



Case Study

# Indigenous Traditional Legal Systems and Conflict Resolution in Ratanakiri and Mondulkiri Provinces, Cambodia

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**Towards Inclusive Governance**

Promoting participation of disadvantaged groups in Asia-Pacific

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**The authors wish to state that: The information contained in this report is the cultural and intellectual property of the indigenous communities studied and should be used only with their permission and in their best interests.**

## Acronyms

DEMD	Department of Ethnic Minorities (Ministry of Rural Development)
DKCC	District/Khan Cadastral Commissions
DRC	Dispute resolution committee
HA	Highlander's Association
ICCPR	International Covenant on Civil and Political Rights
IPs	Indigenous peoples
IYDP	Indigenous Youth Development Project
MoI	Ministry of Interior
MoJ	Ministry of Justice
MLMUPC	Ministry of Land Management, Urban Planning and Construction
MRD	Ministry of Rural Development
OLMUPCC	Office of Land Management, Urban Planning, Construction and Cadastre
PILAP	Public Interest Legal Advocacy Project
PMCCs	provincial/municipal Cadastral Commissions
UNTAC	United Nations Transitional Authority in Cambodia (1992-1993)

## Executive Summary

This report presents the findings of participatory action-research into the traditional justice systems of indigenous villages in Ratanakiri and Mondulakiri provinces. The research took place over the period of March and April 2006. The study has two main purposes:

- 1) to describe traditional justice systems and practices and raise issues for consideration in policy and legislative development that would maintain access to justice for indigenous communities through protection of indigenous peoples' authorities, procedures and norms; and
- 2) to describe some of the difficulties indigenous peoples face in finding just resolutions to their problems outside their village and to suggest some possible solutions, largely based on their own ideas.

Central to the present report is the marginalisation of indigenous peoples and the connections between social change, marginalisation, and the inability to obtain justice. These connections are especially apparent in conflicts over land, and in the intimidation and imprisonment of individuals who have attempted to stand up to powerful outsiders. The development process in northeast Cambodia is complex and numerous reports have demonstrated the contribution of 'development' to marginalisation and certain disintegration of social cohesion within highland villages. The benefits and costs of development are not equally distributed. Wealthy and powerful people, many of them outsiders to the region, are often better able to take advantage of the opportunities afforded by expanding markets and improved transport, while indigenous villagers have found themselves alienated from their land and lacking the necessary capital or other resources and knowledge that would allow them to take advantage of new opportunities. The present village research echoes the findings of marginalisation in earlier reports.

An important finding of the present study is that the informal traditional system is functioning and overwhelmingly supported and used within the indigenous communities studied. On the other hand indigenous communities make only very limited use of the formal legal system, and prefer to seek assistance at the commune and district government level for conflicts which cannot be resolved internally. Some communities rely exclusively on traditional law and internal conflict resolution mechanisms while others involve the official state system (generally commune councils in an *ex officio* capacity) from time to time, especially in "new conflicts" e.g. land conflicts with outsiders. These "new conflicts" are however seldom solved in a satisfactory way. Informants say they trust the informal traditional system to deliver a fair decision to a far higher degree than they trust the formal system, although they have also reported some flaws in the traditional system. Reports of inequities that indigenous people face in the formal system have largely to do with widespread corruption and a generally dysfunctional legal system. This and the fact that the majority of indigenous community members are not confident with written or spoken Khmer language makes this option inaccessible to most for obtaining justice, even if they could afford the charges.

However, it should be stressed that the formal and informal systems often address completely different kinds of conflict. The informal system can not be made to stand in for the formal system, just because it works better. Rather, efforts to reform the formal sector are necessary and urgently needed, while well-intentioned efforts to make the informal system 'pick up the slack' are likely to fail. Policy interventions should be crafted with the goal of preventing the formal system from being used to disenfranchise and expropriate indigenous communities. For instance, the imposition of private property ownership on areas formerly or currently governed through communal property regimes should be prevented.

## Towards Inclusive Governance

This report describes the customary conflict resolution processes of the various indigenous communities. It is important to recognize that differences exist among the different groups, and even from village to village. The study also looks at some specific characteristics of customary law and how it is different from the formal legal system. The preservation of solidarity of the community is a core objective of the traditional system, which seeks to forge agreement between the parties so that the aggrieved has been compensated and the guilty party is punished. In all instances the process seeks to reconcile the various parties in order to restore social harmony. Customary law makes no clear distinction between criminal and civil law and civil compensation is mainly provided in conflicts handled by local adjudicators. The roles and functions of these adjudicators and other actors in the customary legal system are described in this report. The research findings show that the customary structures of community elders and leaders are still important in the traditional conflict resolution process although there are some changes to these structures in some communities. As the highland areas have been made more accessible over the years, formal government structures are now influential in some areas.

The study also briefly examines the formal legal framework for conflict resolution in Cambodia, and analyses the officially sanctioned role that traditional authorities have in conflict resolution in Cambodia today. This legal study also discusses possible roles for the traditional mechanisms for conflict resolution under the present legal system that would enhance access to justice for the indigenous people. Indigenous people and state officials have been consulted on the interface between the formal state system and the traditional systems. We found in this study that the interface between the traditional authorities and the formal legal system is weak and that traditional authorities often only play the role of informants to the police and courts. At the level of the commune council and sometimes at the level of the district, the interface between villages and the government works better. Conflicts solved at this level often involve local government officials who are indigenous themselves and traditional law is often used.

Like many aspects of indigenous culture, the traditional legal system is facing several challenges to its continued existence. With the influx of people and foreign cultures the traditional system has to deal with a range of new conflicts, and changing values amongst community people. Now there is greater reliance on the cash economy and villagers report an increasing desire/need for money, with increased pressure to sell land, increased theft and internal conflicts as a result. Village interviews indicate that now people consider much more possessions and wealth (motorbikes, furniture, etc), when selecting a partner. This emphasis on possessions has also led to more complex divorce and inheritance procedures, which sometimes have to be taken out of the village for resolution.

One of the conclusions of this report is that although change is arguably taking place in the indigenous communities at a more rapid pace than anytime in the past, and this is undoubtedly causing problems for traditional systems, indigenous peoples' traditional justice systems in North-East Cambodia have always adapted to changing circumstances through history. Even in the face of this change and even in communities which have been seriously impacted by land loss, etc. this justice system is managing to maintain a strong moral code and trying to deal with and adapt to many new and more complex conflicts. This work is directly benefiting not only the communities but also the wider Cambodian society through guarding against abject poverty for the most vulnerable community members, maintaining law and order, etc. The idea of 'traditional authority' should not imply something fixed in the past, but rather a set of dispositions and forms of social engagement that are constantly changing. Therefore, with the right emphasis and support, there is no reason why the systems in place could not continue to develop and adapt. It could be argued that actually maintaining and supporting these systems is the key to indigenous peoples' development and poverty reduction for the foreseeable future.

## Key findings



1. **Indigenous community members are marginalised within the formal legal system, which is often used as a tool by powerful interests to expropriate and further disenfranchise them.** Indigenous people are often unfamiliar with both written and spoken Khmer language and with Khmer legal systems and terminology. In court they are intimidated by the higher ranking officials and the police, and the lack of support from friends and family, which is a key part of traditional legal processes. There is also little or no legal defence offered to indigenous people in Court proceedings and there are no trained indigenous lawyers working on behalf of indigenous people. Because the formal system often requires the use of money (both for legal fees and for bribes), indigenous people are unable to get 'justice' from this venue.
2. **Indigenous customary law and the formal Cambodian legal system address overlapping but not identical forms of rights, responsibilities and conflicts.** Traditional systems often address issues within the community, or, more rarely, between two villages. The traditional system focuses on such areas as inheritance, theft, marriage, and other local concerns. These are areas that the Cambodian state has traditionally had little interest in regulating.
3. **Indigenous communities overwhelmingly support their traditional legal system and wish to be able to continue practicing it.** This is because they feel they can achieve justice as their case will be heard in an open and participatory way in their own language. If they are found guilty they and others will be able to negotiate the level of their punishment and fine.
4. **The traditional legal system lacks the authority to deal with many new problems that are now confronting indigenous villages. Foremost of these is dealing with an increasing number of disputes over land and natural resources generally.** Often these include disputes with more powerful people—usually outsiders—over control of the village's land and forests. Disputes with neighbouring villages over village boundaries and ancestral land claims, and disputes with outsiders now living in the villages who do not believe in or respect traditional legal systems, are becoming increasingly difficult to solve.
5. **These disputes are also not being addressed by the formal system. In particular, the Land Law and other national laws are not being implemented or followed.** This lack of access to justice is creating a very dangerous situation, with increasing numbers of conflicts occurring each year. In the absence of justice, communities are disintegrating, and expropriated individuals are find themselves without land and unable to call upon traditional forms of mutual aid. The result is greater impoverishment.
6. **A major reason to preserve and support these traditional legal systems is to allow communities to maintain their culture and traditions while at the same time allowing them to adapt to changing circumstances.** The preservation of culture and traditions in indigenous communities is premised on the maintenance of community solidarity. The implementation of traditional law in these societies is the key way community harmony and solidarity is preserved.
7. **There are some problems with traditional legal systems.** These problems include at times unfair and overly heavy fines, and, more recently, increasing numbers of cases in which more powerful people pay off adjudicators. Women have also complained that they are sometimes not given a prominent role in conflict resolution processes, and while most generally support traditional justice systems, they also sometimes feel that their suggestions are not given the same weight as men. Indigenous youth also generally support their system but some see traditional systems as not being able to deal with modern situations.
8. **A key issue impacting on the effectiveness of traditional legal systems is a lack of any status or recognition in Cambodian law.** This means that in recent years even community members who have money can sometimes bypass traditional systems and achieve the decision they want by paying off commune and district authorities and Court officials.

- 9. There are several examples of good cooperation between traditional legal systems and local governments (commune and district level) in resolving conflicts.** Community members by and large see the commune and district levels as the formal legal system where national law is implemented. Often, however, decisions, fines and punishments at those levels are based on concepts and norms of traditional law, as much or more as they are on application of national laws. Several of these cases deal with criminal matters and the commune and district officials are acting outside their mandate when reconciling such cases. There are very few examples of cooperation between the traditional and the actual formal judicial system and some villages surveyed had never had a conflict go to the provincial court.
- 5. There appears to be tension between the police and the traditional legal system –** Police sometimes perceive the traditional system as being in competition with them (particularly in their informal conflict resolution capacity). There appears to be little coordination with police in traditional conflict resolution, except at the village and commune levels, and sometimes the district level. Police also extract fines from violators but the victims are generally not compensated using this fine money. Communities see this as money that should be going to the victims to facilitate both agreement of the resolution and reconciliation of the two parties afterwards.
- 10. There are some interesting opportunities for maintaining traditional legal systems and developing cooperation with the formal system.** See recommendations at the end of this report.
- 11. There are also some interesting opportunities for improving the functioning of the traditional system through;**
  - a. developing exchanges and discussion groups of adjudicators to compare their experiences,
  - b. developing a system of village based clerks (village youth) to assist the adjudicators in recording and reporting on cases they deal with, for community records or for referral to the commune or higher levels of government,
  - c. training adjudicators in key aspects of Cambodian law,
  - d. allowing women a more prominent role to deal with some cases relevant for them,
  - e. allowing traditional authorities to deal with land and forest conflicts and infringements at the village level,
  - f. training formal court systems in areas with large numbers of indigenous people about the basics of traditional systems in their areas, so that they better understand them and are thus in a better position to cooperate with them.



## Introduction

This Case Study is one of three studies that have been commissioned by UNDP at the start of the second phase of its support to the Royal Government of Cambodia's Legal and Judicial Reform. The first phase of the UNDP/RGC process produced *Pathways to Justice: Access to Justice with a Focus on Poor, Women, and Indigenous Peoples* (2005), a report undertaken by UNDP together with Ministry of Justice (MoJ), which identified the indigenous peoples of Cambodia as a marginalised group with poor access to justice through the formal legal system.

### Problem statement

During consultations carried out as part of this study indigenous peoples' commented, sarcastically, that:

The poor are always wrong and the wealthy are always right.  
(Kachok group, Khuon village workshop)

'The Traditions, cultures, beliefs, the livelihoods of indigenous peoples in their communities, [including] customary laws, traditional authorities, and natural resources are all being destroyed.  
(Tampuen villagers, UI Leu village)

This study on Indigenous Traditional Authority has two main purposes:

1. To describe traditional justice systems and practices and recommend options to policy makers on amendments necessary to legal provisions and institutional arrangements, to enhance the protection of indigenous peoples through both their customary law and customary legal practices and the formal justice system.<sup>1</sup>
2. To describe some of the difficulties indigenous peoples face in finding just resolutions to their problems outside their village and suggest some possible solutions, largely based on their own ideas.

This Case Study comprises the following sections:

1. An overview of the available information on indigenous peoples in Cambodia. This will include a review of the history and present situation of highland indigenous groups, aspects of social change, development, inequality, and problems related to access to justice.
2. The methodology used in carrying out this study is described.
3. The results of a consultation process in 15 villages and 3 inter-ethnic workshops in Ratanakiri and three villages in Mondulakiri carried out as part of this study is presented. This includes a generalised process of customary conflict resolution and the village traditional authority structures
4. The main actors in the state system which interact and interface with the traditional system will also be described. The results of interviews with government officials in Ratanakiri province and with prisoners in Ratanakiri prison will also be discussed. Finally the strengths and weaknesses of the 2 systems is briefly summarised.
5. A review of the existing conflict resolution mechanisms of the Cambodian legal system is presented with a view to defining existing and possible options to interface with the traditional legal systems. This is followed by a description of the changes taking place in the traditional legal system.

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<sup>1</sup> In this report the words 'informal', 'traditional' and 'customary' will be used interchangeably.

4. The final section of the report summarises and analyses some of the key issues which will need to be dealt with to achieve some kind of accommodation of traditional justice systems within the formal legal system.
5. A list of recommendations will raise issues for consideration in policy formulation and legislative development to conclude the report.

### Policy framework: Development, inequality, and a lack of access to justice

As the quote, above, from the Tampuen villager explains, development in indigenous areas, which have traditionally been rich in natural resources, has come at the cost of large scale destruction of local peoples' livelihoods, loss of their land, and the destruction of the natural resources of the area. This has resulted from unproductive forest and land concessions, illegal land clearing and logging, and large-scale and often illegal land grabbing. The benefits and costs of development are not equally distributed. Those who end up paying for this economic 'development' through impoverishment and destroyed subsistence livelihoods are the already more marginalised and vulnerable local/indigenous communities.

Wealthy and powerful people, both in and outside the government, and especially outsiders to the region, are better able to take advantage of the opportunities afforded by expanding markets and improved transport than indigenous populations. Highland villagers, on the other hand, find themselves alienated from their land and without the necessary capital, resources and knowledge to take advantage of new opportunities. While it should be stressed that 'development' is a complex phenomenon and that most villagers embrace certain aspects of social change that accompany this process, the contribution of 'development' to marginalisation and a certain disintegration of social cohesion within highland villages has been demonstrated in numerous studies in northeast Cambodia (e.g., Baird 2000; Baird, et al. 1996; Guérin, et al. 2003; Ironside 1999; Ironside and Chroun Sambo 2003; McAndrew 2000; McAndrew and Oeur II 2004; NTFP 2000; White 1996).

The almost total absence of access to legal services and institutions where they might be able to have their cases heard and fairly adjudicated is a major factor in indigenous peoples' marginalisation. This report will present a brief overview of the connections between social change, marginalisation and the inability to obtain justice.<sup>2</sup> These connections are especially apparent in conflicts over land, and in the intimidation and imprisonment of individuals who have attempted to stand up to powerful outsiders.

As infrastructure has been improved, both land investors and migrants from other parts of Cambodia have increasingly looked to the northeast as a land of opportunity. The result has been a rapid increase in migration to the region, and associated increases in property prices and the number of conflicts over land and other natural resources. A 2004 study found 24 cases of moderate, high or severe land alienation in Ratanakiri Province, out of a total of 48 cases reported to have been occurring in the province at the time (NGO Forum 2004). A follow-up study (NGO Forum 2006) found that the situation has been worsening in recent years, and that many sales were illegal and contrary to the 2001 Land Law, an opinion expressed by provincial authorities as well as by outside legal experts. Some indigenous community members and communities have sold their traditional lands as a result of various forms of intimidation and usually without the full consent of all community members; often they have not fully understood the consequences of their actions or their legal rights (see NGO Forum on Cambodia, 2004; 2006).

While during the mid-1990s there were a few cases in which powerful individuals or companies were prohibited from taking villagers' lands, in recent years there has only been one case of

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<sup>2</sup> For a further discussion see e.g. the *Pathways to Justice* report (pp. 93-97, inter alia) which quite clearly presents these connections.

## Towards Inclusive Governance

note where some land has been returned to villagers. This occurred in Toen Commune through the intervention of a legal assistance programme known as the Public Interest Legal Advocacy Project (PILAP). There is little recent evidence to suggest that the courts are able or inclined to prevent the taking of land from indigenous communities, or help get it returned to indigenous communities, leading many indigenous peoples to the conclusion that the official justice system in fact enables the abuse of power and the further alienation of customary lands and resources.

