

Study on Best Practices & Examples on Resolving
Land Disputes & Land Claims (inc. NCIP, Philippines
& CHT Land Commission, Bangladesh)

[E/C.19/2014/4]

Devasish Roy
Member, UNPFii

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Overview

- Ambit & Scope of Study
- Major & Minor focuses of the Study
- Methodology & Recommendations
- Land Disputes Resolution Commission, CHT, Bangladesh
- Land Claims Settlement by National Commission on Indigenous Peoples, Philippines
- Other systems in Asia: NE India & Eastern Malaysia (Sabah & Sarawak)



Authorship & Ambit of Study

- The study was done solely by myself – D Roy – as proposed Co-Author, Simon W. M'Viboudoulou – was unavailable
- Consequently, the section on Africa was excluded, on account of the present author's lack of knowledge on the subject: **MY APOLOGIES**
- It concentrates on two case studies, from the Philippines and the Chittagong Hill Tracts, in Bangladesh

Ambit & Scope of Study

- Cross-References the Filipino & CHT-B-Deshi systems with relevant International Legal Provisions & Comparable National Systems in Asia
- Highlights the Strengths & Weaknesses of the models in the Philippines and CHT, Bangladesh



Courtesy: C. Ermi, IWGIA

Major & Minor Focuses in Study on Philippines & CHT, Bangladesh

	PHILIPPINES	CHT-BANGLADESH
MAJOR FOCUS	Resolution of Land Claims	Resolution of Land Disputes
MINOR FOCUS	Constitutional Measures	Indigenous Participation in Self-Government
	Regional Autonomy	Undefined recognition of Customary Law
	Operationalization & "Faking" of FPIC	Direct Indigenous Role in Land Management & Resolution of Disputes (inc. on Land)
	Corporate Dominance & Inadequate Indigenous Participation	Inadequate implementation of CHT Accord, 1997, impeding Optimal Operationalization of CHT Land Commission & CHT Councils' Role in Land Claims Settlement & in Land Management

Methodology

- CHT: **PERSONAL EXPERIENCE** as Traditional Chief, Lawyer, Activist & Former Minister; **DISCUSSIONS** with Policy-Makers & Rightsholders-Stakeholders; **DESK RESEARCH**
- PHILIPPINES: **DISCUSSIONS** with Govt Officials & Indigenous Activists; **PARTICIPATION** in international conferences; **DESK RESEARCH** (aided by Ms. Uchacha A Chak of ILO-Bangladesh)

Recommendations

- **TO THE GOVERNMENTS OF THE PHILIPPINES & OF BANGLADESH:** to initiate necessary LEGAL, ADMINISTRATIVE, LOGISTICAL & OTHER reforms to address the dysfunctionalities & limitations in the models concerned
- **PHILIPPINES** [e.g., **REPEALING** Mining Act, 1995, **REVOKING** EO 79]
- **BANGLADESH** [e.g., **AMENDING** Land Commission Act, 2001, in accordance with **ADVICE** of CHT Regional Council, **DEVOLVING** Full Administration Authority to District Councils]

Recommendations

- **TO OTHER GOVERNMENTS & TO INDIGENOUS PEOPLES** To study the Philippines & CHT-Bangladesh models to obtain implementable ideas appropriate to their situations
- These are not “theoretical” models, but models that are actually being implemented on the ground, despite their limitations, defects and shortcomings, **CONCEPTUAL & OPERATIONAL**

Recommendations CONT'D

- **TO THE UN SYSTEM & FINANCIAL INSTITUTIONS**

To promote the concerned models as practical ways to resolve LAND CLAIMS & LAND DISPUTES involving indigenous peoples in their relative spheres of interventions

- **TO OTHER ENTITIES**

To promote necessary research & advocacy on the issues concerned

Basic features of
the Chittagong Hill
Tracts
Land Disputes
Resolution
Commission



Courtesy: Subrata Chakma



CHT Land Commission

STRUCTURE

- Headed by a retired judge of the Supreme Court
- Another member is a senior Civil Servant
- 3 other members – the majority – are indigenous persons: (a) chair of the CHT Regional Council; (b) chair of the (concerned) District Council; (c) the (concerned) Circle Chief

CHT Land Commission

FUNCTIONS, POWERS & JURISDICTION

- Although called a “commission”, its major function is in the nature of a tribunal or court, to provide quick, inexpensive, fair, authoritative & sustainable REMEDIES on land disputes
- It will have the full authority of a civil court of law

CHT Land Commission

JURISDICTION

- There will be no appeals against its decisions, but Judicial Review by the Supreme Court will be available
- It will have jurisdiction over all sorts of lands, except for “reserved forests”, lands settled in the name of government & a few other categories mentioned in a PROVISIO [CHT IPs are unhappy over the proviso]

CHT Land Commission

APPLICABLE LAW

- It will resolve disputes “in accordance with the laws & customs” of the region [CHT IPs seek a reference to “usages/practices” in a proposed legal amendment]
- “Customs & usages“ are included within the definition of law in the national constitution
- Local customs, practices, usages and customs are recognized, sometimes explicitly, and often implicitly, in the CHT Regulation of 1900

Relevant Provisions of UN Declaration on the Rights of Indigenous Peoples (UNDRIP)

Article 27, UNDRIP

- “States shall establish and implement, IN CONJUNCTION WITH INDIGENOUS PEOPLES concerned,”
- “a fair, independent, impartial, open and transparent process,”
- “giving due recognition TO INDIGENOUS PEOPLES’ LAWS, TRADITIONS, CUSTOMS AND LAND TENURE SYSTEMS,”

Relevant Provisions of UN Declaration on the Rights of Indigenous Peoples (UNDRIP)

Article 27, UNDRIP cont’d

- “to recognize and ADJUDICATE the rights of indigenous peoples”
- “pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used.”
- “Indigenous peoples shall have the right to PARTICIPATE in this process.”

