

## Comments and Discussion

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### Cultural Autonomy, Land Rights, and Indigenous Peoples' Movements

While participants applauded efforts by nation-state governments, the United Nations, and representatives of cultural minorities to find ways of protecting the lands and traditional cultures of native peoples, they also discussed the problems that indigenous-rights movements pose for nation-states and for individuals who do not wish to follow group traditions.

JOEL HANDLER

I would like to suggest two positive examples of balancing economic development with respect for the cultural rights of native peoples. One is a historical example: the Native American claims in Alaska. When oil was discovered, a lot of progressive thinking went into how the Native Americans—with their different customs and land-use patterns—could fit in and prosper from oil-based development while preserving their heritage. The second example is the recent attempt of the Canadian government to give Native Americans in the Arctic more local autonomy. Maybe in a couple of years, if conferences like this one take place, participants will be able to say, "Yes, there are things we can do to protect local cultures and indigenous rights. There are ways to ensure that the people at the bottom are not further impoverished by development."

DAVID ENGEL

A colleague described recently how the active United Nations working group on indigenous peoples has made a deep impression on the international community in Geneva. In a community where previously only states had an identity, and individuals, if they existed at all, did so only in terms of their relation to the state, there suddenly appeared a group of colorfully dressed individuals who represented groups of people and communities that were not states. They increasingly demanded and increasingly received an identity in the arena of international law.

KEEBET VON BENDA-BECKMANN

Today the whole issue of third-generation human rights—the rights of autonomy, self-determination, or whatever it is being called by international lawyers—is very much discussed. Nation-states are increasingly reluctant to allow full autonomy for indigenous groups by giving them the position of independent states. More and more, indigenous rights are being discussed in terms of how much autonomy such groups can be allowed within the boundaries of the nation-state.

MICHAEL MASTURA

In international law there is also a debate on indigenous people as such versus indigenous population. The problem is that sometimes indigenous people are not located in a contiguous territory.

KEEBET VON BENDA-BECKMANN

I believe you are referring to two issues. One is the question of whether we want to give rights or provide rights to groups as such or whether we want to provide rights to individuals.

MICHAEL MASTURA: That is part of the question.

KEEBET VON BENDA-BECKMANN

And related to that is whether we want to talk only about groups who live together in more or less the same conditions or whether we want to include people with a common cultural background, even if they live in cities. Is that right? And then, of course, there is the question of recognizing the common property of groups who live together. The issue is complicated because every single group has different ways of creating internal differentiation regarding access to communal property. No?

AKIN RABIBHADANA

No, no, no, no. It is not a question of differences between communities but of governments recognizing and granting legal status to communities. Some anthropologists say that in Southeast Asia the village community does not exist. But a lot of people argue against this view.

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JANE COLLIER

Around the world, there seems to be an elaboration of ethnic identity. As June Prill-Brett noted in her paper, indigenous groups are protecting themselves and their lands, often with the help of the United Nations, by creating the notion of indigenous cultural communities. This is all very good. But it has some consequences that we need to think about. Two issues that surfaced in the indigenous community I studied in southern Mexico are, Who decides who belongs to the cultural community? and What is the culture? There has been a resurgence of religious conflict, with people being expelled from their communities and having their houses burned. Also, some people within the Indian community are claiming to be better representatives of the culture than other people. And there are consequences for gender relations. Pressure to emphasize cultural differences seems to fall mainly on women, who are expected to wear the traditional dress, speak the native language, stay out of state schools, cook the ethnic dishes, and stay home to teach children the native culture.

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KEEBET VON BENDA-BECKMANN

There are serious problems in the debate over the rights of indigenous cultural communities. For instance, the representatives of Papuans at the United Nations claim to represent not a single indigenous people but 200 or more indigenous Papuan peoples. Coming into existence is a new set of intermediaries between traditional sociopolitical organizations and international organizations. I am not sure what implications these institu-

tions will have for the question of who is going to determine what the tradition is going to be. Can a Western-educated person who has lived outside Papua New Guinea or West Irian for 30 years know what Papuan traditions are or ought to be? What kinds of power structures are being created in these new organizations? I think there is increasing uneasiness with this idea of self-determination. What does it do to members of indigenous societies or migrant societies who do not want to follow mainstream traditions or who want to keep parts of the tradition but not others? In some famous cases in the United States and Canada, women, especially, were denied access to Indian land because they did not fully comply with the so-called traditional ways of life. My point is that although it is important to grant autonomy to indigenous peoples and take them seriously at the highest international levels, such actions raise questions about new power structures and new ways of exerting power.