Individuals and community members who have not been successful in seeking redress from the courts for their land disputes have often engaged in social protest as a last resort. When these protests are determined to be illegal by provincial authorities, the individuals involved have found themselves in jail for long periods of time, often without being afforded appropriate hearings or legal procedures, or legal representation. Several of these cases have made their way to the newspapers, and these newspaper articles have sometimes given the inappropriate impression that ‘troublesome’ individuals are being held in jail for political reasons (e.g. their association with rebellious Montagnards in Vietnam). More often, individuals are jailed to disrupt protest and punish those who speak out. As well as the threat of jail villagers face threats, intimidation and violence for opposing the take over of their land. This was the case when a large concession was allocated to a Chinese company in Mondulkiri for a pine plantation. Their rights and sacred places (including their burial areas) were violated with impunity.

This phenomenon certainly represents an important public relations failure on the part of the government, and undermines whatever faith villagers may have in the formal legal system. The recent release of two Ratanakiri villagers from prison provides a useful case in point. The villagers were arrested on January 5, 2006 in connection with the Aekakpheap land case in Ou Chum district, a dispute between villagers and a wealthy Cambodian businessman over a possession certificate issued in 1996, but never activated. The two were charged with infringing on the property of others, but, according to Legal Aid of Cambodia, their detention was illegal. The release of the two men in late March of 2006 did not come about as a result of official legal procedures; in fact, the case has not yet gone to trial. Rather, they obtained their freedom through the intervention of the executive branch into the judicial process, as part of an effort by the Prime Minister to release all villagers jailed over land disputes (Kuch Naren 2006).

### Box 1

In January/February 2004 a Tampuen villager from Yeak Laom Commune (near Ban Lung – Ratanakiri’s provincial town) was arrested, beaten and tortured by the police to extract a confession (which was unsuccessful) and put in jail for the murder of his nephew.\* This murder was linked to attempts by this village to claim some of their former lands back from another village, which was using them, because their former lands in turn had been lost to an expanding Ban Lung town. Police investigation into the case was inadequate. In September 2004 the Provincial Judge ordered the villager’s release due to lack of evidence. The Public Prosecutor however appealed the decision and the villager was not released until after the Appeal Court found in favour of the Provincial Judge more than a year after he was arrested. The villager believes that the people who killed his nephew paid the court to arrest him. His wife and family of six children sold all their land and possessions to pay bribes to people who said they would help him get out of jail, and were even persuaded to sell their cashew orchard to a court official for only \$400 (when the family wanted \$1500), because he said he would help get their husband/father out of jail.

\* This villager actually assisted with some of the interviews with prisoners for this study.

As incidents of land infringement and illegal imprisonment demonstrate, social and economic change in areas where indigenous people live is closely tied to the legal environment and to the

opportunities, or lack thereof, provided by the legal system. Lut Village workshop participants (See Section 5) said that with the increase in the role of the state in peoples' lives they have noticed an increase in illegal activities.

Reform of the formal legal system must therefore comprise an important element of any policy approach seeking to reverse the marginalisation and disenfranchisement of Cambodia's indigenous people. Analysis of the legal framework, and the interface between indigenous systems of conflict resolution and the officially sanctioned legal system in Cambodia demonstrates the failings of the formal system to provide for the needs of indigenous groups, as well as the opportunities that exist for resolving these inequities (see below). The *Pathways to Justice* report recommends looking to informal dispute resolution systems and indigenous customary law as one option for indigenous people seeking redress for their problems. Yet as discussed in the above introduction, addressing the problems in the formal system must be an important element of any reform agenda. In crafting policy, the unique situation of indigenous people in Cambodia, outlined in this report, must be addressed.

## Cambodia's Highland Indigenous Peoples

This introduction presents a review of the history and present situation of highland indigenous groups in Cambodia. Taken together with Appendix 2, this section presents the results of a desk study of the academic, historical and policy literature relevant to the question of indigenous peoples' access to justice in Cambodia and the role of traditional authority mechanisms in indigenous society. By providing background on Cambodia's indigenous populations, and by contextualising the problems which indigenous people face in obtaining access to justice in Cambodia today, this review seeks to inform the creation of strategic policies to address those problems.

The *Pathways to Justice* report's presentation of population statistics for indigenous peoples is a useful point of entry and the present and following paragraph will therefore highlight the relevant information for further discussion in the present report. In fact, reliable population figures for indigenous people in Cambodia are impossible to obtain (See Appendix 3 for some estimates). Employing a legal-pluralist framework (see Appendix 2), the *Pathways to Justice* report identifies the considerable challenges facing marginalised groups seeking justice in Cambodia, and policy recommendations. Basing their analysis on the Cambodian National Census of 1998 as well as on more recent Asian Development Bank (ADB) figures, Yrigoyen Fajardo et. al. (2005:59-60) note that:

“[I]n terms of ethnic origin, the population of Cambodia is 90-95% Khmer. The other 5-10% is composed of ethnic minorities, such as the Muslim Cham, immigrant descendants, such as the Chinese—which is the largest minority in the country—, Vietnamese and Lao; and indigenous peoples. The indigenous peoples, also called Highland Peoples, “Khmer Loeu”, or “hill tribes” are ethnically non-Khmer, and are composed of the Tampuan, Kui, Jarai, Phnong, Kreung, Kavet, Brao, Stiem, Lun and other groups.”

### Demographics and 'indigeneity'

While exact statistics regarding the ethnicity of the population in Cambodia do not exist, the *Pathways to Justice* report goes on to estimate that the total non-Khmer population includes about 120,000 individuals, or approximately 1% of Cambodia's population. As the *Pathways to Justice* report also makes clear, significant social change in Cambodia, and particularly in areas where indigenous people live in significant numbers, is altering the ethnic composition of the provinces where highland indigenous communities once comprised close to 100% of the population (see Guérin, et al. 2003).

Also relevant to this discussion is that in order to deal with an issue such as access to justice for indigenous minorities it is first necessary to get reliable and credible statistical data. Indigenous peoples are at present invisible from national level policy makers attention. To date there is no officially recognised way that statistics related to indigenous peoples can actually be disaggregated from that of the general population, to bring to the attention of policy decision makers specific and special needs that might have to be addressed.

In part also the difficulty in determining the indigenous population stems from the fact that the category 'indigenous' is an identity-based category. This raises a complicated set of questions over who is or is not indigenous.<sup>3</sup> Especially when policy-making seeks to support the rights of

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<sup>3</sup> Although Khmers sometimes refer to highland minority people as *khmer daeum*, or 'original Khmers,' it is not the case that highland people are any more 'indigenous' (in the sense of being original inhabitants) to the region than national majority groups such as Khmers in Cambodia, or Laos, Kinh, or Thais in neighbouring states. Discourse that suggests that highland minority groups represent modern Khmers' living ancestors relegates highland people to pre-modern times, and provides a conceptual basis for prejudice: if Khmers represent the future for highland peoples, then Khmer ways must be privileged over those of highlanders,



groups, rather than those of individuals, determining who is or is not a member of that group takes on great importance.<sup>4</sup> Internationally, indigenous peoples' movements have asserted the rights of individuals and groups to decide for themselves if they are or are not indigenous (Mackay 1999).

In Cambodia the concept of 'indigenous peoples' remains a somewhat foreign concept. There is a working 'legal' definition in the Cambodian Land Law, which will be discussed later on in this report. Indigenous representatives have also developed their own working definitions of a collective yet unique identity in regional forums and gatherings that have recently been conducted.<sup>5</sup> However it is fair to say that people in Cambodia who might be considered indigenous have only recently been exposed to this terminology and to the fact that this classification might be advantageous to them. The majority of Khmers also would likely hardly recognise the concept. The fact that the use of the term is both politically charged (given the recent unrest across the border in Vietnam) and not widely used, recognised or clearly defined represents a significant challenge for policy making.

## Highland society

Cambodia's highland indigenous peoples have remained culturally distinct from lowland state societies for centuries, a distinction that is common throughout all of Southeast Asia (Burling 1965). Language, religious beliefs and practices, agricultural production, and forms of social organisation in the highlands are all distinct in significant ways from those of lowland Cambodians and immigrant communities. The lowland societies—Khmer, Lao, Thai, and Vietnamese (Kinh)—which today form dominant majorities (except for the Lao in Laos, who form a dominant minority) within their respective nation-states all have written languages, practice Buddhism (coupled with Confucianism in Vietnam), and have relied on 'wet' rice agriculture (inundated pond-field and receding-flood agriculture). The productivity per land area, population density, and geographic stability afforded by this agricultural system has also allowed stratified states to emerge among lowland societies, supported by taxes on agricultural surpluses and trade.

In contrast, the use of Khmer and other national languages was not widespread among highlanders until quite recently. Highland societies generally speak languages that do not have written scripts, their belief systems and religious practices may be described as 'animist' (although some have converted to Christianity and Buddhism in recent years), and their agricultural production system is generally based on the practice of 'swidden agriculture'. Swiddening is an often rotational form of agricultural production which relies on the cutting of forests to establish agricultural fields, or 'swiddens,' and on long fallow periods during which swidden fields grow back to forest, allowing soil fertility to recuperate (see, e.g., Izikowitz 1951; Conklin 1957).<sup>6</sup>

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and the role of the Khmer ethnic majority in educating their 'brothers and sisters' is assured. As the literature on the role of cultural difference in obtaining access to justice suggests, overcoming these prejudices is a key challenge in providing justice for all Cambodians.

<sup>4</sup> The first attempts at trying to define 'indigenous' in the Cambodian context has already presented a significant challenge for government agencies, NGO staff and indigenous peoples' representatives seeking to implement the 2001 Land Law.

<sup>5</sup> See Appendix 3 for an overview of indigenous groups in Cambodia and their own self-definition from a recent IP gathering.

<sup>6</sup> The literature on highland indigenous groups is voluminous. Significant ethnographic studies of the major groups found in Cambodia include Condominas (1957; 1965; 1977[1957]) on the Mngong Gar of Vietnam (related to the Phnong of Cambodia), Dournes (1977) on the Jarai of Plei Ku, Vietnam, Matras-Troubetzkoy's (1974) study of a Brao village in Ratanakiri Province, and recent studies conducted by researchers and organizations working in Cambodia since the 1990s (e.g., Baird 2000; Baird, et al. 1996; Bourdier 1995b, 1995a; Ironside 1999a, 1999b; Ironside and Baird 2003; White 1996). Guerin's (2003) dissertation presents the history of the French pacification of the highland groups, with a special focus on Cambodia. Hickey's trilogy (1982a; 1982b; 1988) provides an ethnohistory of the highland groups of the Central Highlands, while Saleminck (2003) provides a historic contextualization of ethnographic writing on these groups.

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Forms of social organisation among highland groups also differ significantly from those of the 'state' societies. Varying norms governing kinship, marriage, post-marital residence patterns, death and inheritance, and many other aspects of social life among the highland indigenous groups are distinct from those of their Khmer and other neighbours. One of the most important distinctions identified by French colonial authorities was the absence of forms of centralised authority or political order governing areas larger than the village. While French colonial studies classified the highland people as 'tribal', keener observers recognised that the lack of supra-village structures mitigated against the notion that the dispersed members of the various language groups constituted larger political wholes. According to Condominas (1966 in Salemink 2003:23), French colonial rule in fact encouraged 'tribalisation'—the forming of self-recognised ethnic or tribal identities where none had previously existed. This process was accelerated by wars of liberation and revolutionary movements, and, more recently, by development efforts, social movements, and the activities of NGOs and government agencies. Importantly for the purposes of this study, Salemink (2003:97-99) identifies French colonial research on and codification of tribal customary law as an important element in the tribalisation process.<sup>7</sup>

This history is relevant to the current policy problem because traditional governance is based at the village level. The Commune structure, while necessary for standardising local government across the country, is not so easily grafted on top of traditional governance structures in indigenous areas, or even Khmer areas for that matter. A group of neighbouring villages doesn't necessarily automatically form a natural administrative whole. Where villages are linked through historical and family ties, commune boundaries have often been drawn to separate them. Disputes over unclear and confusing village and commune boundaries have caused an untold number of disputes within villages, between them, and with outside land buyers. For the purposes of this discussion the natural decision making unit for governance and conflict resolution is at the village level.

## War, recovery and social change

Indigenous forms of social organisation are thus not static but have emerged in a landscape of changing political and economic realities. As in the rest of Cambodia, social change in the highlands has been acute over the past fifty years. War, revolution, recovery and development have all had far-reaching effects in the northeast, where most indigenous minority people live. With the US aerial bombardment of the Ho Chi Minh Trail for instance, the highlanders found themselves in the crucible of some of the most important geo-political struggles of the time. The bombings killed people, sent them fleeing their villages, and encouraged some to join the Khmer Rouge. Although Khmer Rouge leaders "claimed ... to have been inspired by the spirit of people who had no private property, no markets and no money" (Chandler 1991:175), after taking power over all of the northeast in 1970, the Khmer Rouge gradually became more and more draconian in their methods. By the time they took control of all of Cambodia in 1975, they had relocated many highland villages and partially collectivised production. Wearing traditional clothing, practicing religious and healing ceremonies, and, in many cases, practicing swidden agriculture were prohibited.

War and social upheaval led to whole villages relocating or fleeing to neighbouring countries. When the Khmer Rouge were routed in 1979, many highlanders that had joined the revolution fled with them; many others served in the national army that continued fighting and played a role in securing the countryside over the following decade. Service in the military or police, previously limited to a small number of highlanders, became a common experience for many young men. In the years following the conflict, many villagers gradually returned to their original village sites (the process is still ongoing, (See Appendix 6, Case Study 6) and took up

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<sup>7</sup> See Appendix 2 for greater detail on customary law in the region.

many of the same practices and ways of living that they had been forced to abandon (White 1996). Many older highlanders today trace the rapid pace of change in their way of life, including the abandonment of many traditions, beliefs and practices, to this period.<sup>8</sup>

The post-war recovery and development boom has had and is having a profound and marginalising effect on many highlanders. The re-emergence of trade, the repair and expansion of road and communication networks, the investment of foreign capital and expertise in natural resource extraction ventures, the movements of economic migrants within the country—many of them heading for the less densely populated hill region: all have tended to reduce the isolation of the northeast provinces from the rest of the country, and have presented new challenges to highland society. Perhaps the most important of these has been the replacement of a system of communal property rights with a system based on private property holding (e.g., Baird 2000; Ironside 1999b, 2001; McAndrew 2000).<sup>9</sup>

The rapid acceleration of the region's integration into the market economy has provided opportunities as well as setbacks. Small-holder cashew nut production, and the production of vegetables for nearby market centres, has provided much needed cash to some villagers, enabling them to make up for shortages in rice and crop harvests and to invest in other trade goods. Motorcycles, motorised rice mills, television and radio are all part of village life today.

An important aspect of the development process is the greater presence of government in villagers' lives. Efforts to encourage decentralisation, the establishment of commune councils, national and local elections and the proliferation of media have all brought people into closer contact with the state than they had been before (making exception, perhaps, for the aberrant DK regime). International donor-funded projects, as well as the work of non-governmental organisations (NGOs), have accelerated this contact. State services such as schools, hospitals, roads, wells and other projects, funded largely with foreign development assistance, have recently become common in commune centres and villages throughout the region.

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<sup>8</sup> Several accounts have addressed the history of the period and the changes to highland society wrought by the turmoil of period. These include Colm (1996), White (1996), and Guérin *et. al.* (2003).

<sup>9</sup> Communal property rights, here, should not be taken to mean 'open access.' Rather, the term denotes a system through which resources held collectively are managed according to known rules. Common property regimes often include individual or private management of resources, such as that of wood resin trees previously managed privately by highlanders (Baird, 2003; Baird and Dearden 2003; Baird 2005). Dove (1983) demonstrates that the failure to recognise the logic of common property regimes has been useful to governments and power-holders eager to supplant those systems with other 'modern' forms of control.

## Methodology of the Study

Consistent with the proposal for the present study, the main part of the fieldwork has been undertaken in order to review and catalogue indigenous customary practices in conflict resolution in Ratanakiri and to a lesser extent Mondulkiri province. This has mainly been done through consultations with highland communities in these two provinces but also through interviews with state officials in Ratanakiri province. The main effort has been in collecting data from highland informants regarding their customary practices, with less emphasis on interviews with state officials.

The fieldwork for this study was intentionally constructed in such a way as to provide a basis for ongoing dialogue, consultation, and follow up research, especially with the indigenous communities who are intended to eventually be the beneficiaries, as well as with representatives of local government. This is in keeping with the study's objective of providing a starting point from which dialogue and consultation could proceed. A key element of the research was capacity building for indigenous peoples' representatives (women, youth and elders) to conduct the fieldwork. The action research approach taken meant that members of the target communities who participated have an increased understanding of the issues related to access to justice, and are willing to be resource persons for any future consultations which may take place.

### Partner organizations

For the field work, the study team chose to partner with two indigenous groups (para-organisations):

1. The Highlander's Association, a local group in Ratanakiri Province, has been created by indigenous people to represent their interests. The Highlander's Association (HA) has considerable experience conducting consultations with indigenous communities since 2001, and has operated as a vehicle for public participation in the formulation of legal instruments to implement the 2001 Land Law.
2. The Indigenous Youth Development Project (IYDP) was created in 2000 in order to provide opportunities for educated indigenous youth to contribute to the development of their own communities. Action Research has been one of the capacity building and awareness raising tools used by the IYDP programme since its inception.

