo they call the different community units Banua, Binua, Ketemenggungan, Balai, Lowu, or Lewu, in Tana Toraja Lembang or Penanian, in Kei Islands they are known as Ratchap or Ohoi, and there are many other names.

From a historical perspective, in response to the intrusion of external forces and the urge to meet common needs among themselves, indigenous peoples have always been dynamic. Changes take place slowly in some communities or are almost imperceptible in others. There are indigenous peoples, who still retain the practices of their original socio-cultural-politic-religious system, such as the Kanekes People (popularly known as Orang Badui) in Banten and the Ammatoa People (known by outsiders as Orang Kajang Dalam) in Bulukumba. There are also indigenous peoples that change quickly and thoroughly such as those communities that inhabit Java and along the coast of eastern Sumatra. Yet many communities in the inner parts of Java sustain their characteristics as politically independent societies (practising original autonomy). However, to some extent, they have adopted or accepted new values, regulations and social institutions originating from other communities. In some pockets of Java, one can find communities with relatively strong characteristics of 'original' culture and customs, for example among the Kasepuhan in Southern Banten, Orang Tengger and Orang Using in East Java as well as Sedulur Sikep in Central Java.

Indigenous peoples in the archipelago have faced waves of intervention and even coercion to accept the values of those groups that exercise power over them. The first wave of intervention over the archipelago started through the introduction of foreign religions each with its own concept of truth. These religions tried to convert followers to new values underpinned by political concepts derived from

feudal monarchies and sultanates. Such hegemonic interactions transformed the way of life of some indigenous peoples, particularly those communities living in coastal and lowland areas. Feudalism as exercised by monarchies and sultanates affected the social political system of some indigenous peoples, especially those who lived in areas of particular interest to the state economy and foreign merchants. Such areas included irrigable agricultural land that could produce crops (mainly rice) to supply the kingdoms and sultanates with food and trade commodities. Such areas effectively provided insurance for owners of capital and foreign traders.

The second wave of interventions happened during the European colonial era. During this period, the process of negating indigenous peoples' rights was implemented systematically through the enforcement of 'Western' law and state government in order to protect foreign corporate investment in the East Indies. Regions that were wealthy with export commodities, including Java, which was already the most populated island and the center of political power in the archipelago, were the most vulnerable and repressed during this period of history. The Agrarian Law of 1870 as the legal product of Dutch colonial government was one source of repression, expropriation and exploitation of indigenous peoples' rights to their lands and natural resources. This law stipulated that the state owned all lands except where the state had issued title deeds.

The first government of the newly independent Republic of Indonesia (which later became known as the Old Order Regime) strived to reduce the negative impacts of colonial policies on indigenous peoples. Chapter 18 of the 1945 Constitution mandated the state to recognize and protect the original autonomy of indigenous peoples to govern and administer their own territory under special region status. In the same way, the Agrarian Law of 1960 also recognized and protected the existence of hak ulayat or communal rights of indigenous peoples although it subordinated these rights to the national interest.

Calamity for indigenous peoples resurfaced after the military coup that took power from President Sukarno. This military regime called itself the New Order Regime. The spirit of the 1945 Constitution to restore the original autonomy of indigenous peoples under special status and to provide legal protection to communal rights for indigenous peoples as stated in the Agrarian Law 1960 was violated. The New Order Regime revived the soul and spirit of colonialism as contained in the Agrarian Law of 1870. Expressions of colonialist legal concepts can be found in sectoral laws such as those relating to Forestry, Mining, Fisheries, Transmigration and other sectors.

To strengthen its grip on indigenous peoples, the military-colonialist New Order sought to revoke the special status granted to protect the autonomy of indigenous peoples. The regime enforced various laws and regulations as a means of political control such as the centralistic government regulations and laws on 'Democracy Pancasila' and later allowed the emergence of mass militias which governed in a repressive manner. Throughout the archipelago, the government imposed the Javanese model of village governance on all villages in order to break the autonomy of indigenous peoples. This marked the third wave of intervention that was the most lethal in curtailing the social energy of indigenous peoples. During this period, almost all indigenous peoples' lands were handed out as concessions for large-scale natural resource exploitation such as timber concessions, mining and plantation concessions, permits to commercial fishing for foreign fleets, various transmigration projects and military-political projects like ABRI Manunggal Desa ('the Military Serves the Village').

The fall of Soeharto as the leader of the military-colonialist regime brought hope of change among indigenous peoples. As well as opening up political space, there has been a process of implementation of Regional Autonomy - with Papua and Aceh receiving Special Autonomy. With all the imperfections and challenges within the Regional Autonomy Law, this new policy does offer space for indigenous peoples to reassert their autonomy as mandated in the 1945

Constitution, especially as stated in the Second Amendment (2002) regarding the strengthening of recognition, respect and protection provided by the State to ensure that indigenous peoples can exercise their rights. The question is what kind of autonomy should be fought for by indigenous peoples? This quest is essential considering that most of the original customary structures have been badly affected by the three waves of intervention mentioned above. The third wave that took place over 30 years during the New Order Regime was particularly effective in demolishing these structures.

Efforts to revive the autonomy of communities should be based on the distinct nature of each indigenous people. For those customary structures without significant damage, revitalization of autonomy can be implemented by indigenous peoples and their supporters based on these existing structures but taking into account their new situation. This effort should be followed with limited enrichment of certain aspects affected by revival of original autonomy. For those indigenous peoples whose structures have been seriously damaged, efforts should be made to reconstruct or renew them based on community level discussions and informed choices. What are the strategies and actions that respective indigenous peoples and their supporters can take in order to restore autonomy? This is a very important question to be answered by all elements of the indigenous peoples' movement of the archipelago.

This book, when read and practised diligently, offers relevant contributions to the effort of finding options for indigenous peoples in the future. By using a simple question and answer methodology, to be exercised among fellow indigenous peoples or between facilitators and communities, the book can be a practical guide to strengthen the collective identity of indigenous peoples. The discussions, which have been organized systematically to answer complex questions, will help readers to build solidarity and collective commitments with indigenous peoples to seize or materialize their original autonomy. Another important thing

from this book is the presentation of examples from other countries as sources of inspiration and as learning materials for readers.

As a supporter of indigenous peoples, I suggest that both activists who originate from and live in customary communities as well as facilitators or supporters of indigenous peoples living outside, read this book prior to conducting discussions with communities. Starting with a better understanding of the content of this book, try to generate key questions to discuss with indigenous peoples. Whenever possible, it would be better to question and discuss the answers in sequence. Listen and take note of all emerging answers and then discuss the issues together in depth. At the end of the discussion of each question, open this book again to cite examples from inside and outside the country with regard to each topic as discussed. Ensure that you give enough opportunities for participants to respond and to discuss comparative examples. This will then provide opportunities for participants to build common efforts to reclaim their original autonomy as indigenous peoples.

Hopefully this book can strengthen the struggle of indigenous peoples to exercise their rights as dreamt of by the founding leaders of this Nation and as mandated in the Constitution of 1945.

Bogor, June 2003

Abdon Nababan
Executive Secretary AMAN

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Introduction

At its 1999 Congress, AMAN issued a famous statement which has made it internationally renowned.