## International Forces

Complementing and continuing the discussion of cultural autonomy and movements for indigenous rights, participants explored the effects of international forces. They considered the role of market demands for Southeast Asian products in exacerbating local problems and the role of transnational organizations, particularly nongovernmental organizations (NGOs) in moderating, channeling, and countering the forces of unrestrained capitalist development.

### ROBERT KIDDER

We need to keep in mind the international context. Where is the demand for forest products coming from that has caused deforestation in Southeast Asian countries? And the demand for golf courses? It is international forces that impinge directly on local land uses or are filtered through national governments. For example, what happens if the Japanese suddenly develop a new technology for pouring concrete, and they no longer need plywood to build forms? What would happen then to the demand for forest products across Southeast Asia?

### JANE COLLIER

When I think about modernization or development, I prefer to think of ongoing processes with different temporal and spatial dimensions. What we see at any one time in any one place are historical conjunctions of processes; the processes intersect at particular moments in history, have consequences, and go their own way, but changed and modified by the conjunction. One process is nation-state building—trying to integrate populations, to assimilate groups, to create a single culture, to create nations. A second process is capitalism, including the spread of and search for markets, the search for cheap labor, and the search for exploitable natural resources. Third is the internationalization of law and of attempts to use law to resist the kinds of processes that are affecting people.

### TERRENCE GEORGE

One thing that has not been mentioned very much is the emergence of new intermediary organizations that in much of Southeast Asia are called nongovernmental organizations for lack of a better term. These

groups are playing an important role in the issues that we are discussing in law and society—more so in environmental issues than anywhere else. These groups are creatively using the law. They are also playing an important role in increasing awareness of national law at local levels and of customary law at the national level.

FRANZ VON BENDA-BECKMANN

I think law is a way of talking about reality, of imagining reality. Terry George just mentioned that NGOs create new arenas for talking about social and economic problems that have been talked about in terms of state, local, and customary law. Now, increasingly, we talk in terms of human rights.

DAVID ENGEL

In NGOs and in demands for autonomy by indigenous groups, we see the emergence of challenges to the state as the basic conceptual unit of law. The state is also receiving a challenge at the macro level from amalgamations of what used to be states, such as the European Community. Nation-state building as one vector of change may thus be coming into contact with a vector that involves the reduction of the state in importance. If that is the case, what legitimating institutions will arise to supplement or replace the state? Could the increasing tendency to turn to religion reflect this diminution in the role of the state? And do the existence and activity of the U.N. working group on indigenous peoples signal that rights as framed in the international context will also become more important?

KEEBET VON BENDA-BECKMANN

The issue of indigenous peoples is gaining importance internationally. In the United National Conference on Environment and Development held in Rio de Janeiro, Brazil, in 1992, indigenous peoples faced a problem because various NGOs were accepted as formal observers but indigenous peoples were not. The indigenous peoples could have pressed and perhaps received a similar or a slightly lesser status than the NGOs had, but they were so furious that they decided to hold a parallel international meeting in Rio. They said that if the world is really going to take environmental matters seriously, indigenous people, especially those who live in tropical rain forests, have to be listened to and must be part of all discussions and deliberations.

## **The Role of the State**

In addition to considering the effects of international forces, participants also focused on the problem of how to create nation-state governments accountable to the people. Some argued that strong central governments, if properly constituted and reformed, are capable of passing laws that represent and mediate the interests of diverse groups. Others argued that decentralization and local autonomy provide the best protection for people whose economic and cultural interests differ from those of national elites.

MICHAEL MASTURA

June Prill-Brett mentioned “imposed” law in her essay. I wonder whether any law made at the state level should be considered an imposi-

tion. If we elect representatives, then are we not represented at the government level? If we begin to question that, then what is representative government?

FRANK REYNOLDS

Would it help to think of law as an arena—perhaps one parallel to the political arena where representatives are elected—in which discourse is created about the problems of integrating national and local cultures? I was particularly thinking about national legal systems and whether they present a kind of structure in which some of these complexities may be worked out in a way that would help to achieve both an integration and distancing of national and local levels.

SUVIT RUNGVISAI

In developing countries like many in Southeast Asia, law does not form such an arena. Those who won the election in Burma, for example, cannot exercise their power. And in Thailand, too, the middle and upper-middle classes who participate in the lawmaking body want to protect their interests. They do not care about poor farmers.

MEHRUN SIRAJ

Let me add that in Malaysia, talking might land you in jail and bring you detention without trial.