### Human resources

A total of 14 elders (from the HA elders council) and 14 youth from IYDP were selected as research assistants (including four women). See list of research assistants in Appendix 1. These were divided into eight research teams each with one to two elders and one to two youth. This is based on a model which has been found to work well for community development in indigenous villages in Ratanakiri: namely, educated and literate youth work closely in cooperation with elders who may otherwise lack the necessary literacy skills but who have the legitimacy and embody the customary knowledge of their group. As far as possible, research assistants were matched with target communities of their own language groups. The elders give legitimacy to the research team and helped to build trust with community members as well as facilitating group sessions. The youth research assistants guided the process according to a semi-structured interview format, and were responsible for documenting the results. Fieldwork took a total of three to four days in each target village. Evenings were used for group meetings while daytime was used for focus group discussions and individual interviews. Members of the research team trained the research assistants in advance and did spot check monitoring of the process.

## Process

The research format was developed in consultation with a group of elders from the HA advisory Council. This was further adjusted and adapted at a trial consultation organised by the Highlander's Association on 18 March 2006. At this consultation, the research teams tested the methodology with over 55 participants, divided into five ethnic/language groups. Based on the experience of this trial (which already generated a lot of information), the research teams were trained for three days (20-22 March). Field work took place starting 25 March until 5 April. Each research team went to two study sites in Ratanakiri. Based on their experiences in Ratanakiri, one team later travelled to Mondulakiri Province (4-12 May) and conducted research in three villages of the Phnong (Bunong) ethnic group. This was useful for comparison with the groups in Ratanakiri. Verification of the field data and findings from Ratanakiri was done at two workshops:

1. For representatives of the Kreung, Brao, Kavet and Lun ethnic groups on 20-21 April at Kroala Village, Poeuy Commune, O Chum District: 55 participants representing 15 communities, including 16 women
2. For representatives of the Tampuen, Jarai and Kachok ethnic groups on 25-26 April at Lut Village, Ting Cha' Commune, Bor Kaev District: There were 56 participants representing 14 communities, including 18 women.

These workshops were conducted primarily in local languages with facilitators from the Highlander's Association assisting. Local authorities from Village, Commune and District level were included in the participants.

## Study Sites

Villages which are within the established network of the HA were chosen as study sites in Ratanakiri. These were selected to represent the range of ethnic groups in all districts of Ratanakiri, plus two districts of Mondulakiri (see table below). Stable communities as well as communities facing serious social disruption (such as in-migration and land loss) were included in the study, in order to compare the range of responses.

**Table 1: Study Sites**

Village	Commune	District/Province	Ethnic Group
		<b>Ratanakiri</b>	
Ka Tieng	La Bang Pir	Lumphaat	Kreung
Ka Maeng	Poeuy	Ou Chum	Kreung
Ta Heuy	Toen	Koun Mom	Kreung
Kalai Tak	Phnom Kok	Veun Sai	Kreung/Lun
Tumpuon Reung Thoum	Ta Veang Kraom	Ta Veang	Brao
Lalai	Kok Lak	Veun Sai	Kavet
UI Ler	Seda	Lumphaat	Tampuen
Raech	Aekakpheap	Ou Chum	Tampuen
Kak Thom	Kak	Bor Kaev	Tampuen
Ka Nat Thom	Ta Lav	Andong Meas	Kachok
In	Nhang	Andong Meas	Kachok
Reu Hon	Ke Chong	Bor Kaev	Jarai
Chrong	Kak	Bor Kaev	Jarai
Ten	Ya Tung	Ou Ya Dav	Jarai

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Pa Dol	Sesan	Ou Ya Dav	Jarai
		<b>Mondulkiri</b>	
Andong Krolung	Sen Monorom	O Reang	Phnong
Potroo Kraom	Sen Monorom	O Reang	Phnong
Poo Char	Srae Praeh	Kao Seima	Phnong

On average, at least 40 members participated in each target village. This means that over 600 indigenous community representatives (at least 30% women) have been consulted during the course of the fieldwork and verification workshops.

Apart from the above, additional village-level research was conducted in a Jarai village in Andong Meas district and some Brao villages in Ta Veang district, and an interview was also conducted with Brao people living in the provincial capital of Ban Lung, to determine the extent that traditional justice systems are still used there.

## Research content

The village level research took place mainly with small and large focus groups. These included mixed groups, focusing on the opinion of elders (both women and men), as well as disaggregated groups of women and youth. Topics of discussion included;

1. Customary law
2. Identifying traditional authorities and their role (past and present)
3. Identifying the process of conflict resolution and adjudication for different kinds of cases
4. Analysis of case load in the village over the preceding years or decades
5. Documentation of specific cases of interest
6. Identifying changes which have taken place in the customary system
7. Perception of the customary system by specific groups (women, youth, local authorities)
8. Identifying strengths and weaknesses of formal and customary justice systems
9. Identifying interfaces with the formal justice system and local authorities
10. Community recommendations

State officials at commune, district and provincial level, officials of the provincial Office of Land Management, Urban Planning, Construction and Cadastre (OLMUPCC) and the provincial Department of Rural Development, police and military police were also interviewed. One interview was also conducted at the national level with H.E. Suong Leang Hay, the Deputy Director of the Project Management Unit and some of his colleagues at the Council for Legal and Judicial Reform. In this meeting the overall policy environment was discussed along with possibilities for recognising traditional conflict resolution in the overall judicial reform programme.

## Findings

### Traditional legal systems

This part of the report will outline traditional legal systems of the indigenous minority groups that we have been working with in this study. The aim is not to make a comparative study of the different indigenous systems but rather to highlight the differences between traditional law and the formal legal system and to describe the traditional actors, laws and procedures in general.

The traditional legal systems of the different indigenous groups are broadly similar though certain differences exist among the different groups and even between villages. For a more comprehensive description of the Brao and Jarai traditional legal systems and terminology used see Appendix 4 'Jarai Justice Systems - Lut Village Workshop 25-26 April 2006', Appendix 5 'Brao Justice Systems in Ratanakiri Province, northeast Cambodia'. While traditional law is only formally recognised in Cambodia in the 2001 Land Law and the Law on Forestry (see Chapter 6 for a discussion regarding the Land Law), unofficially the many government officials in Ratanakiri and Mondulakiri provinces in fact recognise traditional law as playing an important role in local justice.

Traditional customary law in Cambodia is not codified and in comparison with the formal legal system it can be seen to be less complex (but should not be characterised as simplistic), more flexible and fluid. There are no written records from the proceedings and "Ad hoc tribunals" are established in the communities to solve conflicts when required. Preserving solidarity of the community is a core objective of traditional law and an important part in the conflict resolution is to reach agreement between the two parties so that the aggrieved has been compensated, the guilty party is punished, the two parties have been reconciled and harmony has been restored. Another important consideration is to respect to the traditional customary system and prevent infringements by one person against another (M. Yun pers. comm.) Kak Thoum villagers described the objective of traditional law as:

'They deal with the conflict in order to make people united, without vindictiveness, to prevent future conflict and to avoid having (or creating) crimes in the village. If the conflict isn't resolved, the unity and communication between people will be broken, there will be more conflicts and there will be anarchy in the village. This conflict resolution process can allow people rights, can give an opportunity to someone to give their opinion without forcing them and can change a serious problem to normality'.

The traditional systems make no clear distinction between criminal and civil law. There is mainly civil compensation provided in relation to conflicts handled by local adjudicators. There are elements of punitive sentencing too, including the guilty person working for the victim, etc. However there are no custodial sentences (in case there is need for that, the case will be forwarded to the formal justice system). Alongside having the perpetrator punished, the victims of criminal acts sometimes want to be compensated for damage, injury or loss. Fines go to the victims, with some used (usually from both parties) for reconciliation ceremonies and sometimes payments are made to the mediators and the adjudicators.

### The process of conflict resolution in traditional legal systems

Perhaps the key finding of the village consultations carried out is that indigenous groups overwhelmingly use and support their traditional legal systems and conflict resolution processes within their communities. This is shown in Table 6 and 7 at the very end of this Chapter where only six cases, out of 257 cases mentioned that had been dealt with in the recent past in 10 villages (plus two discussion groups), were taken to the courts. This figure also understates the number of cases dealt with as some villages said they deal with routine conflicts, such as

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animals eating crops, all the time. Traditional conflict resolution is also used in conflicts between villages, mainly for land and boundary disputes, ancestral land claims, selling of other villages land, etc., but also for disputes between village elders, one village insulting another, in competitions between youths over someone they both want to marry, etc. The process is based around negotiations between the conflicting parties and restoring harmony and solidarity in the communities. This is true for both civil and criminal conflicts.

Perhaps the key point about the similarities and differences of processes among the different groups is the fluidity and flexibility of the traditional legal systems, so that the process and the actors involved are adapted to the actual circumstances of each case. There are no definitive standard models except perhaps the protocol of allowing the most qualified and respected members of the community to pass judgement on each case and the participation of community members in the process. The fact that the traditional legal system is based on consensus is also perhaps why there are many examples of good cooperation between local state and traditional justice authorities, as it able to accommodate different actors and arrangements.

See Appendix 6 for examples of cooperation between state and traditional authorities in conflict resolution.

### Initial phase

The process starts with the aggrieved party confronting the 'defendant' with an accusation or a claim. This can be done by the aggrieved party going directly to the 'defendant' with the accusation or claim or, if the complaint is sufficiently serious, the aggrieved party engaging a *kanong*<sup>10</sup> (investigator or mediator) to start looking into the accusations. It is the *kanong*'s role to make the first attempt at a mutually agreed settlement (e.g. by convincing the defendant to admit guilt) and reconciliation. For example, in a case of divorce, both parties get a *kanong*. If the husband or the wife initiates the separation for no obvious reason he or she has to pay a fine to leave the spouse. In the Mondulkiri villages consulted for example if the husband asks his wife to separate he generally has to pay a buffalo for each one of their children they have together and all the money that was paid for their wedding. If the wife asks her husband to separate, she will have to compensate him pigs, cows, buffaloes, chickens, ducks, goats and some money. If a mutually agreeable fine is arrived at and the case stops at this stage, the *kanong* will either receive a small portion of this fine or will join in the reconciliation ceremony (which both sides contribute to, involving drinking a jar of rice wine and eating a chicken/meal, etc) and not receive any direct payment.

#### Box 2: A case of divorce - in village, 1984

A husband went to hunt near a far village (Tumpuon Reung Thoum). He was away a long time and found a new Brao wife and stayed there. The elders, *kanong* and relatives of the 1st wife went to Tumpuon Reung Thoum village to resolve the problem. The new wife had to compensate one buffalo and one pig to the old wife for the mental damage she had endured. The husband had to pay the old wife one set of gongs and one pig (five hands) also to compensate the mental damage he caused her. In the end (after one days discussion and drinking rice wine to reconcile all the parties) the husband decided to go back to the original wife.

Depending on these initial discussions or investigations, if the dispute cannot be resolved 'out of court' either the *kanong* will contact and inform an adjudicator about the case (Jarai,

<sup>10</sup> The Brao and the Kavet do not use the term *Kanong*, and instead refer to these individuals as *Ya Weu* (Ironsides and Baird, 2003). For a more detailed description of the role of the *Ya Weu* See Appendix 5.



Tampuen and Kachok), or in the Brao, Kreung and Kavet situations the aggrieved party or plaintiff will arrange for one or more individuals to facilitate or adjudicate the proceedings, or both the plaintiff and the defendant will choose one adjudicator each (See Section 4.2. Roles of the different actors). Depending on the difficulty of the case each side in the dispute will engage their own *kanong* and even a third neutral *kanong* might be brought in, for example where the case involves a dispute between two different clans in the village.

In Lut village (Tampuen) that hosted one of the inter-ethnic workshops, conflicts are first resolved within the clan and the clan leader adjudicates. If the problem is bigger than the clan, leader(s) of other clans will be called into the process (See Appendix 6, Case Study 7 for a diagram of the different levels of confliction resolution in the village).

### Mediations and investigations

During the mediations and investigations the *kanongs* or adjudicators travel back and forth between the houses of the two parties in the conflict, or they may travel between one group in the communal house, and the other group outside the communal house. The parties are kept separate to avoid conflict, violence or making the problem worse, and if the case is serious elders and family members from each of the two sides will be with the parties in their separate locations. The aim is to understand the nature of the charges, to obtain responses to all questions that arise, to determine right and wrong and eventually to determine appropriate punishments and ways to reconcile the case. The *kanongs* travel back and forth as many times as is needed. Complicated disputes can take some time to investigate and discuss amongst the parties, especially if the plaintiff and defendant are in different villages. At this stage once right and wrong has been established, the *kanongs* may also act as go-betweens in a negotiation between the two parties over the amount of restitution and compensation to be paid by one party to the other (Jarai). For the Brao, Kreung and Kavet, the adjudicators set the initial fine and then the two parties negotiate based on this initial amount. A solution to the conflict or dispute can come about at this stage if both parties agree on an acceptable level of compensation/punishment. Depending on the case this is often a process that involves informal discussions amongst a large part of the adults in the community.

### Ad hoc tribunals

In the Jarai, Tampuen and Kachok systems when the *kanongs* have collected all the information, the elders hear the *kanongs*' presentation of the findings at an ad hoc tribunal and make the final decision about the case after consulting with elders in the village. They seek consent from the two parties and the final decision is determined by a majority of the elders as Pa Dol villagers say below;

'The arbitrators cannot make decisions based on what he wants or thinks; they must seek consent from the two parties to the conflict and the elders, so that the decision would be acceptable by both sides. In the judgment the adjudicators have to think carefully and ensure justice and the fine should be appropriate. They must ensure that the two parties have no revenge or anger in the future and they can be friends again.'

Kalai Tak Villagers explained that: The reason that judgment is fair or good is because there is participation of a lot of people; judgement follows the majority who consider that it is accurate.'

The aggrieved party (friends and relatives may also be involved) first suggests the compensation he/she wants. The guilty party, together with their relatives and friends, decide whether to accept or reject the solution and the penalty. In the Brao, Kreung and Kavet system when the adjudicators feel that they know enough to make a decision regarding a case, they indicate their decision to both sides separately and propose measures for resolving the conflict.

### Compensation and fees

In all systems there is a strong incentive to admit guilt or fault at an early stage as an escalation of the conflict to higher levels of resolutions result in an increased fine and greater sacrifice obligations. When finally determining the fine, the elders consider the seriousness of the offence, what extenuating circumstances there are e.g. if the defendant is a minor, poor, a widow, etc, or if it is a repeat offence. If cooperation has been poor and the offender is disrespectful to the elders (adjudicators), the fines and fees for the involvement of the elders/traditional village leader will be higher. Also, under the traditional system there is a particular punishment for those who are seen to have instigated conflict between other parties. This does not exist in the formal system, unless a case of incitement can be proved that has directly led to the committing of a felony

In villagers where there is a traditional village leader after the fine is set the leader has the right to reduce the level of the fine if he sees that it does not conform to person's livelihood situation. Reu Hon villagers described the thinking behind paying fines as;

- 'The compensation is defined with the aim to protect the guilty not to do his activity again.
- If the guilty is not fined, he will never stop his activity.'

Fines are crucial to traditional legal systems, and the Brao, Kreung and Kavet have an interesting way of ensuring that fines are paid.

### **Box 3: Ensuring payment of fines**

"*Trok*" is a method of debt transfer in the traditional Brao legal system. This is used in the case where an individual is found to consciously avoid paying back a legitimate debt. This involves a warning to pay within a time period or, the debt will be transferred to another individual who is usually influential in the community. If the time period passes and no effort has been made to repay the debt, the debt is then transferred and the new lender pays the original lender the full amount of the debt. Then the indebted individual is responsible for paying the influential person twice the amount of the original debt.

Nowadays, fees are often paid to the people involved in solving the dispute or conflict; but whether a fee is paid or not and how much is paid seems to vary considerably from case to case. Tampuen participants in the Lut village workshop said they are now following the modern ways. Before people only paid fines of rice wine animals such as (chickens, duck, cow and buffalos etc). Now if the case has been complicated the *kanongs*, adjudicators/elders get a fee for their time to solve the dispute. The fee for the conflict resolution service depends on the type of offence - 20,000-30,000 riel, one chicken and one jar of rice wine. A larger case requires 30.000 riel and a chicken (or pig - depending on how serious the conflict is) paid to the adjudicators or elders. In clan based communities (Tampuen, Jarai and Kachok) if all the clans are involved the offender will have to pay all the clan elders involved 30.000 riel as well as paying the traditional village leader. The rule of thumb for payment to the *kanong* is 10% of the fine. Other people who have been involved also may receive something, although this may merely be a share in the meat of the sacrificed animal, and participation in the jars shared after the resolution of the conflict. In Mondulkiri the mediators may be paid in gifts or money depending how much time the case took and how much work was involved. In the past as for Ratanakiri payment was non monetary. Payment to the mediators can be owed but payment must eventually be paid in money or in-kind depending on the agreements between the person and the elders.