'We will not recognize the State, unless the State recognizes us.'

This strong statement has not only challenged the government to respond to the demands of the indigenous peoples, it has also stimulated a fertile and much needed debate inside the communities on what kind of recognition the indigenous peoples do actually seek from government. Moreover, the question goes further: if the State does recognize the rights of indigenous peoples how exactly will they then exercise these rights. Are customary institutions strong enough to resume the role of community self-governance? Is customary law well enough respected in the communities to assure community welfare, social justice and sound natural resource management? Is customary law suited to governing the interactions between communities and global markets? Does custom need strengthening or reforming?

Unpicking the implications of the demand for 'Recognition' has thus emerged as a central issue in this struggle by the indigenous peoples to regain control of their lands, lives and destinies.

At its founding Congress, and in many subsequent statements, AMAN also issued certain key demands. These included demands for reform of laws and policies in order to secure:

- Rights to land
- Control of natural resources

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- Respect for custom and identity
- Self-governance through customary institutions
- Recognition of customary law

The same demands are being made by indigenous peoples all over the world.

These rights are also already recognized in international law. Specifically the International Covenant on Civil and Political Rights, the International Covenant on Social, Cultural and Economic Rights and the United Nations Convention on the Elimination of Racial Discrimination have been interpreted as conferring these rights on indigenous peoples. These norms have been consolidated in ILO Convention No. 169 and in the draft United Nations Declaration on the Rights of Indigenous Peoples.

These instruments can be summarised as recognizing indigenous peoples' rights to:

- Self-determination
- Represent themselves through their own institutions
- Exercise their customary law
- Ownership and control of their land and natural resources
- Self-identification
- Intellectual property

Although not all these international human rights instruments have yet been ratified by Indonesia, a general endorsement of international human rights standards is now included in the revised constitution and in the 1999 Human Rights Act. In 1999, the Indonesian parliament also assented to the adoption of the Convention on the Elimination of Racial Discrimination.

So, this is an important moment in Indonesia's history. As the State now decides how to give expression to these international standards in practice through special laws and as part of the process of democratic reform and decentralization, care needs to be taken that the laws really fit with the realities and aspirations of customary communities.

The participatory workshops on which this report are based were carried out to explore these issues in more detail through community level discussions. Eight community-level workshops in West Kalimantan, South Sulawesi and East Kalimantan were held organized by AMAN and its regional bodies. The workshops were informal in character and highly interactive and were designed both to share insights and to encourage participants to speak out.

Taking our lead from the famous statement of AMAN, the workshops explored four questions, which were then discussed through break out groups and in the plenary sessions of each workshop. These questions were:

1. In what way do you expect the State to recognize indigenous peoples?
2. What rights do you seek over your lands and natural resources?
3. Which person or institution should represent your community in negotiations with outsiders?
4. If you seek self-governance, through which institutions will you govern yourselves? How will you relate to the local government?

Not surprisingly, the workshops found that communities had strong views on these matters, even though many of the issues discussed had not been matters of formal public debate in the villages before. Of course, people knew their own customary systems. However, the workshops revealed that they had not thought in so much detail how - legally and institutionally - these systems should be fitted into reformed State structures and laws.

This booklet has been produced to document the results of these discussions. The purpose of this booklet is not to tell the communities the answers to these questions but to help them develop their own answers to these questions. The booklet thus explores some of the institutional dilemmas faced by the customary law communities in Indonesia. It does so first by reference to examples of how indigenous peoples have dealt with these challenges - successfully and unsuccessfully - in other parts of the world. The booklet then summarises some of the main views expressed by workshop participants and the conclusions that could then be drawn. The aim is to help indigenous peoples make better-informed choices in the future.



Recognition and Self-Determination

Comparative Examples

International human rights law recognizes that all peoples have the right to self-determination. By virtue of that right they may freely determine their own political status and freely pursue their economic, social and cultural development. Indigenous peoples also claim this right and this right has been recognized in the draft United Nations Declaration of the Rights of Indigenous Peoples. However, this claim has provoked strong reactions from many governments who fear that the exercise of this right to self-determination by indigenous peoples may lead to the dismemberment of the nation state. However, while self-determination certainly can imply secession, it can also imply quite different outcomes.

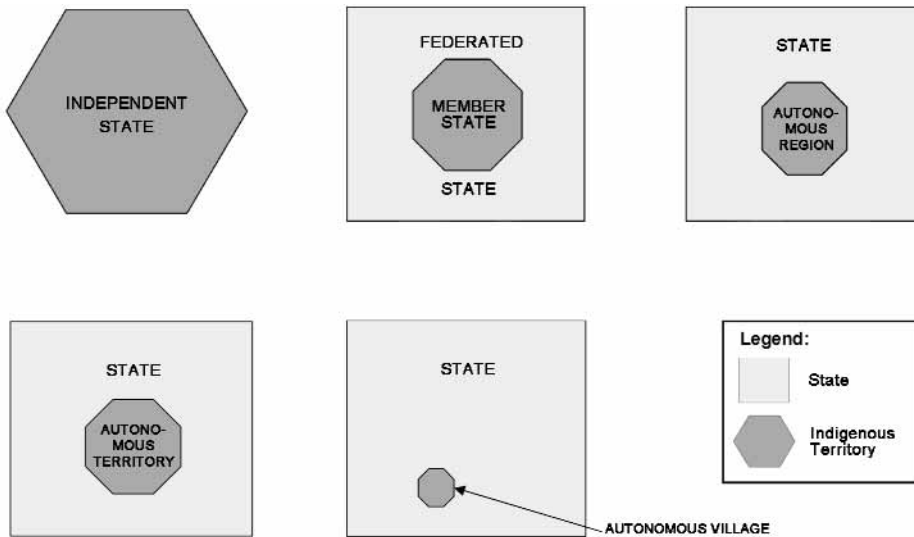
Most indigenous peoples do not seek full independence but seek to re-negotiate their relations with the States in which they now find themselves in order to achieve greater autonomy in their social, cultural, economic and political development. At the minimum, what most are seeking is the right to control their territories and to ensure that no development should be imposed on them without their free, prior and informed consent.

In other parts of the world, at a political level, indigenous peoples have sought or secured a measure of self-determination at very varied scales. The options range from those peoples who have asserted the right to self-determination as Independent States right down to those which are recognised only as autonomous villages.

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Examples of this continuum between secession and very local government include:

- Independent States as in East Timor/Pacific Islands - where the indigenous peoples have full independence as sovereign states.
- 'Domestic dependent nations' as in USA - where indigenous peoples are recognised as self-governing nations with rights to frame their own laws, govern themselves and manage their own lands but whose sovereignty is limited by the fiduciary responsibilities of the USA as exercised through the US Congress.
- States within a Federation - Jharkhand in India - where a new state was created within the India in an area where indigenous peoples were very numerous but not predominant to give them greater control of their affairs.
- Autonomous Territories - like Nunavut in Canada - where a very large area of Northern Canada is now directly administered by Inuit peoples as an autonomous territory but subject to complicated benefit- and revenue-sharing arrangements with the rest of Canada, especially with regard to mineral rights.
- Autonomous Provinces - Miskito, Sumu and Rama peoples in Nicaragua - where after an indigenous uprising an autonomous province was created in a predominantly indigenous area which ensures greater indigenous participation in the local government but where central government retains control over the higher tiers of government.
- Autonomous territories/reserves - Resguardos in Colombia - where indigenous peoples have secured rights to very large areas of their ancestral lands and have the right to local self-government within these areas which usually embrace a large number of villages.
- Autonomous Villages and Districts - as in Guyana - where indigenous peoples have more limited rights to order relations within their communities and where land rights are restricted to small plots of land within their ancestral territories.