Relevant Provisions of UN Declaration on the Rights of Indigenous Peoples (UNDRIP)

Article 28, UNDRIP

- “Indigenous peoples have the right to REDRESS....
- [including] restitution [&] compensation,
- for the lands, territories and resources confiscated, taken [etc.]
- without their FREE, PRIOR AND INFORMED CONSENT”.

UNDRIP Provisions, CHT Land Commission & NCIP

UNDRIP: Arts 27 & 28

- The CHT Commission is substantially in conformity, at least conceptually, with the contents of Arts. 27 of 28 of UNDRIP
- The NCIP (Philippines) is also in conformity with the principles mentioned in Arts. 27 & 28

CHT Land Commission

CONTINUING CHALLENGES (10+ YEARS!)

- Amendment of the Land Commission Act of 2001, in accordance with the advice of the CHT Regional Council, and EXPEDITIOUSLY
- Appointment of a neutral, knowledgeable & otherwise suitable person as the chair of the commission

Other Land-Related Matters in the CHT

CHALLENGES

- Transfer of Full Land Administration authority to the Hill District Councils
- Cancellation of Commercial Leases to Non-Residents
- Revocation of notifications to create new “reserved forests”
- Executive support to Land Management, Land Administration & Justice Administration roles of traditional Circle Chiefs, Headmen & Karbaries (Village Chiefs)



Titling of
Ancestral Domains &
Lands by
National Commission
on Indigenous
Peoples (NCIP),
Philippines & other
provisions of IPRA,
1997

4 "Bundles" of Rights under
Indigenous Peoples Rights Act
("IPRA), 1997 passed in accordance with
Philippines Constitution of 1987

- Ancestral Domains & Ancestral Lands
- Self-Governance & Empowerment
- Social Justice & Human Rights
- Cultural Integrity of Indigenous Peoples



Special Strength of Philippines Law on Indigenous Peoples

CONSTITUTIONAL ENTRENCHMENT OF INDIGENOUS RIGHTS

- Indigenous Rights legislation (“IPRA”) grounded in constitutional principles
- Free, Prior & Informed Consent (FCIP); a strong pillar of IPRA & Consequent Administrative Guidelines

Land Titling by NCIP

- By 2007, about one-third applications for Ancestral Domain titles processed (95 million ha) [Contra: CPA, 13 May, Intervntn]
- Logistical & Procedural impediments slackened pace of titling
- Documentary & Other Evidential Requirements caused undue burden on indigenous communities to establish claims

Land Titling by NCIP CONT'D

- FPIC process not exhaustively followed in several cases involving mining concessions (esp. where concessions were issued pre 1997, violating NCIP AO-1998)
- Adequate INFORMATION not provided
- Customary laws & practices often violated ["manufacturing of FPIC" & creation of "fake tribal councils"]
- Mining Code is biased *for* miners and *against* indigenous communities

Other "Best Practice" Models from Asia

NORTHEAST INDIA

- Constitutional Stipulations [Arts 371A, 371G] safeguarding arbitrary legislation by Government w/o consent of concerned State Govt [Nagaland & Mizoram; Indigenous-Majority States]
- Land Administration Authority of Autonomous District & Regional Councils [6th Schedule, Const. of India]
- Safeguards against arbitrary transfer or Aboriginal Lands to Non-Aboriginals [5th Schedule, Const. of India & Other Laws in States not governed by 5th Schedule]

Other "Best Practice" Models from Asia

SABAH & SARAWAK STATES, EAST MALAYSIA

- Constitutional Stipulations on Sabah & Sarawak States and their "Natives" [Const. of Malaysia, Arts 95D, 95E, 161E, 9th Schedule]
- Special judicial authority of *High Court of Sabah & Sarawak*, "Native Courts" [Appeal, District, Chiefs & Headmen]

Major Strength of the 4 Asian Models: The Prevalence of Customary Law

CUSTOMARY LAW [Ref: D. Roy Publications on Customary Law in Asia referred to in E/C.19/2014/4]

- Self-Determination of Indigenous Peoples to legislate, independently, or autonomously, of, State Legislative Bodies
- Customary Law is Peoples-Made Law rather than State-Made Law
- Such legislative prerogatives make the "playing field" a little more "even" in the (generally) ASYMETTRICAL RELATIONSHIP between States & Indigenous Peoples
- Customary legislative processes may be, and often are, more direct, inclusive, equitable & consensual exercises of democracy than legislation exercised by representatives "elected by the people"

Thank You