In some places more traditional forms are still followed. There is not so much a set fee but an offering is made out of gratitude for resolving the case and for travel costs in order to participate.

A commune councillor from Ke Chong Commune said at the Lut Village Workshop that Commune officials don't ask for payment, they accept people's gifts for resolving the case. However villagers said the service fee the Commune authorities charge depends on the type of problem, which they said is often 10 percent of the fine/compensation. Lalai village said the commune council charges according to the seriousness of the case – 20,000 riels for less serious and 30,000 riels for more serious cases. Payments also depend on the ability of people to pay, the amount of time required to solve the case, and the level of wrongdoing on the part of one or both of the parties. One councillor said that if there is a Khmer party to the conflict they pay the fees in cash but the indigenous people pay with wine, animals and money.

Sometimes adjudicators do not get any direct pay, but benefit by being able to eat and drink jar beer during case proceedings and after they are finished. Often parts of fines are paid right after a case is decided, and then later the rest is paid little by little.

As below, Chrong villagers describe how the winner also has to contribute something.

- '- If the guilty person compensates pigs & rice wine, the winner who receives this compensation also has to contribute one rice wine jar and one chicken for a reconciliation ceremony.
- If the guilty person compensates only chickens & rice wine, the winner only has to contribute a wine jar for reconciliation to forget the problem, recognise that resolution has been achieved, and everyone agrees not to talk or bring this conflict up again.'

Despite this system of fees corruption in the system is kept in check at the village level because of the numbers of people involved in a dispute resolution process and the difficulty in hiding corrupt practices from all the village members. A strong reason to make for the continuation of the traditional legal system is because of the many stories of corrupt practices at higher levels.

### **Saen (ceremony to put an end to the conflict)**

As described by Chrong villagers above the parties and other people who have been involved in solving the case participate in the ceremony which is held to ensure village solidarity and that the conflict is put to rest. (Such a ceremony is held in all the traditional systems researched.) After having drunk this wine, it is not appropriate for the parties to bring the case up again, especially not to complain that it was settled unfairly. An important part of the reconciliation process is to bury forever the dispute. If this is not done Ka Nat Thoum villagers explained that;

'...they (both parties in the dispute) promise each other that if either of the parties remind each other of this dispute (ever again) the party who brings up the dispute must compensate the other party the same amount of compensation which was originally paid because bringing up the dispute cancels the previous compensation paid.' This is because the rice wine drinking is ceremonial/ritual as before drinking the village spirits are asked to witness this agreement.

### **Appeals, referrals or trial by ordeal**

Anyone of the parties can appeal a case or refer it to a higher level if the accused person does not admit guilt or if the parties do not agree with the proposed decision by the elders. Ta Heuy villagers explained that; 'If the participants find that the decision is unjust they can resolve one more time and they can find another elder to do this.' Tumpuon Reung Thoum villagers said if a person doesn't agree with the adjudication he can find another adjudicator to hear the case again but only if it is within a year or so of the last hearing. Three to five years since the last hearing is too long to ask for an appeal, they said.

Appeals can also go to higher levels in the village (traditional leaders) or outside the community to the Commune and District and more seldom to the police or court system. This is particularly the case when the crime is serious or when the case involves outsiders requiring a judgment based on formal Cambodian Law.

Grounds for appeal can be, for example, as Reu Hon villagers explained, when one of the parties thinks the adjudicator was biased;

'The justice hands down a decision which is not impartial, if the decision changes wrong to right they can find a new adjudicator in order to make a judgement for him again.'

**Box 4: Ta Huey village: Case of appeal - death resulting from a motorbike accident.**

Someone drove his motorbike and hit and killed someone else. The conflict could not be solved by traditional authorities, so they went to commune authorities and asked them to solve. The conflict was solved by the commune authorities ordering the moto driver to pay \$2,500 to the victim's family. The moto driver didn't know what was fair or not because he didn't know the law. He depressingly agreed to pay the compensation because he hit that man unintentionally, but he didn't have enough money.

He accepted the solution, but he, the elders, traditional authorities, and his relatives wanted to solve the conflict again by the traditional system. He asked the victim's family to reduce the amount of compensation because he didn't have enough money to pay. In the end the traditional authorities decided, with agreement from the victim's family, to reduce the fine to \$1,500. The motorbike driver agreed to pay the compensation with the aim to keep the friendship, sentiment, solidarity, peace and harmony in the village.

Finally if no resolution can be found for the dispute, Pa Dol villagers explained that;

'If the arbitrator cannot find a solution, and they cannot find other arbitrators from other villages; the two parties in the dispute must take responsibility for the conflict by themselves and this tradition has existed since the past until today.'

Trial by ordeal is sometimes used to resolve conflicts if the defendant pleads innocence or if one party refuses to accept the ruling by the elders, but this is not practiced as much as in the past, especially not the more arduous versions of it (See Appendix 6, Case Study 5 and Box 5 below). Also people are not obliged to participate in trial by ordeal unless they agree. Kak Thoum village explained the change in this practice as follows;

'If a dispute cannot be resolved they must swear to find the justice in front of *Arak Nak Ta* (Grandfather spirit) who is the arbitrator of justice. But now if it is the serious problem they will find the law (usually meaning the Commune and District authorities) to resolve it.'

Where trial by ordeal is used the parties agree to be tried by the spirits. A key aspect of traditional justice is the fact that the spirit world is looking down on the acts of people. When people swear an oath to the spirits and also undergo an ordeal to prove their innocence, what

they are saying is the spirits will be their ultimate judge and punisher (in the form of illness, misfortune and death) if they are lying.

**Box 5: Theft of buffaloes, Lome village, Malik commune, Andong Meas district.**

In December 2005 the thief was leading a buffalo with his younger brother in law but on the way he stole two more buffaloes belonging to two different owners. He sold these buffaloes and the two spent the money. It was obvious that they had money and buffaloes owners called their relatives including the elders to a meeting. They ordered the mediator (*Kanong*) to discuss with the thief's relatives. The thief's relatives denied that he stole the buffaloes. The buffaloes' owners found the village leader and elders to prepare for a trial by ordeal (*Bror Lokh*) but before this the thief confessed. As compensation 3 buffaloes, 500,000 reils (US\$125), one pig and two jars of rice wine had to be repaid for each buffalo stolen, because the thief denied the charge. This was resolved with the approval of the village chief (government), the village leader (traditional), village elders, and the relatives on both sides.

## Village leadership structures and conflict resolution actors

'Traditional authorities are all persons who know the customs and authorities more than others and who are older than others.' (Kreung Group Khuon Village Workshop)

**Village leader(s) - Kra Shrook (Brao/Kreung/Kavet), Krak Srok (Tampuen), Kwha Ploie (Jarai), Kra Des, Kra Ngkong (Kachok), Poorieng Bon (Phnong), Mea Kontrieng (Khmer)**<sup>11</sup>

Traditionally this person 'had the role to lead the people in the village and control all the power in the village' (Pa Dol village). The Kachok group at the Kun Village workshop said 'because he is the chief his speech is very powerful like a thunder flash and everybody has to follow him'. However, from village interviews, workshops, discussions with elders it appears that the role, position, function and even existence of an overall village leader or leaders has changed considerably over the recent past.<sup>12</sup> Most ethnic groups said this role still exists, but in some villages, especially those which have undergone large scale changes there is no longer a traditional leader. Ten Village said this position has finished since 1985 and the role has been taken over by the state appointed village chief. In other cases the village chief and the leading village elder(s) exist side by side with the traditional elder performing a more cultural/ceremonial as well as an internal conflict resolution function. In other cases such as in Lut Village the village chief is subservient to the traditional village leader. In the three Mondulkiri villages surveyed the traditional village leaders still play a prominent role in conflict resolution and in maintaining traditions but also have to deal with a loss of trust, support and erosion of traditional culture in a fast changing 'social situation'.

<sup>11</sup> Kra Shrook is the general Brao/Kreung/Kavet term for village elder including the overall leader. In Tampuen the term is pronounced Krak Srok. Other Tampuen terms that have been mentioned during this research are Meic Kantrieng, Meic Srok, Krak Ngkong. Other Brao terms mentioned during the research include Me Kra, Me Lie (richest person). The common Khmer term is *Mea Kontrieng*, which was also often used in translating and writing village discussions in Khmer language.

<sup>12</sup> See Changes Section for an overview of these changes.

## Towards Inclusive Governance

Village informants said in general, the concept of the traditional village leader is either the one who founded the village or is a descendent from this person.<sup>13</sup> Often this founder originally named the village. Often also the village leader is assisted by one or two deputy leaders. In some Tampuen, Jarai and Kachok villages these assistants will be the leaders of other clans in the village. For the Brao, Kreung and Kavet there is not a single village leader but different elders take responsibility for different roles. In Mondulkiri smaller villages have one leader while Poo char village had three overall leaders.

In the traditional legal system the village leader may be the overall arbitrator but this does not seem to be the case for many Brao, Kreung and Kavet communities. He deals with cases that the lower level authorities in the village cannot resolve and as a higher appeals judge.<sup>14</sup> The leader can give advice on levels of fines and reduce fines set by these lower level authorities.

Traditional societies judge the competence and decision making capacity of their leader by experience and by concrete evidence of success. The village leader is often the oldest and wealthiest person in the village. Many villages mentioned that the village leader has to have experience of different regimes and several regions. More in the past wealth was measured by the number of elephants, buffaloes, cows, wine jars, gongs, etc. More in times past the village leader was expected to contribute more buffaloes than others for the village ceremonies. Also a plentiful store of rice was a sign to the other villagers of the competence of their leader. Leadership is by example and an important function was to encourage all the villagers to cut enough swidden and work hard to ensure that no one goes hungry.

A major role of both the village leader(s) and elders is to lead the village ceremonies to the spirits of the village, land, water and forests. An important part of maintaining village solidarity and village wellbeing is maintaining harmony with the spirit world. The leader(s) are also responsible for supervising the building and maintenance of the village meeting house. This house represents and is crucial for the continuity of the village and the link with the village spirits.

### *Selection and training*

#### **Box 6: Selecting the village leader – Jarai group, Khoun village workshop**

Mr. Sev Yun, chief of Srala village, Kak commune, Bar Kaev district, said that the village leader was selected by village consensus after the villagers knew the leader's capacity in organising traditional ceremonies and in managing, serving and adjudicating cases for the villagers. The elders with all villagers discussed the selection of their leader. This discussion could take two to three days depending on the time that the elders and villagers took in making a decision. After the decision was made, the selected person would be invited to a meeting place and be appointed. A ceremony would then be held in order to gain recognition and trust from the villagers. He also added that some leaders were selected from the next generation of leaders by the spirits due to dreams by the elders and villagers.

In clan-based societies this position is often a relative from the present leader's own clan. Chrong villagers even said that the children from this leading family are more intelligent than average. In Mondulkiri people said they chose their leaders not based only on family but also on capacity, wisdom and knowledge of the traditions. People discuss together to choose and recognise the most capable person. As above villagers also have to endorse this person's selection as their leader. When a new leader is chosen it is necessary to hold a ceremony to

<sup>13</sup> Inheritance rights are passed down through the women's side of the family among most minority groups.

<sup>14</sup> In the vast majority of cases the village leaders and elders are men. (See Section 4.2.5 Women)

inform the village spirit. This requires the killing of a buffalo and jar of rice wine. The leader has to call people to come and drink and eat, and inform everyone. The leader's authority therefore also comes from the village spirits. However in Mondulkiri people said they don't have a ceremony for a new leader as they give him a three year trial period first to see if he should have a right to be the leader.

From the village research, the village leader is chosen on some or all of the following criteria;

- Able to educate, lead and govern the village
- Has a good knowledge of traditions and rituals, and has special powers
- Has shown by experience that he is good in solving conflicts and in mediating to find the solution that is fair for everyone.
- Able to make good and fair decisions about levels of punishment and fining.
- Is clever, has higher knowledge, is wise and skilled in public speaking.
- He understands the problems of the village, is seen to have the interests of the village at heart and volunteers his time for the collective benefit. 'Active in the village and likes to help the poor' (Pa Dol Village)
- Is the oldest and wealthiest in the village. This gives him the most impact and influence.
- Has a gentle attitude. Knows how to advise the children.
- Can build solidarity in the village.
- Knows how to communicate with outside.

It is on the basis of the above that he earns his respect and the villagers have confidence and obey him.

The leader is not formally trained but learns by experience. Younger men who are interested will sit in on conflict resolutions processes. Because of this learning by experience a person under 40 cannot become a village leader and more often the person is considerably older than this. Villagers said there is also an element of natural talent involved in this person's selection, 'he talks a lot from the time he is born' (In Village, Kachok). In Villagers call this gift from birth 'tong'.

### *Dismissal*

Unlike the village chief it is not possible to remove the village leader(s), his/their appointment is for life. In Village said his mandate is for at least 20 years with one of their leaders in office since 1991. Lalai villagers said it is not possible to remove the leaders as they have their own power. This could cause disharmony with the village spirits and could cause illness, etc. If he is a good leader and he makes a mistake or a bad decision he is expected to 'recognise it and tell the villagers not to follow his mistake' (Kachok Group, Khuon Village Workshop). Otherwise a bad mistake on the part of the leader could cause the village to split. When the leader requests to leave from the position because of old age, illness, too much other work, etc he must conduct a ceremony with jar wine, pigs and chickens (depending on his ability) in the village meeting hall in order to let all villagers know. In Mondulkiri however the Phnong villagers said it is possible to dismiss the leader(s), most likely during the trial period. If his/their legal judgements are not good or he doesn't work hard to help the people, villagers and the village elders would have a meeting to decide to dismiss the leader and select a new one.

### **Clan leaders<sup>15</sup> and village elders - Kra Shrook (Brao/Kreung/Kavet), Krak Srok (Tampuen), Kwaha Ploie (Jarai), Kra Des, Kra Ngkong (Kachok), Poorieng Bon (Phnong)**

<sup>15</sup> While the Jarai, Tampuen and Kachok have clans, the Brao, Kreung and Kavet do not.

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Given the similarity of the names between village leader(s) and village elders in all languages the elders assist/work for the village leader(s) to maintain traditions, manage the village and implement customary law. Ten villagers mentioned that in the past the elders assisted the traditional village leader but now they assist the state appointed village chief. In Chrong village there is an interesting arrangement where the village has chosen 10 elders to manage all village affairs.

In Tampuen, Jarai and Kachok villages an elder is also selected to lead and resolve problems in each of the different clans in the village. Some of these clan leaders in turn become deputies and assistants to the village leader, but others have limited authority in village management. Not all older villagers perform leadership functions. There are 'ordinary' elders that don't have the qualities required and people don't call on them for advice and assistance.

One important check and balance in the traditional legal system is that elders are called on by villagers for their assistance based on their record and ability to make fair judgements and decisions. If the elders' judgements are poor, or are seen to be biased, then villagers will cease to call on them. The resolution of each conflict requires careful weighing up of compensation for the victim, the guilty party's ability to pay, and also the impact this decision will have on the solidarity within the wider village community. This community involvement is a major difference with the formal system which is not accountable to and does not have to consider the impact of its decisions on the other stakeholders (families, villages, etc) involved in the case.

The village elders therefore resolve conflicts and prevent further conflict. This involves educating and advising villagers, especially the youth. They act as a lower level court within families and clans. They also function as a *kanong* (see below) investigating both sides of story in the case and assisting the parties to come to a mutually agreeable solution. In Brao/Kreung/Kavet legal systems this mixed role of investigator, mediator and judge is particularly common.

However another function of the elders is to act in the interests of family and clan members who are involved in a conflict. As described in Section 4.1.1., the go betweens (usually two people) research the case by listening to one party's story and then the other's. In important cases elders and family members will sit with their family members in their houses or inside and outside of the meeting house and the go-betweens will move between one party and the other. In this role of advocate for one of the parties the elder will assist to negotiate for fair compensation for the victim or to reduce the amount of the fine the guilty party will have to pay.

### **Box 7: Stealing a buffalo and the elders reducing the fine**

In Ta Lao village, a villager accused another villager of stealing his buffalo, but the defendant denied this. He said the buffalo belonged to him. Although the defendant denied the charge, the plaintiff knew his buffalo very well. All villagers participated in the hearing.

**Solution** - They bet for 10 chis of gold (a unit of weight for gold equal to about 3.75 grams) and a white and a black buffalos which would be killed for a village ceremony. At that time, the elders asked to reduce the amount of bet to a pig and one chi of gold. Both parties agreed to immerse themselves under water after a traditional ceremony was held. At the end, the defendant lost and gave the buffalo back to the plaintiff with one chi of gold and added one more buffalo and a pig for the village ceremony.

## *Selection and training*



A clan leader is chosen by the clan members and elders, but the position is also partly hereditary. Dreaming about this person by other people can also play a role. The position of important elder however is earned by merit. As for the village leader, clan leaders and elders are expected to be intelligent, knowledgeable, influential and brave in public speaking. For conflict resolution, powers of reflection and analysis are required, as is experience and patience and an ability to listen to conflicts and cases. Elders are also recognised for natural talents and their ability to 'think for themselves' (Tumpuon Reung Thoum Village). Honesty and non-partisanship is also important to gain respect and trust from the clan and village members, and to be able to maintain village solidarity. Elders need to know customs and traditions and need to be hard workers and lead by example. Ka Nat Thoum Village said important elders also must be married. Ten Villagers commented that now they actually elect their elders with a show of hands in a meeting.