Experience has shown that where indigenous peoples have chosen the larger scales of self-governance, small communities may still face the same challenges of dealing with the State as those in large, non-self-governing polities.

Experience has also shown that it is wise for indigenous peoples to choose a scale of self-determination so that the capacity of their customary institutions more or less matches the size and scope of the self-governing area. The responsibilities of self-governance are not just political, but economic, social and cultural too. Some indigenous peoples have taken responsibility for education and health issues, for tax regimes and enforcement of the law. Others prefer to leave some of these issues in the hands of the State. Experience shows that there are risks in getting control of overlarge territories with weak institutions: indeed some of the Inuit in Nunavut in Canada are already talking resentfully of the power and influence of the so-called

'Nunacrats' who administer their territory many of whom are not even indigenous people, as the indigenous people are said to lack the qualifications necessary to run the bureaucracy.

Views from the Workshops

During the workshops a strong view was expressed that :

Under colonialism Indonesia was colonised but the communities had their freedom. Under independence the country got its freedom but has colonised the communities. National reform must mean giving freedom to the customary communities if it is not to be a continuation of the Dictatorship.

Participants made clear that they seek recognition in the Constitution, through a new Basic Law and through Local Regulations. All these new legal instruments should be elaborated through a participatory process of legal reform.

In effect, it seems that indigenous peoples are seeking a restoration of the system of legal pluralism somewhat like the system established under the Dutch, such that equal authority will be given to customary law within traditional areas as is given to so called positive law- with clarity of how the two legal systems should interrelate.

By 'recognition' the participants claim :

- That their civil authority within customary areas be upheld, for example to hold weddings which would have status equal to marriages under State law.
- Use of traditional names to both institutions and places

- Recognition of customary territories
- The right to self-governance through customary law and customary institutions
- One view was that custom should apply to both indigenous and non-indigenous people in customary areas
- The right to run their own education systems

Autonomy is being demanded at very different levels in the different areas visited, but in all cases firmly within the framework of the State:

- Lembang at level of the subdistrict or multiple villages in Tana Toraja District. After Local Government Regulation Number 2 of 2001 about Customary Governance, the indigenous people in Tana Toraja gained customary self-governance at the subdistrict level of the government administration. There are now 114 Lembang replacing the 325 administrative villages in Tana Toraja. The government administration continues as before at the district level.
- Binua at level of multiple villages in West Kalimantan
- Wilayah Adat at level of village and Wilayah Adat Besar at level of multiple villages in East Kalimantan.



Rights Over Land and Natural Resources

Comparative Examples

Indigenous peoples' experience in other parts of the world shows all too clearly that, when it comes to land rights, the wrong law may be worse than no law. For example, in the USA in the C19th, the government decided to break up Native Peoples Reservations, which were areas held by the State on behalf of the Native Peoples, and to incorporate the lands of unsettled



indigenous communities into the land markets. The indigenous peoples in the Mississippi valley

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North American Native Peoples lost huge areas of land during the 'Indian Wars' against government troops but they lost land even faster after the Government parcelled up their lands into saleable plots. Land markets, debt and corrupt officials speeded up the process of dispossession.



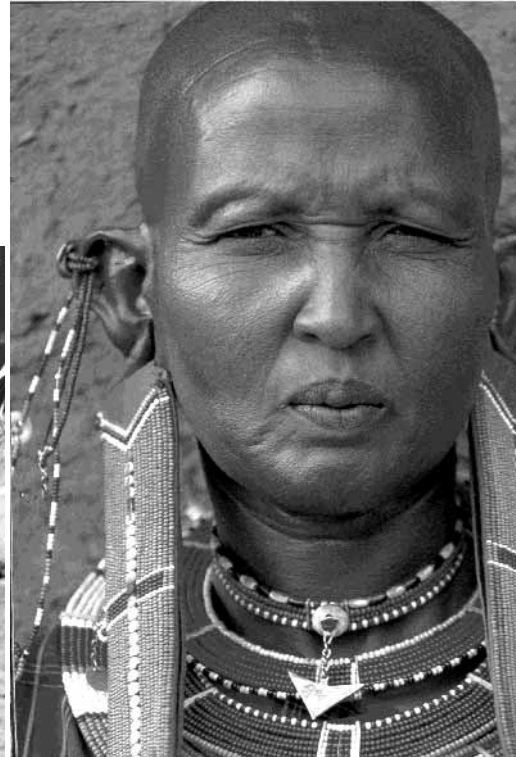
Native Peoples queuing to get land titles to small plots of their ancestral territories (1898). The allotment system almost destroyed traditional social structures and led to impoverishment and the rapid loss of land to outsiders.

lost their lands and resources faster after the Dawes Act provided individual titles to the Native Peoples than before when land ownership was unclear.

In East Africa today, the titling of Maasai lands as privately owned land has also led to a rapid loss of lands, as chiefs sell and trade newly established 'ranches' in order to consolidate their personal wealth though at the expense of the wider group. Many impoverished Maasai, who have been dispossessed of their grazing lands, say that a land title is just a license to sell your lands.

In Latin America many indigenous peoples have got around this problem by demanding land titles in which lands are both collectively owned and inalienable. This means that the lands belong in perpetuity to the community

The Maasai cattle herders of East Africa once owned extensive pasturelands. Land titling has led to the tribal elite gaining land, while others are left with nothing. Many conclude that 'land titles are just a licence to sell our land'.



Sanema Peoples from South Venezuela. South American laws now recognize the right of indigenous peoples to inalienable, unleaseable, unmortgageable, collective rights to their lands and territories.

and are thus preserved for the benefit of future generations. 'Inalienable' lands are thus untransferable - they cannot be sold, leased or mortgaged. Many Latin American States have now adopted legislation recognizing this principle of inalienable, collective lands. The downside is that this means

communities cannot use their lands as collateral for loans from banks- but there are other ways that rural communities can secure credit without putting their futures in jeopardy.

In the early 20th century Dutch lawyers invested a great deal of time analysing custom in Indonesia. They discerned 19 different customary law regions in Indonesia substantially on the basis of different customs related to land. Notwithstanding their emphasis on these differences, Dutch lawyers also generalised that a defining aspect of customary law was the principle of the 'right of allocation': according to these studies in Indonesia land was not owned in the western sense, but it belonged to the community. Land could not be bought or sold, but the community allocated land to community members to use and inherit and the land could, temporarily, be allocated to outsiders to use. The current concept of inalienable collective freehold comes somewhere near this notion.