JUNE PRILL-BRETT

When we talk of law as an arena, we must ask which particular groups participate, because Philippine society is multiethnic, and the groups are at different levels of economic development. In the Cordillera there are hunters and gatherers, swiddening groups, and wet-rice-terracing groups. When their lands were scheduled to be flooded in the Chico Dam project, they joined together to fight the government, making use of an indigenous political institution—the peace pact—to create unity. Their need for weapons also led them to bring in the National People's Army, the Communist armed group in the Philippines, which had been waiting for years to move into the Cordillera to recruit people. Since the fall of Marcos, the Cordillera groups have been trying to use national laws to keep their lands from being flooded. This is why I am concerned about the ancestral land rights bill in Congress.

MICHAEL MASTURA

June Prill-Brett is complaining that there is no end to the debate in the Philippine Congress over the ancestral land rights bill. I sit in the Congress, and the issue seems to be, Do we define the law applicable to ancestral lands? Or do we create a commission to deal with the situation? The Americans and Spaniards left us the legacy of creating specialized agencies to deal with these kinds of situations, from reservations to the integration commission, etc. I do not feel that the law can define ancestral land rights. We are in a quandary. We need a third-party mediator, an informal international group, an NGO connected to some very powerful lobby group, like the U.N. Commission on Human Rights, that can pressure the government to act. If we codify ancestral land rights as Republic Act Such and Such, who will enforce the law? And if this is the case in the Philippines, I do not see why it would be different in Thailand or Malaysia or anywhere else.

CHUPINIT KESMANEE

I think the countries in this region need recognition at the state level of the existence of multiethnic groups. How can the state impose a law for the whole country when such a law comes into conflict with customary law? I can give you a concrete example. Whenever a national park is announced in Thailand, the people who live there are given a chance to claim land within the park boundaries. But the government does not take into account the sociocultural fact that the majority of the people, especially the highlanders, are illiterate. They rarely go to government offices where the announcements are posted. So nobody who could claim possession of park land does so. Therefore they have to be evacuated. This is ridiculous, particularly when their ancestors lived there more than 100 years. There have been two such cases in Thailand. The people had no room to react against the policy, and the enforcement of the law was very rigid. Most of the time it was done by the military. It seems that whenever state law and customary law come into conflict in Thailand, customary law always loses ground.

ERMAN RAJAGURUK

I just want to talk a little about share cropping arrangements legislation. As far as I know, no single developing country has yet succeeded in implementing a share cropping arrangement act for several reasons. First, there is a limited amount of land in developing countries but too many people. So if the landless do not agree with the leasing conditions suggested by the landowners, the landowners have only to take away the land. Second, the landless do not have fair access to the courts; going to courts is very expensive, very complicated, and time consuming. In Indonesia, the Share Cropping Arrangements Act of 1960 did not work. Even though the government required that share cropping arrangements be written agreements, approved by the head of the village, it did not work. And so who controls the land? The elite controls the land, the elite controls the power. Even in Indonesia before 1965, when the Communist party gave very strong support, politically and physically, to the landless farmers, they failed to implement share cropping reforms.

SCOTT CHRISTENSEN

In Southeast Asia, governments have adopted or inherited from their colonial masters two major legal systems. One is the administrative legal system; the other is the common law system modeled along American or British lines. In the administrative or civil law system there are obvious reasons why the average person would not want to go to court or rely on formal legal mechanisms. The courts do not provide much recourse because the bureaucrats and judges who run them sit on the side of the state. They can essentially rule on whether a citizen's claim is legal before it is ever raised before the court.

SULAIMAN ABDULLAH

Akin Rabibhadana and Scott Christensen mention in their essay that deals take place within the framework of administrative law that undermine the basic legitimacy of the government. In Southeast Asian countries, we have a situation of administrative arbitrariness. I think we should play along with our governments' intention to be modern, and stress that it is modern to ensure accountability. It is modern to ensure that discretion is not unfettered, that discretion must operate within bounds. The concept of an ombudsman is very important, particularly in countries like Thailand, Indonesia, and Malaysia. We should couple this stress on modern substan-

tive law with the development of procedural law. There should be various mechanisms to ensure fairness. I think Scott Christensen is right to point out that in many systems, the law is whatever the administrator decides it is. But within our legal systems, there are precedents for insisting that whatever decision is taken by an administrator must be a reasonable decision, taken on rational rather than on irrational or biased grounds. If these ideas can be developed and used as a focus of attack, we can tell the state, "We are not disputing your right to allocate resources and so on. What we are disputing is whether the allocation itself was done fairly and rationally."