There is no formal training except helping the village leader mediate conflicts. As with the village leader, the influential elders have gained their education by living through 'many eras such as Pol Pot and Lon Nol regimes' (In Village).

### *Dismissal*

The clan leader cannot normally or easily be dismissed. The role of elder can continue until the person's death if the villagers respect, value and continue to call on them for assistance. 'If he does wrong people don't call on him again' (Kak Thoum Village), people stop to obey him and he 'loses power and influence' (In Village). 'It's up to him if he wants to continue his work or wants to stop, nobody forces him.' (Raech Village). This therefore is a volunteer position as the elder is not formally 'selected or nominated.' (Ui Leu Village). Elders are chosen for their different strengths. For those who have great knowledge in conducting the village ceremonies, the situation is slightly different as this person cannot be dismissed by the ordinary villagers.

**Table 2: Summary of general tasks of the village and clan leaders, and elders (from all villages and ethnic groups)**

General Village Management Tasks Performed	Village Leaders	Clan Leaders	Village Elders
<b>Village Management</b>			
▪ Educate to strengthen and maintain village solidarity.	✓	✓	✓
▪ Educate the children to study at school. Encourage them to participate in village affairs teach them about village governance.	✓	✓	✓
▪ Lead the Village – so it can progress. Coordinate/lead and educate the villagers and children to do community work.	✓	✓	✓
▪ Control villagers' duties.	✓	✓	
▪ Collect money from villagers for developing the village.	✓	?	?
▪ Look after the village. Take care of village assets.	✓	✓	✓
▪ Call meetings regularly and inform the village of problems.	✓	✓	
▪ Prepare the weddings (Mondulkiri)	✓	✓	✓
▪ Make decisions about funerals. Select the burial site. Decide on the place to bury bodies of people who died violently or by accident outside the village (as normally they can't be brought into the village).	✓	✓	✓
▪ Approve villagers going to a funeral in another village.	✓	?	?
▪ Define village boundary and spirit areas.	✓	✓	✓
▪ Function in place of the village leader. Work for the village leader.		✓	✓
▪ Take over after the village leader.		✓	✓

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▪ Communicate with the outside and represent the indigenous people.	✓		
<b>Cultural activities</b>			
▪ Lead the village religious ceremonies. Look for buffaloes and lead the village sacrifice.	✓		
▪ Preserve the culture and traditions - ensure that these are respected and practiced. Educate about the traditional stories, practice the village taboos.	✓	✓	✓
▪ Assist the village leader to carry out the village ceremonies.		✓	✓
▪ Decide about moving the village, look and ask the spirit of the area. Start a new village.	✓		
▪ Lead people to do the village meeting house.	✓		
<b>Livelihood/social aspects</b>			
▪ Look at and resolve people's living conditions and causes of illness	✓	✓	✓
▪ Educate the younger village members how to farm and encourage them to grow enough food for themselves.	✓	✓	✓
▪ Give good advice to the villagers. Provide moral education to the village youth.	✓	✓	✓
▪ <b>Land And Forest</b>			
▪ Mediate internal disputes	✓	✓	✓
▪ Divide the lands and water between one community and another community.	✓		
▪ Control the village borders once in two years (Mondulkiri).	✓		
▪ Educate and tell the children about the borders between one village and another village.	✓	✓	✓
▪ Educate the villagers to keep the lands for the future generations.	✓	✓	✓
▪ Inform about the usefulness of lands and forests and the difficulty of losing the community's lands.	✓	✓	✓
▪ Divide the use of natural recourse clearly in each area	✓	✓	✓
▪ Lead the people to control/patrol the protected forest once a month (Mondulkiri).	✓		

**Table 3: Tasks in conflict resolution carried out by the village and clan leaders and elders**

<b>Conflict Resolution Tasks Performed</b>	<b>Village Leaders</b>	<b>Clan Leaders</b>	<b>Village Elders</b>
▪ Take responsibility for implementing traditional law. Give advice and educate about these laws and levels of fines.	✓	✓	✓
▪ Resolve problems inside and outside the village	✓	✓	✓
▪ Lead each clan and solve conflicts in their clan		✓	✓
▪ Listen to, investigate and research each case of conflict – to determine how serious it is. Find the right reasons.	✓	✓	✓

'Analyse right from wrong' (Kak Thoum Village).			
▪ Give opinions from own experience, to village elders, village chief, committees, and team leaders.	✓		
▪ Adjudicate - make judgement to resolve the conflict, decide on sentencing and define the amount of compensation without bias. (Ten village no right to sentence. Chrong village ten elders agree together)	✓	✓	(✓)
▪ Advise and help the village chief solve problems (Lalai Village. Ten Village - in cases where there is no traditional village leader).		✓	✓
▪ Mediate conflicts. Function as a go-between ( <i>kanong</i> , <i>Ya Weu</i> – Brao and Kavet) in resolving conflicts		?	✓
▪ Negotiate to reduce the amount of compensation	✓	✓	✓
▪ Review and revise decisions about fines	✓		
▪ Ensure parties are reconciled after the dispute	✓	✓	✓

### ***Kanong* (go-between/mediators/advocates)**

This person is chosen as a mediator for each particular case by the parties in the dispute and also to negotiate a marriage. If the conflict is small only one *kanong* will be used, for example in a case of insult. The one *kanong* (*Ya Weu* in Brao and Kavet) will complain to the person who made the insult and ask for restitution for the plaintiff. If there is only one *kanong*, and the other party thinks it is unfair or does not agree, he/she can then take another *kanong*.

Generally two *kanong*, one from each side of the conflict come together to investigate the case to prevent stories getting mixed up. When two villages are involved one *kanong* is taken from each village. They look into the background of the case, facilitate negotiation and a resolution between the two sides, moving between the two parties.

The *kanong* therefore makes the first attempt at resolving the conflict through trying to find mutual agreement between the two sides. He considers, educates, give suggestions and advice to mediate the conflict' (Ten village). If this is not possible the village elders will be asked for advice and eventually the case will be brought to higher and higher levels in the village governance structure and even out of the village if the dispute cannot be resolved (See Appendix 5).

When the case is brought to the village elders or higher, it is the *kanong's* job to listen to both sides and accurately report the case to the decision makers. In Tampuen, Jarai and Kachok justice the *kanong* acts for the interest of the person who engaged him and plays a role in negotiating the level of fine/compensation for their respective 'clients'. The Brao, Kreung and Kavet situation is quite different as the *kanong*, (*Ya Weu* in Brao and Kavet) are expected to be neutral people as they act as investigators and judges at the same time. Ten village also reported that the *kanong* can also be involved in making a judgement on the case. As discussed, the key point in the role of the *kanong*, as with the other actors in the traditional legal system, is that who does what, when and where depends on the circumstances of the case.

### ***Selection and Training***

A *kanong* can come from any clan, or anyone in the village who is capable and knowledgeable. This person is chosen because he is honest, wise, just, intelligent and can speak well (for example see Appendix 6, Case Study 1). They will usually be chosen for their reputation and 'ability to adjudicate' and mediate (Ten Village). This is learned through working with the elders and 'naturally' (Chrong Village). Often the *kanong* will be someone over 40 years age as a young person will not be believed so much. Often the *kanong* will be a relative of the people involved in the case but the family relationship should not be too close.

## Parents, friends, relatives and villagers

These play an important support role listening, giving suggestions, educating and asking the winner of the dispute to reduce the compensation according to the loser's ability to pay. This is also where important public debates are carried out about justice, the degree of right and wrong, the appropriate level of compensation, etc. It is this grassroots participation which distinguishes most of all the traditional systems from the formal legal systems and the reason that villagers overwhelmingly support their traditional system.

### Box 8: Ul Leu - village the role of the relatives

A person in this village gambled a lot and had to sell all his possessions. There was no food at home and he hit his wife. Resolution - 1st offence, no compensation was paid, relatives on both sides met together and made him promise not to do this again. 2nd offence, the elders joined as witnesses (not as mediators). The relatives discussed the problem again. One jar of rice wine was provided for the guests and still no compensation was requested. 3rd offence, this time the parties made a contract together that if it happens a 4th time, the relatives of the wife will have to fine the husband one pig to provide food for all the guests participating in the mediation. After this the husband stopped.

## The involvement of women in traditional law

Apart from support roles (join in as a witness, listen) women do not have a significant role in resolving conflicts traditionally. During the village research women complained about this and asked for a more equal role. They do have an important role in conflict prevention, maintaining village cohesion, in providing moral education to their children, etc. Women also play an important role in maintaining solidarity with neighbouring villages through hosting their neighbours during village ceremonies. Also, for the Brao, Kreung and Kavet there are instances where women are adjudicators. Touay Umbil village's main adjudicator is a woman, and many other villages know of women who played that role in the past. Women can play this role, if they are seen by the community to be good enough talkers and have enough knowledge. However, in most cases men end up serving as adjudicators. Women are also able to have an equal say during proceedings, although in reality men usually play a greater role.

Several villages have leaders of women's groups (elders) which play a role in 'mediating women's quarrels and disputes', and in 'strengthening solidarity' (Ka Maeng, Ten and Ta Heuy Villages). These women can be elected by women (Tumpuon Reung Thoum and Ka Tieng Villages) or appointed by the village elders (Kreung Group Khuon Workshop). They are often women who don't have a husband, who have knowledge about traditions and other things, and can speak other languages than their own. Some villages (Lalai) also said NGOs have been training and assisting these women leaders. In Village said there was a woman village leader but her role was more to do with leading women during traditional ceremonies.

Other more recently established women's roles are members of agriculture and natural resource management committees. These women are sometimes involved in resolving/discussing land and forest conflicts. They receive some training and participate in study tours.

## The state system - the interface between the two systems

A large part of the changes impacting on indigenous culture in Ratanakiri and Mondulakiri nowadays is the increasing roles and power of the village and commune chiefs, and the increasingly marginalised role of the traditional village leader/elders. One of the important findings of this study however is the very large role that traditional village authorities are still performing in resolving conflicts and in maintaining order and harmony in the village, even in villages which have suffered from large scale land loss and community 'disintegration'. Another interesting finding is that even when state appointed authorities (Village Chiefs, Commune and District authorities) are involved in conflict resolution, they often follow traditional conflict resolution processes, fines and punishment standards. See case studies presented in Appendix 6 which illustrates the interface between the two systems in more detail.

### Group chiefs

The group chiefs are government appointees and considered of limited importance in the traditional sense. Interestingly membership of these groups in Lut village (Tampuen) does not conform with membership of the traditional clans (See diagram - Appendix 6, Case study 7). Group members come from all different clans in the village, meaning there are two different governance structures in the same village. In Lut Village sometimes a case will be taken to the group chief before taking it to the village chief, especially when the conflict involves two different clans. The group chief therefore functions much the same as a traditional elder (and most probably is one). Selection is according to similar traits already mentioned, active in village affairs, some literacy, able to speak and express opinions, intelligent, popular, etc. Ka Nat Thoum villagers said they are elected to their position and are chosen due to their 'many years of leadership experience'. They receive some training from the state authorities and their mandate is indefinite unless they 'work illegally' (Ka Maeng Village).

### Village chief

The village chief's role in managing the village also includes conflict resolution tasks. The role of traditional village leader and state appointed village chief now overlaps in some villages. Reu Hon villagers explained 'that in the old time the village head was chosen according to the family line, but now the village head is chosen by the village collective'. This quote also illustrates the increasing confusion over who wields the power in the village, overlapping roles and authorities, marginalisation of traditional leaders, etc. In some Jarai and Brao/Kreung/Kavet villages the village chief has assumed the role of managing the village, resolving conflicts and he is responsible for the (traditional) task of maintaining village solidarity (See Section 5 Changes in indigenous communities).

The village chief in Lut Village however cannot decide on cases he can only give advice and assist to facilitate a resolution. He also mediates between clans acting as a level of authority under the village leader. Tampuen participants in the Lut Village Workshop said the difference between the state and traditional authorities is that the state authorities only deal with the every day issues. Their 'authority/legitimacy' to lead is not ceremonial or ritual and their role is entirely different from the traditional elders and leaders. They can also come from any clan, which is not the case with the traditional leader.

Villagers said the village chief's role is to link the village with the government structure. He both collects information from the village and disseminates information from higher levels to the villagers. In this role of bringing information/training from the outside he calls village meetings and carries out education and awareness raising. He is also involved in overseeing village development activities (or at least the ones that come from outside the village) and in facilitating village development plans. He also represents his political party in the village, which in some cases can make his 'non-partisan' adjudication role less than ideal. His role in witnessing land

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sales documents in his village also means that in many cases the village chief is the cause of disputes in the village, which compromises his ability and credibility in resolving them.

In the sense that he bridges between the village and the state he therefore is involved in both formal and informal justice processes. To villagers he (and the Commune and District authorities) represents the formal legal system. The distance from this system (courts) and villagers' lack of knowledge of state law means that they assume the village chief is actually implementing state law when in the vast majority of cases the village chief is following traditional conflict resolution processes.

The village chief often plays an important partnership role with the traditional authorities, providing advice and information in the conflict resolution process. The village chief can be asked to assist if the *kanong* and the elders fail to resolve a case. He can also provide advice during the conflict resolution process, but doesn't participate unless asked (Jarai responses, Lut Village Workshop, Makin 2006).

### *Selection and training*

All villages studied felt they had the authority to select (through a village election/secret ballot) and dismiss their village chief if he does wrong for 'cursing, drinking too much and other serious problems' Ten Village. This accountability factor needs to be carefully considered for developing policy that promotes good governance, as village chiefs will soon be selected by their commune councils. Villagers said the village chief can be chosen from any clan and actually can be any age. There was no case of the village chief being a woman, but a handful have been recently appointed in Ratanakiri province.<sup>16</sup>

One important aspect of the village chief assuming the traditional role of village leader is more often than not the village chief does not have the years of experience and training that the village elders have been through in order to be able to mediate and adjudicate disputes. It could be a serious mistake to assume that the village chief or other state appointees are able to take over these roles and effectively administer justice without regard to the importance of this experience and wisdom, and the trust and respect that goes with it.<sup>17</sup>

The qualities villagers look for in a village chief are similar to those mentioned above for the traditional village leaders; honesty, working for the community good, respected by the villages, leadership skills, impartiality, etc. Villagers also said the village chief has to be good at public speaking and 'explaining so that people understand' (Kak Thoum Village). He is also chosen on the basis of education he has received outside the village. Ka Maeng Village said they looked for 'Someone who can speak many languages', and In and Ka Tieng Villages saw Khmer literacy as important to both relate with the outside government system and bring back information from it. Ka Nat Thoum Village said that the village chief should be a village elder and should be married. This reinforces the point that the village chief is also part of the traditional authority structure, however the role this person plays and the dynamics that exist between the two governance systems varies considerably across the villages studied.

According to villagers, it seems training for the role of village chief is largely carried out outside the village – they said by the Commune, District, or the State. Indications from the village research are that the village chief is neither sufficiently trained in implementing state or traditional law, but he is expected to implement both 'to solve conflicts using traditional and state law' (Kak Thoum Village).

Some villages mentioned the village chief can remain in office almost indefinitely while others said he has a definite mandate 'two to five years, but can continue' (Brao/Kavet/Kreung Group

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<sup>16</sup> At present there are a 20 women Commune Councillors in Ratanakiri

<sup>17</sup> See Section 4.3.6. Strengths and Weaknesses of the Traditional and Formal Legal Systems.

Khuon Village Workshop). After a certain period some villages said they can re-elect their village chief.

### Commune and district level

Commune councils and the district level is where the state and traditional systems meet and these local government officers facilitate this. From the villagers perspective the commune council is something from 'the modern society' (Ka Maeng village). They are actually seen as another kind of elder with villagers saying they are elected but also they are 'selected from among the village elders' (Ka Maeng village). Villagers said they are trained in a similar way to the village chief, outside the village. They cooperate with the village chief, provide security and order, control social activities, work with NGOs and participate in development. They also 'solve conflicts when they are invited by letter' (Ka Maeng village) and 'make official letters and contracts concerning the resolution of a problem' (In village). Most villages surveyed felt it is possible to dismiss the commune councillors if they make a serious mistake.

Our research findings show that there is a high level of interface (and synergy) between the traditional authorities in highland villages in Ratanakiri and Mondulakiri and state officials at village, commune and district level.<sup>18</sup> Disputes over village boundaries for example involve both state and traditional law. When cases cannot be resolved in the village if one or both parties do not agree with the ruling they are sent to these higher levels, particularly when the crime is serious or when the case involves outsiders requiring a judgment based on Cambodian Law. Ka Nat Thoum villagers said;

'Those who need to send their case to the formal court do it because they don't listen and accept the facilitation of the elders and village chief in the community and these are people who have money, property and power that they want to win from the sentence.' Ka Nat Thoum villagers also complained that conflicts resolved out of the village has some bad effects on community members, especially if the resolution is unfair. Some said that people can't look each other in the face, they think of revenge, and community solidarity is affected.