Views from the Workshops

What sort of rights are being asserted by indigenous peoples today? During one workshop this powerful statement was made:

In my community our understanding is that we have rights to our land and the natural resources both above and below the land. Everything up to sky belongs to us. Several laws and policies have classified our forests as State forests and the minerals as property of the State. We don't see it like that. I have hair on my arm, on my skin. Both are mine. I also own the flesh and bones beneath. They are also mine. No one has the right to take me apart. But the policy has cut these things apart and thus has cut us into pieces. We want the land back whole.

Participants at the workshops also articulated demands to what land rights lawyers call a full 'bundle of rights'. Participants asserted rights to own, protect, defend, manage, regulate, control, use and inherit their lands and wider territories.

In many workshops emphasis was placed on the right of the communities to identify and demarcate these lands through community mapping exercises based on their own notions of their lands and in collaboration with neighbouring villages. Lands so defined should include: areas of customary forest use, sacred areas, agroforestry areas, grazing lands, shifting cultivation areas and fallows, as well as village sites and wet rice areas.

However, while it was clear what rights they want, there was a lack of clarity about where State titling comes in. This is not surprising given the chaotic state of land titling in the country in general.

The workshops also revealed considerable confusion or latitude in the precise meaning of the concept of ulayat. We found the term variously used to mean:

- customary lands as opposed to titled lands
- areas of use rights not ownership rights
- collective areas as opposed to individually owned areas

Again this was not surprising given that Indonesian law is equally confused about the legal meaning of hak ulayat.

Most workshop participants emphasised the importance of their communities regaining their collective rights to their customary lands. There was much less clarity, though, about how communities would therefore deal with land markets. Although good data are lacking, the evidence presented suggests that

land markets are intrusive and very prevalent in some areas. Land sales are not limited to areas which are secured by proper titles - sertifikat - but are being made on the basis of much less formal deeds. Moreover, markets are not just restricted to wet rice areas. Land markets are active in the rubber small-holdings and agroforestry lands of West Kalimantan and in dry-land farming areas in Toraja. Customary mechanisms to control land transfers have been weakened by the imposition of the uniform village level administrative system and Basic Agrarian Law.

In Toraja 80% of wet rice areas are mortgaged - mainly as part of an internal market in land linked to obligatory contributions of sacrificial buffaloes and other livestock that must be contributed to family funerals. However, land speculation is intensifying with pressure to acquire land for hotels and coffee estates. As the noble and land-owning classes are increasingly resident in the cities, they are less and less subject to custom. In West Kalimantan even the indigenous-run Credit Union accepts land as collateral when making loans.

Discussions about whether there was a need to regulate land markets if custom was to be secured led to very varied responses. Some participants asserted the individual's right to buy and sell their land. Others thought that land sales should be controlled by customary institutions, while still others expressed the view that customary territories should be inalienable but that land transfers within the community should be allowed subject to customary law.

This is a major area in need of further study and discussion, if unrealistic land tenure regimes are not to be imposed or chosen unwarily.



Legal Personality

Comparative Examples

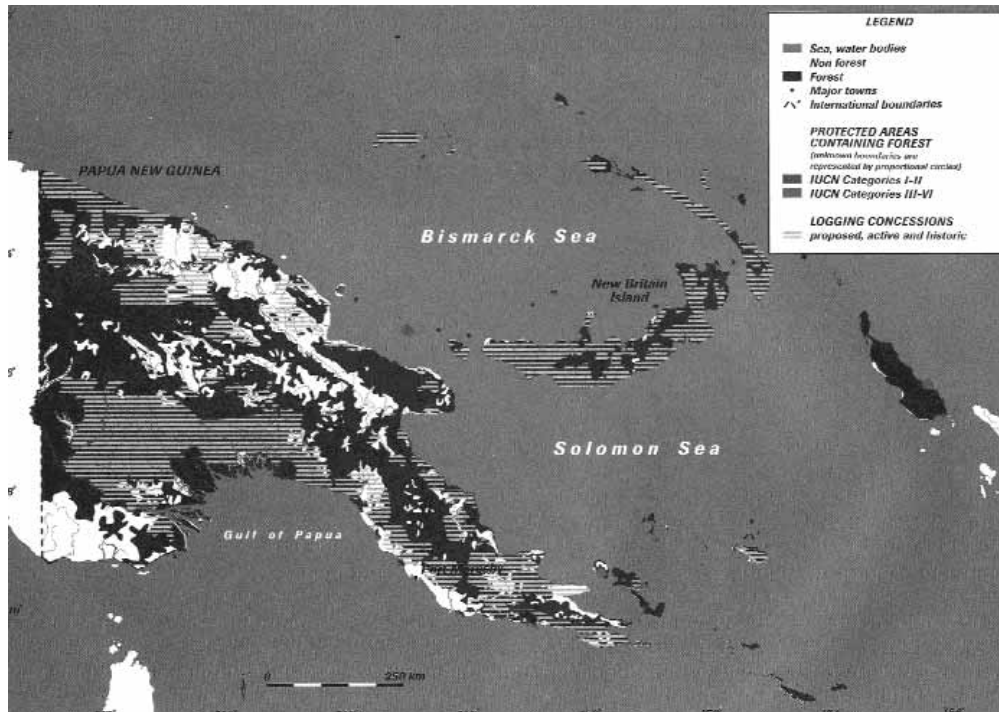
In many other countries, lack of clarity about how indigenous communities should be represented in negotiations with outsiders has caused serious problems. Who has the legal right to negotiate with outsiders on behalf of the community? Who signs agreements? Who else is involved? Without clear answers to these questions, indigenous communities can easily be defrauded or corrupted.

For example in Papua New Guinea, where 98% of the land is collectively owned by 'clans' which have strong rights to the timber on those lands, nevertheless the majority of lowland forest areas are leased out to loggers, notwithstanding the widespread damage this is causing to community welfare and resources. There are many reasons for this. But one reason is that, despite the strong rights conferred by the law, there is considerable lack of precision in the law about just who can sign contracts on behalf of the community. Fake or unrepresentative landowners' associations have thus been able to incorporate themselves under various laws and cut deals with outsiders. Too often the money ends up in their pockets and is not invested in the community's welfare. The result is that a few individuals get wealthy at the expense of the wider group who lose their forests and their livelihoods.

In the southern Philippines, where land rights are now beginning to be secured under the new Indigenous Peoples Rights Act, there is a similarly lack of clarity about who speaks for the community. A growing experience is

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Although indigenous clans own 98% of the territory of Papua New Guinea, loggers have gained concessions over most of the accessible forests in the country.

that the customary leaders who traditionally represent the communities are likewise negotiating deals to their personal advantage but at the cost of the communities. It seems that traditional systems for negotiating with outsiders, evolved in an era of small-scale barter for visible goods such as cloth, iron, salt and bananas. These institutions have not proved strong enough to regulate much more invisible and lucrative trades involving cash, minerals, timber and land. People feel that their leaders are betraying them and are demanding better accountability.