Tables 4 and 5 in Chapter 4 show the number of cases resolved in 10 villages (and from two group discussions in Khuon Workshop) over the recent past. This table shows that 257 cases were dealt with by the traditional authorities in their own villages. Out of this 87 were taken 'up' to the village chief, 49 were taken to the Commune level (including 19 cases in which the Commune police were involved). Only nine out of 257 cases involved the District authorities and only six cases were taken to the Provincial Court. Table 5 shows that the vast majority of cases are still resolved by the traditional authorities at the local village level. In 87 out of 257 cases (34%) the case was brought to the village chief.

However within many (but not all) villages unless the village or the commune authorities are expressly invited (usually by the village chief) to assist with the resolution they only have the right to provide advice and support to the elders. Lalai Village echoed other villages<sup>19</sup> when they said;

'The commune councils have roles to resolve the conflicts according to the traditional laws.

When there are cases in the community the elders in the community invite the commune heads to help in the resolving but they can't pass judgement, they just come to listen and help to mediate. If the village elders can't resolve the case the commune head can resolve it.'

<sup>18</sup> It should be noted that the interviews with state officials at village, commune and district level have been carried out in areas where the indigenous people are in majority and that the interviewees are all indigenous themselves apart from one district official. It could be expected that had the interviews been carried out with Khmer state officials where the highland groups are in minority the answers would most likely have been different.

<sup>19</sup> Including Ten, Pa Dol, Ka Maeng, Ta Heuy, Tumpuon Reung Thoum, Chrong, Kalai Tak, Ka Nat Thoum, etc.

In terms of traditional protocol the commune council becomes a higher 'traditional' court. 'The commune authority use the state laws to resolve all conflicts, they use the constitutional laws that is the high laws of the country.' (Ten village). In reality however both laws apply at the Commune level.

### **Box 9: Slaa village accusation of killing a buffalo 2002**

The owner of the buffalo which wandered into another person's cashew plantation accused a villager from Kok of killing the buffalo (but without evidence). The accuser called the relatives of both sides, elders, village leaders and village chiefs (government) from both villages. The resolution was not successful because the accused did not admit any fault. The accuser was not satisfied and took the case to the Commune. The participants were Commune Chief, Village chiefs, village leaders, elders from both villages, plus relatives. The Commune chief and the village leaders were the adjudicators at this level. No decision was made due to lack of evidence. The Commune sent the case to the District. At this level all of the above people participated with the District head in the resolution. The district could still not resolve due to no evidence or witnesses from the accuser. The accused was adamant that he didn't kill the buffalo and asked to take the matter to a trial by ordeal. In other words the case went back to the traditional system. The accuser went to think about it but in the end didn't dare to take the matter further.

Jarai participants in the Khuon village workshop said that once the conflict moves up to the village chief or the commune level these authorities become the adjudicators and the village elders also only have the right to provide advice and support to the local authorities; 'If the case is being solved by the law, the traditional authorities have no right to judge the case during the process. They could only join in the judgment process and shown give some suggestions related to the case. Only commune authorities or legal authorities had the right to judge this case.'

In the process of resolving the conflict, the commune councils usually set up a group consisting of the commune chief or/and other commune council officials, commune policemen (not always included), elders, village chiefs and the parties to the conflict that will work to solve the conflict. If there are two or more villages involved the same set of people from the different villages are invited to participate. Lalai villagers said that the resolution process can take two to three days, and that there are now more conflicts to deal with.

Several commune councillors that we talked to say that they know traditional law well and in a very large number of cases they use traditional processes, fines and ceremonies, especially when the parties to the conflict all are indigenous. This is the case even in urban areas like Ban Lung, the provincial town. Commune councillors often work closely with the elders before the case reaches the commune level, and the councillors often have a good understanding of the conflict and its history.

Appeals to the district level sometimes by-pass the commune level, and appeals from the commune level sometimes by-pass the district level and go straight to the Court. Our research has found that district officials who are indigenous, similarly to commune officials, often follow traditional law when the conflicting parties are indigenous. See Appendix 6 for case studies showing the interface between the State systems.



Although the commune councillors and district officials often say that they only reconcile in disputes and don't make decisions, some admit to deciding on cases brought to them, and there are a number of examples where they make decisions in disputes. (See Appendix 6).

## Police

When looking at interface between the traditional authorities, and the police (and courts see below) we found that the cooperation doesn't seem to be as close as between the traditional authorities and the village, commune and district levels presented above. However, as seen in Table 6 and 7 local level commune police often cooperate more than higher level police, and it also very much depends if the police are indigenous or not. Village consultations told of police participating in meetings called by the commune council or district officials to solve conflicts but the role of the police didn't seem to be as defined as the role of commune or district officials.

Two senior Khmer provincial policemen acknowledged that the traditional authorities do solve a lot of conflicts in the villages. They said that if the traditional authorities could not solve the conflict the case would be brought to the commune police or higher. The examples they gave were not about the police cooperating with the traditional authorities but rather about what they thought were injustices in the traditional system, and how the police had solved the conflict in accordance with national law after the traditional authorities had failed to solve the conflict. The police interviews indicates that the interface with village elders seemed to be limited to the police using the elders as informants in their investigations rather than actually working together to solve the conflicts. The police officials said however that cases that were not so serious could be dealt with by the traditional system and that they recognised traditional concepts of justice and law that was similar to national law.

The police informant's emphasis on solving conflicts according to the national law might imply that there can be no (or little) interface between the police and the traditional authorities while the latter is applying traditional law. However we found that local police are involved in local level resolution under traditional law, see Appendix 6 and Box 10 below,

Participants during the verification workshops said that they do not want to involve commune or district police (or militia) because it is time consuming and will cost money. Village consultations suggested that the conflict resolution under the traditional system is in conflict with the unofficial "out of court" settlement undertaken by members of the police force. This could be one of the explanations to why there is little interface between the police and the traditional system. Although the present study did not specifically look at the role of the police in conflict resolution there is enough evidence from the *Pathways to Justice* study, NGO reports and newspaper articles to say that police are involved in "out of court" settlements that are not in compliance with the national law.

### **Box 10: Case of youth competing with the same girl and the involvement of the police 2005**

A Khmer youth from the district centre competed for the same girl as a village youth. The Khmer youth came to the village and made advances to the girl, who was already a girlfriend of the village youth. The village youth confronted the Khmer youth, who hit the village youth over the head with a piece of wood, causing injury and bleeding. The parents of the village youth lodged a complaint with the district military police (as he wasn't from the village). The military police arrested the perpetrator for one night. The next day they resolved the case in front of the parents of the victim, the village head, elders of the village, and their relatives. The head of military police was the one to adjudicate (his deputies would have no authority to decide). In making his decision he consulted with the relatives of the victim to ask them how much compensation should be paid. The decision was to pay 2 million riel (\$US500) to the family of

the victim plus 800,000 riel (\$US200) to the military police.

### **Courts and prisons**

Research findings show how the informal system is still functioning and the formal legal system has not managed to bring justice to the indigenous groups, with many individuals suffering great injustice in the formal legal system (See Section 1). Villagers with limited Khmer language skills are at a grave disadvantage in the formal system, especially women. Villagers see the traditional system as generally more fair, more pro-poor and easier for local people to access than the formal system and also they don't really know and understand the formal system. However interviewees have said that people from their community with power and connections are now using the formal system when it suits them and they are bypassing the traditional authorities.

The limited use of the court system by indigenous peoples is shown in Table 6 and 7, where the courts played a role in only 2% of the cases mentioned. One of the judges at the Ban Lung provincial court estimated that maybe only 20% of the cases he was handling involve one or more parties that are indigenous. The Ban Lung judge believed that this is because the indigenous peoples have not abandoned their traditions and almost always go to the traditional authority or the commune council to resolve their conflicts. The judge also said that cases between outsiders and indigenous people are mainly about land and cases where both parties are indigenous are mainly related to divorce and assault /domestic violence. While the most common cases between Khmer and Khmer people are divorce and contract disputes over loans.

In the Ban Lung prison, five out of six prisoners we talked to were indigenous minorities and the crimes they had been accused of or tried for were committed in their villages, the other was a Lao ethnic minor from Lumphaat. Several of the prisoners we talked to were held in pre-trial detention that well exceeded the time limits set out in the UNTAC Law; four months or six months if justified by the requirements of the investigation. According to them this was because they had not paid anything to the formal system authorities (police, prosecutors or prison officials) to be let out or have their case tried by the court. One prisoner had spent 10 months in pre-trial detention for theft of a chicken in his village! He couldn't tell us why his case was not handled by the traditional authority, except that the owner of the chicken had gone straight to the police to complain.

Another prisoner had been sentenced to an eight month prison sentence for theft of a buffalo in his village. Again we have no explanation why this case had been handled by the formal legal system and not in the village. In addition to his sentence he spent seven months in pre-trial detention. The prosecutor appealed the sentence and while waiting for the appeal to be tried at the Court of Appeals in Phnom Penh the prisoner has spent 17 months in prison. Although he has served his sentence long ago he will not be released from prison until his case is tried by the Court of Appeals. As the law does not give any time limits for when the Court of Appeals has to take up a case, the prisoner could spend up to three or four years in prison for a crime carrying an eight month sentence. The mother of one of the prisoners told us how she had paid the prison officials to let her son out of the dark room with no windows where he had been confined during the first days of his stay in prison.

### **Strengths and weaknesses of the two systems**

The villagers consulted in this study have given several examples of strengths and weaknesses of the traditional and formal systems. Table 4 presents the main categories of strengths and weaknesses that villagers had about the traditional legal system and Table 5 does the same for

the formal legal system. Quotes from the village research summarises how indigenous villagers feel about these two systems.

**Pa Dal Village - Conflict resolution at court**

'Usually people are not satisfied with the judgment because it is a way to find justice based on money. When there is a serious dispute, people would be happy to resolve it through the traditional way, not going to the court; as traditional is a way that we spend little and hope for real justice.'

Lalai Village - 'The people that want to resolve at the court are mostly rich and powerful people. The poor people have no ability to contest. The villagers don't like taking cases to resolve at the court as it's not good for their community. Resolving conflicts at the court breaks solidarity and makes people spiteful in the future.'

*Strengths and weaknesses of the traditional system*

**Table 4: Strengths and weaknesses of the traditional system<sup>20</sup>**

<b>Strengths of the Traditional System</b>	<b>No. of villages which mentioned this</b>	<b>Weaknesses of the Traditional System</b>	<b>No. of villages which mentioned this</b>
1. Justice is perceived to be done	17	1. Punishment and fines can be beyond the damages incurred in the case.	17
		2. There is no standard body of law and no proper training for the adjudicators.	7
		3. Biased decision making.	9
2. The traditional system is efficient in time and procedure	13	4. Can take a long time if the conflict is complex	1
3. Respects and maintains the culture and traditions	12	5. Traditional authorities lack authority to resolve a lot of conflicts	8
		6. Loss of traditions.	9
4. There is less corruption	6	7. There is some corruption these days	7
5. Reconciliation of the 2 parties is an important part of the process	14	8. At times reconciliation is not complete	4

<sup>20</sup> Based on answers from 15 villages in Ratanakiri and 3 in Mondulakiri (combined into one for the purposes of this discussion). Also included are the results of two group discussions from the Khuon Village workshop. Draft tables of this research were also presented at the Kreung, Brao and Kavet workshop held on 20-21 April in Kroala village, and the Tampuen, Jarai and Kachok workshop of 24-25 April for modifications and additions.

6. Community solidarity is maintained and strengthened.	15		
7. Community Participation is strong	12		
8. Community self reliance is maintained	8		
9. The cost is less than going to the Courts	14		

The villagers' views of the key strengths of the traditional system included;

- It supplies a degree of justice and impartiality which they don't feel they receive through the formal system.
- Conflicts can be dealt with quickly to reconcile the two parties, restore harmony and social cohesion. 'A serious problem becomes a little problem' (Kak Thum Village).
- Anyone in the village has the right to join in when a case is being heard and there is a wide debate in the village over guilt, degree of seriousness of the offence, and the appropriate level of punishment and compensation.
- Wide participation means;
  - People own and understand the decision and the punishment. The participatory process is just as important as the result of the case,
  - Excessive bias, corruption and miscarriage of justice is avoided,
  - Offenders, village youth, future elders, go-betweens and adjudicators all learn about traditional law by implementing it,
  - It is easier for elders and women to understand and speak.
- The offender's ability to pay and the victim's circumstances were taken into consideration when decisions were made. 'Penalties or fines are to make the offender stop committing violence; actually, we do not want to become rich from these fines...' (Pa Dal village). Fines can also be paid over time.
- People prefer the system they know and have some influence over, rather than confronting the intimidating formal system, which they can't influence because of their limited knowledge of national law, Khmer language and their inability to pay the formal and informal fees.
- Self reliance which helps preserve culture and traditions – Traditional law is 'the peoples' own', and is capable of resolving conflicts by peaceful means.

Weaknesses of the traditional system were found to be;

- Fines are sometimes very heavy and more than what they felt the offence warranted. There are no limits to the levels of fines which could be set. Sometimes the party who wins the case will demand an overly large compensation.
- Fines have to be paid again if the problem repeats itself or is brought up again after it has been resolved once. This limits hearing the case again if a new investigation is warranted (In Village).
- The system is open to different interpretations, biased decision making and confusion over some of the decisions the elders take, because of few guidelines/limits for the adjudicators. For some offences there are very precise guidelines regarding what the fine levels should be.
- Sometimes true reconciliation does not occur and people look for revenge.
- People are sometimes found guilty on little or no concrete evidence. The traditional system sometimes can not clarify what is the right and what is the wrong and an innocent person may be punished, if people believe this person is the cause of misfortune or illness experienced by them or their family (M. Yun pers. Comm.)
- Elders sometimes discriminate in favour of their own clan and relatives and against the interests of poor people. Corruption is creeping into the system as some 'rich people,

supporters or relatives who work in higher rank' can afford to pay the adjudicators/elders and influence the decision.

- Elders lack training in the national law and there is no way they can learn about this.
- Some parts of traditional law have or are now being forgotten. Experienced adjudicators are not passing their knowledge onto younger community members and they are not in touch with the changes happening in their communities. Elders are making decisions based on traditions without adapting quickly enough to rapid changes occurring in society. New conflicts require new approaches and processes, as they are more complicated and in some cases can not be resolved.
- The traditional legal system is powerless to deal with more powerful outsiders. Ordinary villagers don't have the courage to deal with these people. In some cases powerful outsiders actually want the traditional legal system to be lost.
- When the conflict resolvers are not able to find a solution then community members begin to question the relevance of the system. This in turn leads to conflict within the community and loss of trust and respect for elders, traditional law and culture.
- Now due to land sales and changing land uses people live more dispersed in their farms and traditional law is based on a strong community which live together in the village.

### *Strengths and weaknesses of the formal system*

**Table 5: Strengths and weaknesses of the formal system<sup>21</sup>**

<b>Strengths of the Formal System</b>	<b>No. of villages which mentioned this</b>	<b>Weaknesses of the Formal System</b>	<b>No. of villages which mentioned this</b>
1. There is a standard body of law	8	1. Uses a lot of time and people don't understand the process.	11
2. There is enforcement of the decisions	5	2. Lack of security for people who are involved in the cases.	1
3. Conflicts can be resolved according to the actual situation	1	3. Perceived as unjust and unfair	10
4. Don't have to pay a lot (for food, etc.) to people during the investigation and trial process	1	4. There is Corruption 5. Need a lot of money	12
		6. Weakens Community solidarity, culture, traditions and self reliance. 7. There is no community participation in the process 8. Reconciliation is difficult	9

Villagers said they saw the following strengths of the formal legal system;

- There was a standard body of national law where punishments and fines were clearly laid out, and all conflicts and crimes (including serious criminal offences) can be dealt with under this law. Serious offenders and gangsters could be caught and put in prison.

<sup>21</sup> Based on answers from 15 villages in Ratanakiri and 3 in Mondulakiri and the results of two group discussions from the Khuon Village workshop. Also added to at the 2 workshops held to present the research data.

## Towards Inclusive Governance

- The formal legal system is backed up by a system of law enforcement and prisons throughout the country. There is a strong deterrent for the offender ('makes offender more honest and frightened') to re-offend.
- If the formal law was used properly it could help to defend their rights and interests.
- Punishments are adjusted according to the age of the offender.

Weaknesses of the formal legal system were found to be;

- The court system does not deliver justice. It involves even higher costs than traditional fines and very often decisions made were unfair.
- The formal system is something "for rich people with knowledge, money, power, who don't want to lose", "The person in the wrong can win if he gives money to the court." (Raich Village). The formal system 'tramples on poor people' and 'the powerful people oppress the weak people'. Decisions are based on the amount of money people had and are not based on principles of right and wrong.
- There is a lack of security for community members after a decision has been made, for example when the court rules in their favour and against a high ranking person.
- It requires a lot of time and money to travel to the court.
- The offender is punished but the 2 parties are not reconciled and there was a real possibility of the conflict reappearing or of revenge by one party against the other. It is difficult to reconcile the two sides if the loser is in prison and the winner is free.
- The fine must be paid all at one time. Punishments are not adjusted according to the circumstances, to consider the persons ability to pay, for example for widows and the poor.
- It is particularly difficult for women to receive justice in the formal system.
- People are not confident in Khmer language and people are unfamiliar with the national law and court processes. Lack of familiarity with court procedures means that when a villager needs to make their case (with limited support) they are intimidated by the unfamiliar surroundings and the many police and officials. They are nervous, are not able to say what they want and they forget important arguments and details.
- Villagers don't know how to make formal complaints and fill out the Court documents. There is very little legal assistance that villagers can access to negotiate their way through the formal system. A villager from Kak Thum Village described the formal system simply as 'horribleness'.
- Going outside the community weakens family and social cohesion, traditions and self reliance.
- Lack of community participation means neighbours, relatives and community members cannot help and speak up for their friends and family. The court's decisions are therefore not accepted.