Papua New Guinean Highlanders displaying their wealth in the 1930s. When wealth is visible and exchange is public, 'big men' can be trusted to negotiate on behalf of the community. Today, logging and mining deals are often made in far off capitals and the money ends up in invisible bank accounts. Community members often lose out.



In other parts of the world, indigenous peoples have evolved new institutions and mechanisms to regulate such transactions to ensure that they are honest and that the benefits are enjoyed by all community members. In Canada, for example, indigenous peoples dealing with mining companies have appointed special teams of negotiators to interrelate with outsiders and secure binding agreements through legally enforceable, staged contracts which ensure that trust funds are set up, new community councils are established to administer compensation monies, and oversight mechanisms by auditors and treasurers are put in place to ensure funds are used for agreed ends.

Views from the Workshops

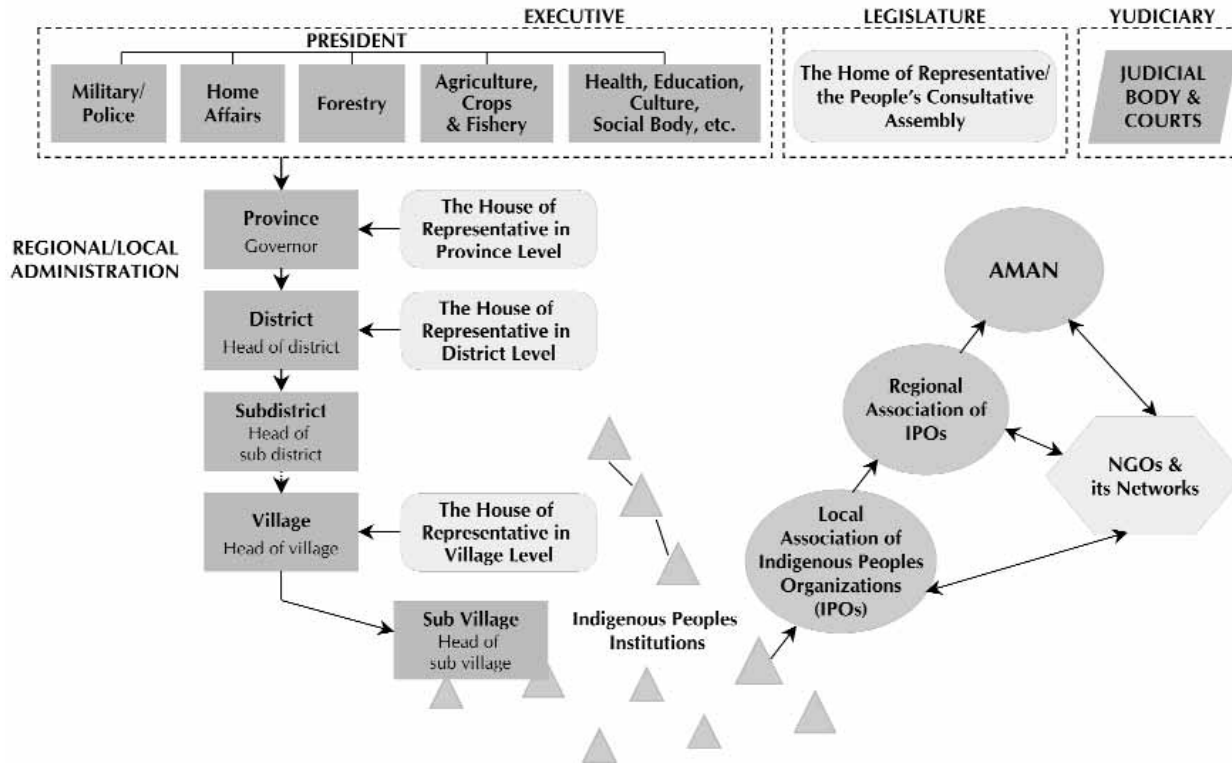
Lack of accountability in traditional leaders and lack of clarity in the law about who is authorised to deal on behalf of communities are clearly both problems in Indonesia also. As one participant from the middle Mahakam in East Kalimantan noted:

The Dayak leaders are now mostly in the cities thinking of their own profits. They are signing away logging concessions to their own village forests. The situation is unclear. Who destroys the forests? Not just Bob Hasan [a notorious timber baron, now in jail for corruption] but maybe our own community leaders too!

Notwithstanding this candour, most participants were basically of the view that they want their own leaders recognised as their legitimate representatives in negotiations with outsiders. They varied in the degree of emphasis they placed on how much additional controls need to be instituted to control these leaders. Many communities, especially those which had been ripped off by their leaders in the recent past, advocate more inclusive decision-making processes to ensure fairer deals. In two workshops, participants also stressed that when outsiders come to do business in custom areas, they must agree to observe custom and be bound by custom law. There was a strong expectation that the AMAN movement will provide vigilance over policy makers and introduce the concept of free and prior informed consent to every development plan in customary areas.

The workshops made clear one other worrying finding: no one seems to have previously thought about the issue of legal personality.

THE CHALLENGE OF SELF-GOVERNANCE OF INDIGENOUS PEOPLES IN INDONESIA





Self-Governance and the Administration

The question of how indigenous peoples are best governed by outsiders is one that has long been experimented with by colonial powers. Aside from direct conquest and extermination - which has been all too common - two predominant approaches have been adopted. One approach is by direct rule, an approach favoured by the French, in which the imposed administrative system reaches right down into the smallest settlements with the aim not only of imposing the will of the ruler on the ruled to the least detail but also of eradicating indigenous culture and replacing it with the culture of the rulers. This was the approach also favoured by the Suharto regime in Indonesia.

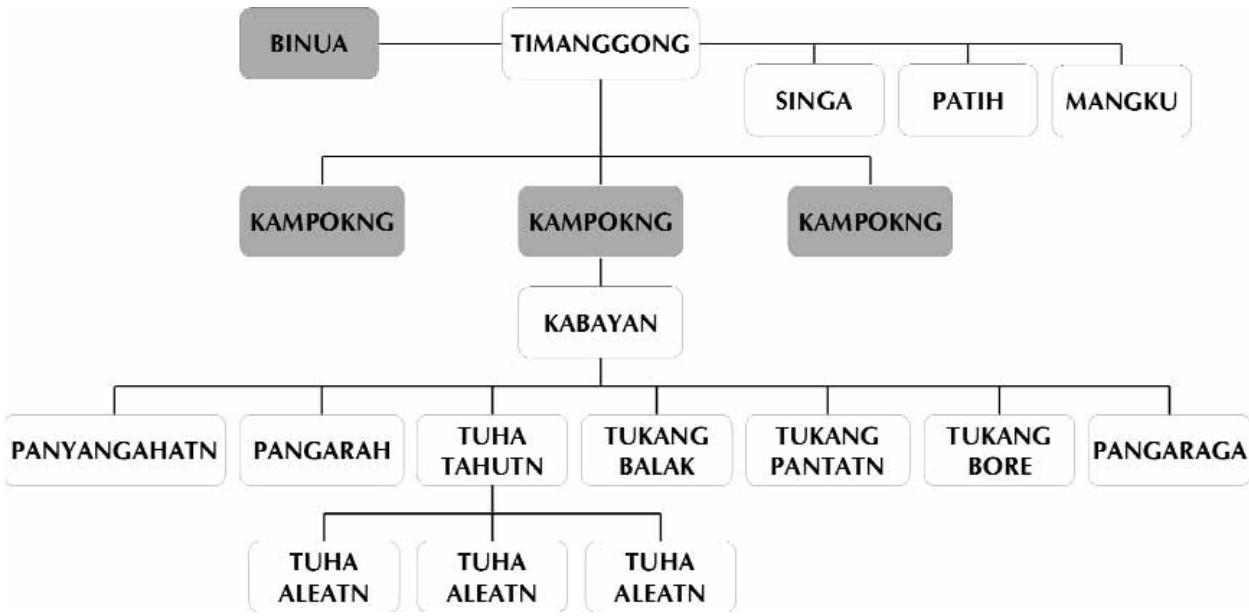
By contrast, British colonists favoured the approach of indirect rule, whereby native peoples were allowed to govern themselves through their own institutions and given the authority to interpret and impose colonial authority and raise taxes on behalf of the rulers. The British favoured this approach as a cheaper one than direct rule.

The Netherlands East Indies was governed by a mixture of these two approaches, with indirect rule prevailing in the Outer Islands and direct rule being limited to the areas of longest occupation and most intense economic exploitation. After independence, governance through direct rule was gradually imposed both during the period of 'Guided Democracy' and by the 'New Order' government which replaced it.

Indonesian indigenous peoples currently experiencing administration through direct rule are thus tempted to promote models of indirect rule as a

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SELF-GOVERNANCE SYSTEM OF THE KANAYATN DAYAKS OF WEST KALIMANTAN



Kampong: a village - smallest unit of customary administration

Binua: a group of kampongs, usually consists of 10 kampongs

Patih: person who leads a Bide Banua territory. This person has the right to take decisions in the case of unresolved problems tried at Timanggong level.

Mangku: the deputy leader of a Patih who conducts coordination work among members in a Bide Banua territory. A Mangku does not have authority over the territory and does not have the right to administer or influence the decisions taken by a Timanggong. A Mangku only coordinates the Timanggong with maximum administration area up to 3 Binuas.

Timanggong: the Head of Binua. Timanggong handles all problems that occur in the Binua - problems which the Pasirah of that Binua cannot resolve.

Pasirah: the Head of a Kampong who is responsible to take the lead in Kampung governance.

Singa: the coordinator of several Pasirah. This person does not have territorial authority and cannot overpower the decision of Pasirah.

Kabayan: the Vice coordinator of a Pasirah

Pangaraga: the subordinate of a Pasirah who is responsible to administer adat or customary affairs or problems.

Tuha Tahutn: A person who has the mandate to take care of other problems in relation with agriculture, such as determining when the beginning of the land clearing and planting season will fall, and so on.

Tukang Balak: A person who has medicinal knowledge and performed circumcision.

Panyangahatn: Religious leader who has the task to read mantras and prayers for Jubata (God) in religious adat ceremonies.

Tuha Aleatn: the Head of farmers group who organizes work roasters to help forest gardens (ladang) of farmers within the same group. Tuha Aleatn coordinates and administers other gatherings in the same group through collective community work (gotong royong)

Pangarah: a person who assists the head of a Kampong in community relations as well as gathering community members to conduct traditional or tribal ceremonies or other customary affairs. The Pengarah executes the plan as developed by the Head of Kampong and communities.

preferable alternative. We heard from numerous workshop participants who demanded that administration in their communities should be vested in their customary institutions and went into great detail about which institutions should be so recognised - the Timanggong being the key position in West Kalimantan (see Kanayatn organigram) and the Kepala Adat Besar being the one most often mentioned in East Kalimantan.

Perhaps, the experience of indigenous peoples in other parts of the world should make them cautious about this. The choice between direct rule and indirect rule should not be confused as a choice between imposed government and autonomy. Indirect rule through indigenous institutions was adopted by colonial states to ensure their rule, extract revenue and control resources and not to secure local autonomy.

In the Malaysian State of Sarawak for example, where administration through indirect rule has been retained from the colonial days, many Dayaks note that the traditional leadership, which is part of the local administration, now often make decisions in favour of outsiders, notably loggers and plantation companies, and against the interests of their own people. For this reason in a number of communities, new longhouse associations have been created, as a way of creating new democratic and accountable institutions under village control as a counter-weight to their traditional institutions which have been co-opted by the State.

In Latin America, there has likewise been a widespread experience of manipulation of indigenous leaders co-opted into government administrative structures. Leaders all too often become more responsive to government fiat than community demands as they seek personal advancement and access to budgets through the prevailing patron-client relations. Party politics makes

leaders into tools of the party machines and divide and factionalise communities.

In Mexico, indigenous peoples' representatives have learned that it is best to keep indigenous institutions separate the machinery of the state, so that indigenous systems of self-governance can act as checks and balances on indigenous politicians who enter the administration. The Kajang people in South Sulawesi have made this choice in their relations with the local government there, while the Toraja have favoured the idea of getting the existing institution of the lembang recognized as part of the local administration.



Separation of Powers

Western democracies are often celebrated as having particularly worthy forms of government because they emphasise the importance of a 'separation of powers', according to which the electorate has access to the three independent 'estates' of government - the legislature, the executive and the judiciary. The objective of this separation of powers is to ensure that no one person or institution becomes unduly powerful. Checks and balances thus exist to ensure that the executive is accountable to the legislature, the legislature is accountable to the electorate and all are accountable before the courts, which rule according to laws agreed by the legislature.

However, western democracies hold no monopoly on social systems that include mechanisms to control power and ensure accountability. For example, among the Oglala Sioux in the 19th century, who long resisted the takeover of their lands by US government backed gold-miners and land speculators, before their eventual destruction by the US cavalry, the separation of powers was a fundamental part of their political organization.

In Oglala society, the highest political body was the tribal council, which was composed of the most important men of the society, referred to as the 'big bellies'. The council would meet approximately every four years to elect four chiefs who would have the task of making major political and social decisions during their period in power. The chiefs were generally men of wisdom and experience with reputations for generosity and concern for the community.

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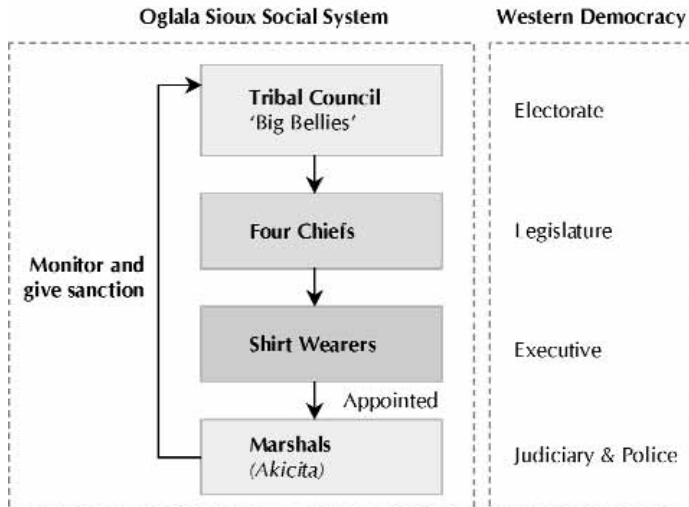


Sioux People after negotiating the Fort Laramie Treaty, which deprived them of much of their lands. Traditional Sioux institutions of accountability were largely ignored by officials.