## Summary of Strengths and Weaknesses of the two systems

- (1) The traditional system strongly emphasises community wellbeing and fairness to prevent future conflict

An elder from Kachok village, Kak commune commented that traditional conflict resolution is completely different from conflict resolution using the government law. A participant from Chrong Village (Jarai) explained that in the traditional process, agreement and the level of compensation is negotiated between the parties, and community members also contribute their suggestions. In this sense people are equal before the law. Conflicts are resolved by peaceful methods without bribes,

"If it's wrong they say it's wrong if it's right they say it's right" (Raech villagers).

UI Leu village youth also said traditional laws are very fair are easy to comply with, and are implemented without ambition. Ka Nat Thoum villagers said however that traditional law is very strict. In Mondulkiri, for example, people said the fine for a serious case of gossip

(defamation) could be cows or buffaloes. Traditional law is preferred by the community, as decisions have public participation, majority support, it is based on forgiveness, and the punishment can be reduced 'by thinking, analyzing and asking the majority' (Ka Nat Thoum). The Brao from Ta Veang said the principles of justice in both systems are similar, but that the ways decisions are made and the result of decisions are quite different.

(2) The formal legal system has a serious credibility problem among indigenous communities

The contrast with the formal system in the villagers eyes is that inequality is much more pronounced and the indigenous community members are often the far more powerless and handicapped party in the case - 'we are illiterate, do not know about the laws, whatever we say we still lose' (Ka Nat Thoum Village). The poor people have no ability to contest (Lalai Village). Ka Nat Thoum villagers echoed many others when they said that, 'In fact now we see that the implementation of formal law excuses someone who has money, is powerful and who supports others from behind. The result they said is that there is the law, but no one obeys the laws'. Chrong villagers said these people 'can go anywhere (do anything) they want because they have money and they want to win'. For indigenous villagers resolution in the formal system is not fair and implementation of justice is far superior in their own traditional system.

In the Court system;

"What is wrong is right and what is right is wrong" (Reu Hon villagers)

The other major difference is that villagers believe that filing a complaint to the court means that the two parties will not be able to make friends any more, as the formal system is simply punitive and does not focus on resolving the conflict. "They would lose solidarity and friendship, and bitterness would come instead." (Loam village, Malik commune). Other villages also agreed that 'after the resolution there is no solidarity. 'The minorities don't like the court's decisions.' (Raech village).

The villager's idea – Conflict resolution with justice always has agreement with a lot of participants and the village elders are impartial, they stand in the middle of the both parties and don't favour their relatives. The villagers like the adjudication according to the traditional authorities, because when the elders make a decision they have good reason and have agreement of both the parties.' (Lalai village)

**Tables 6 and 7: Number and types of disputes handled by traditional authorities and other levels****Table 6: Index for Table 7**

Name of Village or Discussion Group (from Khuon Village Workshop)	Abbreviation used in Table...	Commune and District	Ethnic Group	Period referred to in Table
Chrong	(Ch)	Kak, Bor Kaev	Jarai	2002 to 2006
Reu Hon	(LH)	Ke Chong, Bor Kaev	Jarai	2001-2006
Pa Dol	(Pdl)	Sesan, Ou Ya Dav	Jarai	1990-2006
Ten	(Tn)	Ya Tung, Ou Ya Dav	Jarai	2002-2006
In	(In)	Nhang, Andong Meas	Kachok	?
Tampuen Group Khuon Village Workshop	(TGKVV)		Tampuen	?
Raech	(Rch)	Aekakpheap, Ou Chum	Tampuen	2002-2006
Tumpuon Reung Thoum	(TRT)	Ta Veang Kraom, Ta Veang	Brao	2003-2006
Kalai Tak	(KD)	Phnom Kok, Veun Sai	Kreung/Lun	2003 – 2006 – 19 Different types of cases, 50 cases have been resolved in total
Kreung Group Khuon Village Workshop	(KGKVV)		Kreung	?
Lalai Village	(LI)	Kok Lak, Veun Sai	Kavet	?
Ta Heuy	(Ty)	Toen, Koun Mom	Kreung	?

**Table 7: Number of cases and where these cases were resolved in 10 villages and two ethnic group discussions over the recent past**

Type of conflict	TA	Village	Commune	Commune police	District	Court	Comments
<b>Marriage, separation and divorce</b>							
Pre marriage - jealousy, competition for the same girl, take someone else's partner (Ch, Pdl, Tn, LH, KD, KGKVV, Ty)	19	9					
Pregnancy before marriage (TRT, Ty), with sister in	9						



law (LI)							
Conflict between wife and husband/ separation/divorce (Ch, Pdl, Tn, In, TGKVW, Rch, KD, LI, Ty)	54	23	2	1			Fine 100,000 riels (Tn), TRT not alot
Adultery/two wives (Tn, TRT)	9	8	0	0	0		
Parents don't agree to a marriage (TGKVW, KD)	2						
<b>Family disputes</b>							
Between parents and child in law (TGKVW, KD, Ty)	5						Moved into separate houses (TGKVW)
Family problems (Rch)	2		1	Joined in			
Violence in the family (Rch), domestic violence (KD, KGKVW, Ty)	17					4	
<b>Inheritance/sharing property</b>							
Inheritance (KD, Ty)	5						
Sharing property (TGKVW)	1						
<b>Defamation/Insult/Harassment</b>							
Lying (KD)	2						
Scorn from neighbouring villages (Pdl, KD)	4	1					
Drunk - cut bamboo for carrying water (Tn)	1	1					
Boasting (TGKVW, Ty), defamation (KD, Ty)	11		3				
Wealthy looks down the poor (TGKVW, KD, Ty)	7						
<b>Fighting and Violence</b>							
Made a trap for wildlife but accidentally killed someone killing people (1994 Porkh Ngia, See Appendix 6, Case Study 2)	1	1	1	1	1		District Chief resolved
Drinking and fighting (Ch, Pdl, TGKVW, TRT, KD, KGKVW, Ty)	34	20	3	6			Fighting between gangs (KGKVW)
<b>Theft</b>							
The conflict of stealing the gongs. (LH)	1		1	0	1		
Steal assets, others property (Pdl, Tn, TGKVW, Rch, TRT, KD, Ty)	19	15					Trial by ordeal (swear an oath) to resolve (Pdl)
The conflict of stealing the cows and buffaloes (LH, Ch, In, TGKVW, KGKVW)	1	2	2	3	1		Police got the buffalos back (Ch)
Steal rice (LI)	1						
<b>Animals eating crops</b>							

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Cow and buffalo eat rice (Pdl, Tn, TRT, KD, LI), pigs (LI)	12	1	1		1		Between villages, TRT every year
<b>Burning crops and property</b>							
Burning others crops (TRT)	4						
<b>Traditions/ceremonies/funerals</b>							
Do not make funeral ceremony (husband and wife get marry with new) (Ch)	1						
Cut burial forest (TRT)	-						In the past
Conflict between leaders (TGKVV, KD, Ty)	3						
Conflict over spirit belief (magical issues .....)(TGKVV, Rch, KD, Ty)	9	1	2	1			Resolve by trial by ordeal (swear an oath) (TGKVV)
Conflict over village taboo (TGKVV)	1	1					
<b>Accidental death</b>							
Bomb exploded while tampering with it (Tn) (See Appendix 6, Case Study 4)	1	1					Pay back lives of the dead
<b>Land conflicts</b>							
Land issue (Katei and Chrong village) from 2005-2006 (Ch)	3		2		2		
Villages boundary disputes (Pdl, TGKVV, Rch, TRT)	3	2	2	1			Not resolved (TRT)
Conflict with outside business person (Rch)	1					1	Unsuccessful (Rch)
The conflicts of land (LH, TRT, LI, Ty)	11	0	8	3	3	1	Not allow to farm on their land – not resolved (TRT)
Conflict with person who sell the community land (TGKVV)	1	1	1	1			
Give the land to a friend in another community (Rch)	1		1	Joined in			
<b>Other natural resources</b>							
Destruction natural resource (KD)	1						
<b>Totals</b>	<b>257</b>	<b>87</b>	<b>30</b>	<b>19</b>	<b>9</b>	<b>6</b>	

## Changes Taking Place in the Traditional Legal System

Like many aspects of indigenous culture, it is clear that the traditional legal system is facing several challenges to its continued existence. The influx of people and foreign cultures means that the traditional system has to deal with a range of new conflicts, such as land disputes with outsiders. In a very few villages near Ban Lung which have been most impacted by in-migration and land buying the young are choosing to go to the commune council for dispute resolution. However as noted 'For resolution commune councils depend on the traditional law and public law, but we use more traditional law.' Ka Maeng village

A participant in the Khuon workshop said that in Leu Touch village, Kak commune conflicts were solved by the village chief with the participation of village elders, mediators and heads of families. People assume that the village chief is using the formal law to make decisions and so the participants don't have any right to make any decisions. UI Ler Village, which has not been impacted by land alienation to the same extent as Kak Commune, also said that organising village affairs is now done jointly by the traditional village leaders and the village chief. Important reasons for these changes were a loss of respect and confidence in the elders, the changing social environment, and 'government laws'. In Mondulkiri also now many people 'depend on the state authority and there are a lot of educated people and a lot of cunning people that don't respect the leading elders in the community.'

However in other villages 'The decisions of traditional judgment are still obeyed and stable until now.' (Ka Tieng Village), and 'Villagers are satisfied with the decisions according to the traditional laws and it still continues but some of it has been lost.' (Ta Heuy Village). Tampuon Rueng Thoum villagers confirmed this loss of some aspects of traditional law, saying that now only the one who has influence can resolve community conflicts. Ka Nat Thoum also commented that in the past people 'obeyed the leader more than now, because they believe in a leader who is strong'. They said though that 'they still have good solidarity in the community'.

In all the villages consulted for this study however the traditional legal system was still widely practiced, respected and supported. Ka Nat Thoum, UI Leu, Chrong and Trabok villagers (Brao from Ta Veang district) villagers were not able to discuss their experiences with the formal system as not a single case had ever been taken outside the village. Tampuon Ruing Thom said they have never had to deal with a case of murder in their village.

Brao people living in Ban Lung town, who have also been badly affected by the loss of land in recent years claim that they still mainly rely on their customary justice system to resolve conflicts within their communities, and there are particular elders who are frequently called upon to adjudicate cases. However, they acknowledged that this was mainly possible when Brao people, or other minorities, were involved in the cases, and that it was much more difficult when outside Khmers were involved, since they frequently refuse to acknowledge their justice system.

### Box 11: Raech village

In the past outsiders who came to live in the village had to agree to follow the traditional law. Now there is an influx of outsiders who don't respect the village law/system. If there is a conflict, they don't agree, respect, listen to the traditional resolution. They depend on the national law and the courts.

Raech and UI ler villagers both said justice was much better in the past (before 1979). In this time no cases were ever taken to the commune or higher authorities. Tampuon representatives (Khuon Workshop) however said that in the past (Lon Nol time) complaints were sometimes sent to the chumtub (former Commune Authority), then to higher levels.

A Reu Hon village elder said that, in the past, the most important rules (laws) that the villagers followed related to village ceremonies and funerals. The village leader and two village elders carried these out.<sup>22</sup> The leader managed the internal rules and regulations as he had full power and control over all villagers. People said the rules in the past were much more and strict than the rules in these days. Some rules/laws have been lost.

Leu Touch (Kak commune) and Ul Leu villagers said that conflicts in the past included jealousy, adultery, clan arguments, criticism of one village about another, disputes between elders of different villages, theft of rice and cattle, youth of another village wanting to marry a girl outside their village<sup>23</sup>, verbal abuse from drinking alcohol, etc. and these conflicts still happen. Verbal and sometimes violent conflicts would happen when traditional taboos were violated such as crossing someone's swidden field to clear a new one. Some conflicts such as adultery have always been very complicated and difficult conflicts to resolve, because lots of detailed information and reasons are needed, villagers explained. Disputes between elders could persist for a long time and could cause the village to split. Villagers said that in the past conflict between villages over land was rare because people were able to cooperate and resolve these problems.

### **Box 12:1986: Split in Kak village due to 2 leaders (Kak Srok) in the village**

The village was preparing to gather together (after the war) to build a new village site. At that time the incumbent leader died. He had not selected who would succeed him. The villagers wanted to make his son in law the new leader in his place. But some villagers wanted to select another elder to be the leader. Also they had not yet built the village meeting place at that time. So the spirits were angry and many people died. So the village split - Kok Thom (large) moved to a site near the old village site with the son in law of the old leader; Kok Douich (small) moved to a further site with a different leader.

Some people said the traditional legal system stopped dealing with murder and other serious cases since the Khmer Rouge period. This was because anyone was killing anyone in the KR period – without retribution. Indigenous traditions were wiped out during this period, people said. Other representatives said that some murder cases have been dealt with more recently. One aspect which has changed is that in the past, the offender had no options to run away anywhere but now he/she does. Other villages would not accept them, because accepting a new person into the village who had killed someone would affect the village taboos. Therefore the criminal would have had no one to depend on and would be eaten by tigers in the forest if they left the village. So the incentive for compliance with traditional legal adjudication was much higher than now.

Participants at the Lut Village Workshop said now that it is possible to go to the state system (Commune, District and the Courts), people can pay the courts and authorities to avoid fines and imprisonment, and the traditional system is sidelined. In the traditional system, the fine for murder has always been 12 buffaloes for one person. In Mondulkiri a serious fine for murder if the guilty person denied the crime would be one elephant and 15 buffaloes. For the reconciliation ceremony the person would be required to pay a medium to large pig. Because of corruption, people know that if they have money to pay the formal system will be much more lenient on them than the traditional system. People said that even murderers get out of jail after three months, and most murderers don't even spend one year in jail (this is because the formal

<sup>22</sup> In many ways there is a strong overlap between law as something much more to do with observing traditional rituals and ceremonies and something that regulates ordinary human behaviour.

<sup>23</sup> With regard to disputes over other villages' women Pa Dol Villagers said – In the past the men would sometimes make a trap along the road to catch men from other villages and this would be followed by fighting and sometimes someone would be killed. However today, such disputes do not commonly occur, as people are not strict in protecting their village's women.

system is corrupt and non-functional. (Patang Commune elder) Compare this to people committing minor thefts that are serving much longer prison sentences, but did not have the money to bribe the officials, see section 4.3.5.). Because of this murder and theft are much more common now than in the past, as people are not as afraid of retribution as they were when the traditional system had full authority (See Box 1, section 1.1. for an example of a cold blooded murder where the perpetrators were able to avoid prosecution).

However, even now, social attachment of highlanders to their communities is still very strong, which undoubtedly explains why traditional justice systems are still largely functioning. People in many villages however commented on a decrease in community solidarity and the important role that traditional law plays in maintaining community cohesion. In general people felt that they work together and help each other less than in the past.

## Land and natural resource conflicts

Regulating land use has always been an important part of traditional conflict resolution. Communal land management could not exist without it. In the Khuon Village workshop Kreung respondents said that in the past land was managed by the elders, villagers were largely free to use village land for swidden and natural resource collection, and there was no selling of land or timber. Now in some villages land is managed by a community committee with seven members (two women). Areas for community forest use have been delineated, the village boundary is clearly demarcated and some land has been sold. Kak Thoum villagers said before people could hunt or collect forest products in another village area. Now they said people must get permission from the elders, village chief and this new committee, which is linked to the Provincial Department of Environment. Pa Dol village said the management of community land by using the government law is not working well, as the management team has limited capacity. They said that Jarais think that the traditional way of land management is good, as people help and discuss among themselves about who would use what piece of the village land before clearing a swidden plot. They said these arrangements were flexible.

As discussed above, a major change revolves around what were previously community resources becoming privately owned (Ka Maeng Village). This is causing increasing disputes, both within and between villages. Secret land selling and buying also complicates land ownership and makes traditional management practices impossible at times. Now in village meetings people talk about what to do about land disputes and corruption, such as people selling their land and going to live in other communities. Villagers said that these problems are causing 'the indigenous people to be poorer and poorer' (Ka Maeng Village), especially more vulnerable community members.

Villagers in Kak Thoum said, 'Our livestock free range to eat their crops. Our livestock raising systems are different to theirs. If our chickens range in their place, the chickens disappear. They take our livestock. They make fences and cut off our paths.' Kak Thoum village is a good example of the changes occurring as much of the village lands have been sold and villagers said they now have to keep the cows tied up all year round to stop them from eating other peoples crops and young trees, 'because there are many different ethnicities living together' (Tampuen Group, Khuon Village Workshop). Traditional methods of conflict resolution cannot be used because these outside people don't recognise them. 'The conflicting parties need the formal legal procedures (commune chief) to solve conflicts' (Tampuen Group, Khuon Village).