The chiefs in turn passed on the task of putting their decisions into practice to a body of energetic, younger men with strong wills and reputations for bravery, who were referred to as the 'shirt wearers'. These 'shirt-wearers' were appointed by the chiefs. (The renowned Sioux leader 'Crazy Horse' was a 'shirt wearer' at the time he began to mobilize opposition to the US Cavalry that led to the famous battle of Big Horn.). Those who violated the decisions of the chiefs and tried to ignore the authority of the 'shirt wearers' were held accountable by the akicita, community 'marshals' who acted to enforce the law.

Such systems of self-government were largely ignored by the US Government in the establishment of reservations. However, since the 1920s, tribal self-government has been once again encouraged. Experience has shown that the most successful tribal administrations not only retain this separation of powers

THE SEPARATION OF POWERS IN TRADITIONAL OGLALA SIOUX POLITICAL ORGANIZATION¹



¹ Based on summary of Oglala Sioux institutions found in Stephen Cornell and Joseph Kalt, 1992, *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development*, University of California, Los Angeles: 18-19.

Sitting Bull, a shaman of the Hunkpapa Teton Sioux who became a chief and war-leader, united the Sioux against the US Army. Sioux chiefs held authority as long as they were respected by the 'big bellies'. Their power was always limited.



but also base their current administrative systems on the traditional institutions. Under Public Law 638, Indians are now enabled to administer public funds supplied to reservations for programmes in health, education, road construction and so on.

Views from the Workshops:

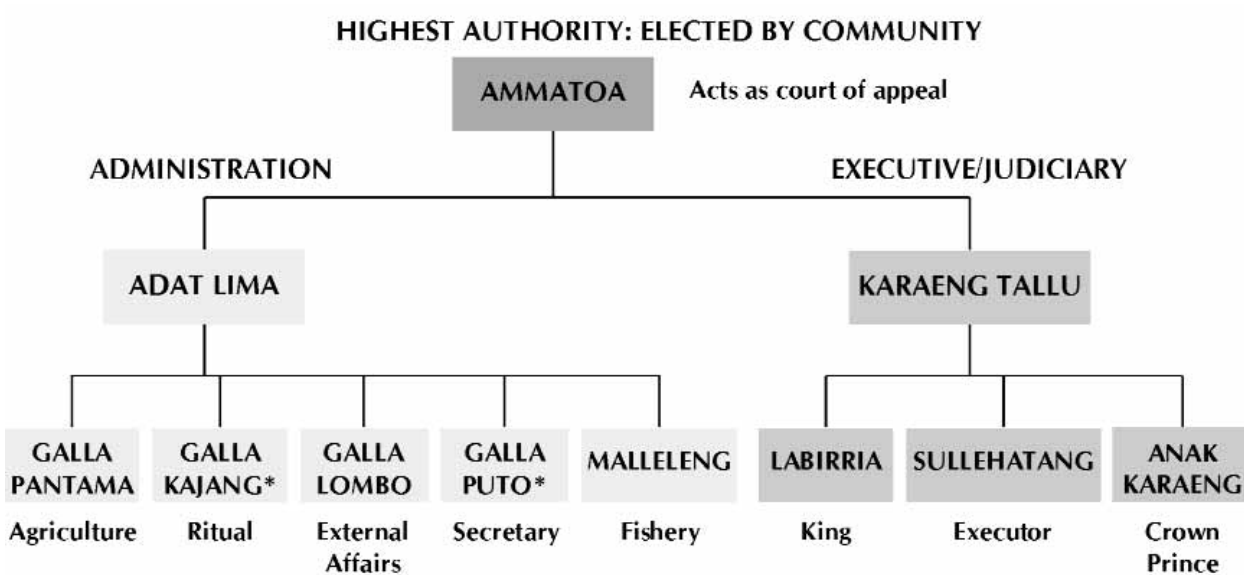
In a number of workshops, participants were stimulated by these discussions to re-evaluate their own institutions in terms of a 'separation of powers'.

The lack of a separation of powers in many traditional Dayak social organisations was noted as a potential problem in Kalimantan. As one Dayak leader in from West Kalimantan remarked:

It seems the Timanggong is a superman. He has the authority to govern everything. So it is easy to buy us, you only have to buy one person. In other societies they have a separation of powers, unlike us. Luckily we now have AMA so the Timanggong have a chance of developing themselves. The Timanggong is the critical position in the self-government system.

In South Sulawesi, participants examined the social organisation of the Kajang people in these terms and decided that they did indeed have a system that could be said to demonstrate a separation of powers, including a judiciary and an appellate court (see diagram of Kajang social structure).

INSTITUTIONS OF SELF-GOVERNANCE AMONG THE KAJANG OF SOUTH SULAWESI



The Indigenous Peoples of Kajang do not have a separate legislative body. Changes of customary regulations and laws are deliberated through meetings attended by all Kampong authorities.

*A person appointed by Ammatoa. Other functional customary positions or officers, including Ammatoa, are elected by the community.

LIST OF ADAT KAJANG WORDS AND THEIR MEANINGS:

AMMATOA	Respected Elderly Man (Head of Adat/Customary)
ADAT LIMA	Five Adat, the power holders
KARAENG	King
GALLA PANTAMA	Person to help AMMATOA in farming/plantations
GALLA KAJANG	Person to assist AMMATOA in conduction rituals
GALLA LOMBO	Person to help AMMATOA for external relationships beyond the customary territory
GALLA PUTO	AMMATOA's secretary
MALLELENG	Person to assist AMMATOA for fisheries
LABBIRIA	Executive leaders subordinate to AMMATOA
SULLEHATANG	Executive Leader under AMMATOA
ANAK KARAENG	Prince or Heir to the Throne



Legal Pluralism and Dual Judiciaries

The importance of conflict resolution mechanisms for self-governing societies is something that has also been highlighted by the indigenous peoples experience in North America and is also stressed by those who have studied community-based natural resource management regimes. If people are to have confidence in their own customs they must feel that their institutions can administer fair play - otherwise community members will go outside the

community to secure justice.

Tribal governments in the USA have found that they have been obliged to develop not only courts to provide access to justice but also appellate courts to provide a forum for further appeals.

7



Judge Minnie Bert of the Miccosukee Reservation in the USA. As part of self-government, many native Americans have developed their own law courts and legal codes, based on customary laws, often with appellate courts too.

Under the customary systems in the past, most disputes were settled within the community but serious or unresolved disputes were taken to higher levels in the social structures for judgement. Eventually unresolved claims would be taken to the heavens for adjudication by the spirits or could be taken to the court of the sultan for judgment there. As a last resort disputes were settled through warfare between communities.

Under the Dutch, the powers of the sultans were heavily curtailed and warfare and head-hunting were prohibited. To fill the vacuum, customary courts were set up by the Dutch and were gradually institutionalised and increasingly 'guided' by Dutch administrators. However, these courts were abolished by Sukarno in 1950s and 1960s as part of his effort to centralise power in the newly independent state and establish a unitary state run according to 'positive law'.

If customary law is once again to be recognised and given due authority, communities will need judicial mechanisms. Most workshop participants insisted that conflict resolutions mechanisms exist or could be revived in their communities. What is less clear, however, is how or whether they should or would prevent community members demanding access to national courts when they find that customary courts have not found in their favour. Which courts should hear disputes between mixed parties which cross administrative and ethnic boundaries? Where should appeals be heard. How should the boundaries between customary and State systems of justice be determined. It appears that these issues have not yet been much discussed.



The Future of Custom

A widespread view expressed in the workshops is that custom is under heavy pressure due to it not being recognised, due to the imposed institutions of the government, due to the unclear jurisdiction of remaining customary law, due to the pressures from the market and due to changes in local people's values. The damaging impact on custom of the organised religions were stressed in numerous meetings.

There was also a widespread acceptance that not all custom is good. Workshop participants insisted that custom must be seen as flexible, under community control and thus subject to constant revision. The idea - often expressed by indigenous representatives at international fora - that customary law should adhere to international human rights standards was widely accepted.

In Toraja, for example, the old institutions of slavery and the extremely hierarchical system of the customary order is being actively questioned by those in the AMAN movement. There is a general acceptance that those who are currently landless and live as sharecroppers need a better deal if the restoration of custom is not to mean a perpetuation of injustice. The organised customary rights movement is thus trying to actively distance itself from those who think that the restoration of custom is a move to restore 'feudalism'.

8

As a strong advocates of custom in the middle Mahakam put it:

We have become heterogeneous. Some want to join the majority 'nationalist' system, while others want to follow custom. Do we force the minority who want to modernise to follow our traditional system? Do we need to divide our territory? Do we move them out? If we don't deal with this wisely we will have a revolution right here - even, maybe, a physical one.



Conclusions and Recommendations

This booklet has sort to highlight some of the key questions that indigenous peoples need to find answers to if State recognition of custom is to improve their lives. As noted the booklet does not impose or even propose answers, it only seeks to elucidate what some of the fundamental questions are and notes how other indigenous peoples have addressed these same questions.

It needs to be stressed that it is unlikely that the answers found suitable in one region or for one people will be suitable for all others. Peoples' differences in custom, history, political aspirations, material circumstances, religious beliefs and cosmovision will be likely to lead them to find different solutions to their problems.

9



Dani from West Papua in the 1960s. Customary decision-making systems may require a long time before a consensus can be found. Outsiders pressing for quick decisions, undermine customary processes and marginalize the less powerful.

This is already clear when we look at the political solutions that indigenous peoples are seeking. While all indigenous peoples are seeking to increase the degree of autonomy they enjoy, in line with a common agenda based on the right to self-determination, only a few indigenous peoples are demanding full independence from Indonesia at the political level. The degree of political autonomy being sort by many in West Papua will imply different legal and constitutional reforms than those being proposed in other areas.

The development of more flexible land tenure regimes, which accommodate customary systems of land ownership, rights allocation, resource use and management - confusingly referred to by the single term hak ulayat in current Indonesian jurisprudence - will almost certainly also imply a great deal of regional and local differentiation. Some communities are strongly demanding collective and inalienable land rights. Others seek the formal titling and registration of individual land rights. Some seek a combination of the two. Much thought needs to be given to how communities will deal with land markets if divisible, alienable or individual properties are chosen. Much thought also needs to be given to how reforms of national laws on land and natural resource management can accommodate these diverse preferences. The lessons of history teach us the perils of imposing the wrong laws in defiance of peoples real choices and circumstances.

The workshops also show that much more thought needs to be given to the issue of legal personality, so that workable solutions - in line with custom but which accommodate the realities of a now global market - can be found which define who should and should not be able to negotiate with outsiders on behalf of the community.

How should the complex institutions and customs of the communities fit with the local administration? The answers that communities give to this question

seem to depend substantially on the extent to which they feel a decentralized administration will be democratic and accountable. Where the indigenous peoples feel politically strong and are relatively numerous, compared to other Indonesians, they feel more confident of engagement with the administration and even of becoming part of it. These solutions may not be appropriate in other provinces or districts where communities feel weaker, are less numerous or are dominated by powerful interest groups.

Once communities do achieve self governance again they will face a number of further challenges. They must seek to develop, or revive, systems of accountability to ensure that those empowered by the reforms make decisions agreed by the community and which benefit the community as a whole and not just individual actors. Do customary institutions need reforming to face these challenges?

Traditional mechanisms for dispute mechanism are one facet of customary societies that seems to have been particularly weakened by the interventions of colonial authorities and the 'Guided Democracy' regime of Sukarno and the 'New Order' regime of Suharto. Much thought needs to be given to how disputes in the communities are to be resolved and appealed, so that community members can retain their respect for custom as a force of justice.

Custom is not immutable. Not everything in custom is appropriate to the lives of indigenous peoples today. It must be evaluated and endorsed to ensure it is respected. As a famous Declaration of the indigenous peoples of Colombia affirms:

Culture is alive, like a river. Like a river, it is permanently in motion even though for centuries it flows in the same course. Culture is the capacity to change without losing that course and its foundations. Culture is articulation. When two rivers merge the waters swell, but the

river courses do not disappear, they create a new one. Culture is not a strait jacket, it is the current of a river, which permits us to advance. A culture does not come to an end if people do, damage, arrange, create or live from it. Culture is not just in things that we make, but in our hands and in the minds of those who make things, in those who work, believe and dream. Without people there is no culture, no cultural achievements.²

This report thus ends with just one recommendation. Discuss these issues in your communities: find your own answers to the questions that the booklet poses!

² Declaración Yanacona, Manifiesto de Pancitará, 1994.



'We will not recognize the State, unless the State recognizes us'

With this famous statement at its founding Congress in 1999, the Indigenous Peoples Alliance of the Archipelago (AMAN) challenged the Indonesian Government to reverse its policy of integration and recognize the rights of indigenous peoples to govern themselves, their lands and natural resources according to their customs. They have demanded legal reforms, decentralization and respect for international human rights standards, in accordance with the Constitutional recognition of indigenous peoples right.

But what will recognition mean for the communities themselves? How should national laws be shaped to accommodate the diversity of customs and aspirations of the country's 500 different peoples? What kind of legal recognition of land rights are communities seeking? Who will negotiate on behalf of communities in the future? How will the communities govern themselves? How will they interact with the administration?

In Search of Recognition records the results of a series of community-level workshops, organized jointly by AMAN, the World Agroforestry Centre (ICRAF) and Forest Peoples Programme (FPP) which looked into these questions. The booklet sketches in how indigenous peoples have dealt with similar dilemmas and summarise the ideas and conclusions reached in the workshops. This booklet does not hold all the answers. It is aimed at provoking an informed discussion within the communities so that they can find their own solutions to these challenges, in line with their right to self-determination.

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