## Changing values

As discussed in Section 4.1.1.4 a major change now occurring was the payment of money to those assisting to resolve a conflict. Participants in Lut Village workshop said they were following the changes they saw in the wider society, but recommended that this practice be

stopped. Participants said there was an increasing desire/need for money, which increased pressure to sell land, increased theft and increased internal conflicts. This is seen also with a breakdown of solidarity and the increasing use of money in resolving conflicts. Participants said it was not like this in the past when conflicts would have been solved without asking for fees. Village research also confirmed these problems due to changing economic conditions, the influence of videos and people following the example of outsiders (immigrants) – such as the Cham immigrants in Padang who organise thieving groups (Patang commune elder)

### **Box 13: Case of cow theft; an old kind of conflict arising because of new reasons**

Economic debt due to introduced cash crop systems from the lowlands. 2003

Von from Kak Village stole the cow of his uncle. He took it to sell with his son. The owner was investigating and suspected Von but was not willing to accuse because no evidence. Soon after (about one week) Von and his son had an argument, the owner overheard their heated discussion in a neighbouring house which uncovered their guild. The cow owner called the elders, relatives, village chief. Because it was their own relative, they decided for Von to pay the cow back (no added compensation necessary) plus one pig and rice wine for the guests (this was the fine). The reason why he stole the cow was because he was in debt to Khmers in Bor Keav, because he borrowed money to be repaid when he harvested his bean crop, but he was not able to pay them back. So Von was not able to pay the uncle back (for the cow) immediately. It took a year for him to collect the money and get help from relatives, to buy a cow to pay back his uncle.

Village interviews also indicate that now people consider much more possessions and wealth (motorbikes, furniture, etc), when selecting a partner. This was changing the dynamics of marriage with people in Reu Hon saying men look for women with property and often the wife doesn't dare ask for her husband's family's property during the marriage process. This emphasis on possessions was also leading to more complex divorce and inheritance procedures, which sometimes had to be taken out of the village for resolution. Before possessions such as gongs were paid as a settlement in divorce cases, now people don't want gongs, they want money. In the past people also had surpluses to pay the fines of rice to make wine, chickens and pigs. Now people are short of rice every year. They also have nothing to sell and so people can't pay their fines.

Women also mentioned jealousy and pride over possessions as a source of conflict amongst themselves. Greater distinctions based on possessions adds to a sense of poverty felt by some and a sense of superiority felt by others, which was not as pronounced in the past. This leads to increasing internal conflicts and decreased sharing.

Another problem mentioned in Reu Hon was conflicts over the unfair division of money from selling animals, cashew nuts, etc. In the past this wasn't so much of a problem as people didn't sell wildlife, etc. Now people are looking for things to sell to get money, a motorbike, etc.

## Changing roles for women

Responses from women in several villages suggest that gender relations appear to be changing. In Ka Nat Thoum Village women said the women group leaders are not as strongly respected as in the past. A new phenomenon is women becoming members of village committees and being called away from the village for training. Husbands have to adjust to these new roles for their wives. A man in Reu Hon Village said in the past husband's would

severely threaten their wives and not let them work in public roles, but now husbands understand about human rights and let their wives play a larger role. Women also said some were jealous of other women who have these more public roles.

UI Leu women however commented that there is no woman traditional authority because men think that women cannot solve conflicts effectively. Women in Reu Hon said they would like 'to govern like the men too'. They said if only the men govern things don't improve. Things only improve if there is participation from the women.' Women in Kak Thoum Village said that women authorities have good communication with men authorities. When there are problems, they always discuss and solve them, and organise ceremonies in families and the village. Kanat Village women said village solidarity is still the same as before because this is the 'bridge for protecting from any destruction occurring in the village or in the society'.

### **Support from women for the traditional legal system**

Women in Tumpuon Reung Thoum Village felt that the traditional justice system is very good and supplies rights to women. Women in other villages often added a condition that the decisions must however be fair for them. Ka Nat Thoum women said if punishments were 'appropriate, they are happy to accept and the compensator is happy to compensate'. Ten Village women felt just decisions came from all the actors joining in to mediate and resolve the conflict. Ka Tieng Village women said fair judgements mean there is no hatred and discrimination, and people can make friends, invite each other to join social events and there is no fighting anymore. Ka Tieng women however said 'fair judgment is very difficult to find'.

Despite their lesser role, women in several villages expressed a desire to 'reform and strengthen our traditional justice system' (Ka Tieng Village). Women in - Ka Nat Thoum, Ka Maeng, Ta Heuy, Tumpuon Reung Thoum, Raech, Kalai Tak, Ka Tieng, UI Leu, Ten and other villages all recommended that the traditional legal system be preserved. They also requested assistance to 'effectively integrate our traditional court system into the national law of the government' (Ka Nat Thoum).

### **Changing circumstances for village youth**

Village youth in Pa Dol Village felt that the influence of the leaders was reduced mainly due to the influx of outside cultures. Another problem is that the elders are not able to deal with new problems, and with the increase of these new conflicts the relevance of the traditional legal system is diminishing. Many youth value the new (outside) culture more than their own, which is seen as out of date. This leads to a loss of respect of traditional beliefs and a rising sense of individual over community interest. Socio-economic changes now mean younger people have possessions such as motorbikes and are exposed to outside influences. They are not so dependent on community solidarity. People in Kak Thoum village mentioned some young people forgetting their family and friends as they put more value in cultivating more 'prestigious' friends outside the village in the market towns, etc.

The discussion group of Tampuon elders in the Lut Village workshop however said that only around one youth in 10 were disrespectful to their elders. In the past participants said young people often bowed their heads to the village leader now some show little respect and don't pay attention to them in meetings. Youth also don't pay attention or participate in preserving the traditions. Community activities are changing as a result.

Youth in several villages mentioned many new conflicts such as motorbike accidents, drugs 'attacking each other by glue sniffing between big brothers and small brothers' (Ka Tieng Village youth), theft, HIV/AIDS, human trafficking, land loss, borrowing money and refusing to

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repay it, destruction of natural resources, the invasion of foreign cultures and religions, etc. These problems were all being dealt with by the elders, parents, relations and to a lesser extent the village chief, generally through education rather than punishment.

Youth in Ta Heuy Village acknowledged their elders role in maintaining their culture and leading the village but felt they were too strict. Kak Thoum Village youth also mentioned that despite respecting the youth and being a good role model, they also do not solve some problems, and have insufficient knowledge. UI Leu Village youth said 'Some people don't respect and follow their beliefs and the elders. They don't have solidarity and destroy their own culture and traditions.'

## Support from the village youth for the traditional legal system

Despite the changes occurring in general youth were strongly supportive of the traditional legal system. They saw the elders as playing an important role in maintaining order, providing advice and education on right and wrong, working for the interests of their village and for future generations, and of course, maintaining their culture and traditions. Mondulkiri villages suggested that there should be an active programme to involve the youth in learning about the practice of traditional law.

Ka Maeng village youth said that traditional authorities can resolve most things for young people. They assist the community members to understand, help, have good communication and apologise to each (Ka Nat Thoum Village). The elders 'show what is black and white and, resolve problems of - theft, looking down on each other, sexuality, conflicts with relatives, etc. (Kak Thoum Village). Ka Tieng Village youth said they follow the elders' decisions, the elders educate them 'to avoid things that the society prohibits'. They also said they recognise the elders achievement 'in maintaining and keeping the land and natural resources for us'.

The elders role in maintaining the culture was also valued by most youth. Despite the changes going on around them and the weakening of some cultural traditions, 'in conflict resolution, young people still respect and listen to the elderly people and traditional law, but many of them think that the traditional way is out of date. (Pa Dol Village).

The issue of loss of respect of the customary legal system is perhaps the central issue which needs to be addressed. Some youth of UI Leu Village said; 'The system is strong if it has the power so that villagers respect and follow it and it is able to make decisions about all issues that occur. The system is weak if it has no power. People will not follow and respect it so much as it can not solve cases.'

Despite this weakening of customary practices many youth said that without the elders implementing customary law there would be;

- No security, no happiness, no solidarity, no friendship between each other.
- Robbery, swindling, murder, and many different conflicts.
- The village would be in turmoil and have a disaster.
- The land and forest would be lost completely.
- The youth in the community would have a lot of arguments and people would fight each other. There would be domestic violence and possibly killing. They would become gangsters.
- Everybody would do what they want without thinking about the wellbeing of others. No one would take responsibility for the villagers.
- There would be no one to help solve conflicts and problems, no one to give advice and educate about following the customary laws; no one would practice any taboos and traditional beliefs.
- No village would be formed. There would be no improvement and no one to lead the village to progress towards development.



- Live without order. There will be no clear community<sup>24</sup>

## New circumstances and conflicts which the traditional legal system needs to adapt to

The changes discussed above are resulting in conflicts that cannot be resolved by the traditional legal system, but many of these conflicts are also not being resolved by the official system either. Major new or increasing conflicts include;

1. **Village boundaries** - even the Commune authorities are not willing to resolve these cases. The District level has been involved in resolving some boundary disputes but in some cases these authorities have also sent these cases back to the traditional authorities for resolution. In some cases village elders are able to resolve village boundary issues, but this is becoming more difficult.
2. **Claims over ancestral land** of one village which is now being used by another village. This has been complicated due to movements of villages since Khmer Rouge times. Resolution of these problems would lead to stability in village land use and reduced possibilities for selling other villagers' land. The Commune and District authorities are just as often exploiting these disputes and signing land sale transactions.
3. **Secretly selling the village or another village's land.** This is a major problem throughout Ratanakiri Province.
4. **Planting of long term crops** – In Ten village, for example, in 2005 people started to take land and make it individually owned because of crops they had planted in their swiddens. This caused a lot of internal disputes, where in the past none existed.
5. **Logging** – traditional authorities have little authority to regulate illegal activities.
6. **Religious Conflicts (Islam, Christianity)** Villagers in Ka Nat Thoum Village were worried that the dissemination of Christianity could destroy 'our own religion' and internal solidarity.
7. **Increasing numbers of outsiders who don't respect the traditional system.** Before there was only one ethnic group in the village, but now there are several and this makes conflict resolution more difficult. The traditional legal system can only be used if outsiders agree to be judged by this system and Khmer or non-indigenous outsiders usually don't respect this system. Some Kreung villages also reported that there have been some cases where Khmers agreed to follow their traditional justice system, but this is more of the exception than the rule.

A comparison of Kak Thoum village with UI Leu illustrates that the effectiveness of the traditional authorities depends on the extent to which the traditional system has been eroded by outside influences. In UI Ler, the traditional system is still strong. Even serious cases are resolved in the community by the traditional authorities. Over the four year period documented (2002-2006), seven important cases were brought to the traditional authorities. These included theft, serious violence and marital disputes. All were successfully resolved without referral to formal authorities. The village head joined as an observer in most of the cases but with no role to adjudicate. There were many other cases of small conflicts during this period, which were resolved within the extended family, with "knong" (mediators).

By comparison, Kak Thoum Village has been badly impacted by land alienation and encroachment of lowland culture and economy. This is especially true of land cases involving non indigenous immigrants, which the traditional authorities have no basis to resolve. Over a 23 year period (1983 – 2006) 12 important cases arose. Seven were successfully resolved by the traditional authorities (58% success rate, compared with 100% in UI Ler). Two cases went

<sup>24</sup> Combined responses from youth discussions in Ta Heuy Village, Ka Nat Thoum Village, Ten Village, Tumpuon Reung Thoum, Kak Thoum, Reu Hon and UI Leu.

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direct to the District Police. One case was referred to Commune and District authorities but without a resolution. One recent land case has not been resolved. Another case, involving a power struggle between two traditional authorities, resulted in the village splitting into two (See Box 12). It is striking to note that in recent years, the majority of important conflicts in Kok Village have been cross-cultural, involving non-indigenous lowlanders. Out of 6 cases documented since 2004, five involved disputes between local villagers with Khmer immigrants. The sixth case was a theft prompted by debt from cash cropping. One case of rape, the offender paid the specified fine by selling land from the village. This shows the lack of recourse for local villagers in dealing with land problems. It also shows how vulnerable they are to being cheated by outsiders, even when their own conflict resolution system is used. Outside cultural and economic influences are now the main cause of conflicts in Kok Village. The increasing frequency of conflicts in recent years is also striking – 6 important cases in the last 4 years compared with only 6 cases in the preceding 19 years.

Kak Thoum village representatives said that now due to these new and difficult problems which the traditional elders are either unable or have no authority to deal with they don't dare to give an opinion in resolving conflicts. Especially with land and logging disputes village elders are being asked to adjudicate cases involving government officials and private business people who are much more powerful than them. Without any authority to make these kinds of rulings Kak Thoum villagers said the elders prefer to stay in their farmhouses and not to get involved in resolving cases. The traditional legal system is still a viable way of maintaining law and order in indigenous villages and those responsible for implementing it need training from elders, as well as regarding the official legal system, and recognition of their roles in serving justice and reducing conflict, to cope with these new realities.

## Policy Discussion

### Options provided for in Cambodian Law to formally accommodate and recognise the traditional legal system of Cambodia's indigenous communities

This section makes a brief overview of the mechanisms for conflict resolution under the formal legal system and looks at what formal role the traditional authorities have in conflict resolution in Cambodia today. With regard to the situation presented in the findings above, possible roles for traditional conflict resolution under the present formal legal system that would enhance access to justice for the indigenous peoples will also be discussed.

The principles of equal rights before the law and non-discrimination are fundamental when discussing the possible roles for the traditional mechanisms under the formal legal system. The Cambodian official legal framework affords equal rights before the law and the principle of non-discrimination to all Khmer citizens under the Cambodian Constitution, article 31, and to all persons under article 26 of the International Covenant on Civil and Political Rights (ICCPR), which Cambodia is a State party to. The ICCPR Human Rights Committee has said that the principle of equality sometimes requires State parties to take affirmative action in order to diminish or eliminate conditions that cause or help perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters. As long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.<sup>25</sup> Differential treatment is permitted under the principle of equality to achieve equality between e.g. members of minority groups and members of majority groups in society. The legitimacy of differential treatment depends on its purpose - preserving minority cultures may be legitimate.<sup>26</sup>

The fact that equality before the law and non-discrimination of Cambodian citizens are enshrined in the constitution and international law means that where a formal interface between traditional authorities and the formal legal system for conflict resolution could be justified to enhance indigenous peoples' access to justice:

- a) The government has the legal authority to pass/amend legislation in order to strengthen existing interfaces and/or create new ones, and
- b) The local authorities and other agencies have an obligation to ensure that the opportunities afforded are taken advantage of in a positive manner.

As we have seen earlier in this report, the indigenous peoples have been on the losing end of the development process in their traditional areas. The participation in decision making in the development process and the exercise of control over their own economic, social and cultural development are important measures that need to be developed in order to enhance access to justice. This will be further discussed under 6.1.3.2.2. below.

### Conflict resolution mechanisms under the formal Cambodian legal system

The Judicial System of Cambodia is set up under the Cambodian Constitution and national laws and it has jurisdiction throughout Cambodia. Under the formal Judicial System the

<sup>25</sup> Human Rights Committee, General Comment 18 (2004), paragraph 10, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.7 (2004), page 148.

<sup>26</sup> Human Rights and Equal Opportunity Commission, Aboriginal and Torres Strait Islander Social Justice (2003), *A fight against racism: Principles of non-discrimination and equality*, page. 2.

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Judiciary shall cover all lawsuits including administrative ones and the authority of the Judiciary is granted to the Supreme Court and to the lower courts of all sectors and levels<sup>27</sup>. Only judges have the right to adjudicate<sup>28</sup> and only the department of Public Prosecution shall have the right to file criminal suits<sup>29</sup>.

### *Criminal actions*

A crime is an act prohibited by law for the protection of the public, the violation of which is prosecuted by the state and punishable by fine, incarceration, and/or other restrictions of liberty. The prosecutor is always the principal party in a criminal case, i.e. he or she is the only party who initiates a criminal action in the court and seeks to convict the accused and the prosecution, arrest, or detention of any person shall not be done except in accordance with the law<sup>30</sup>. There is no official role for the traditional authority to prosecute criminals under the formal system today. Some of the minor offences that the traditional authorities are dealing with today would not qualify as a misdemeanour under the UNTAC Law, e.g. when one person's cows enter another person's swidden field and eats the rice. While other minor offences fall under the UNTAC Law. For such offences there is a strong incentive to find ways to allow the traditional authorities to continue to handle them. This is supported both by the fact that the traditional system is still intact and solving these conflicts (while the formal legal system is broken and does not provide access to justice for these groups), and that there is strong support from the community to continue to handle these cases (See Table 6 and 7 above).

### *Civil actions*

Civil action seeks a judicial resolution of disputes between parties. In civil suits there are three main remedies: 1) order to pay compensation, damages, or settlement of debt, 2) attachment of debtor's property or mortgaged property, and 3) imprisonment for debt. Other remedies apply to Family Law cases such as divorce, alimony, child custody, child support, property awards, determination of paternity, etc. (Koy Neam, p. 72)

As we have seen above only judges have a right to adjudicate in civil actions and there is no role for traditional authorities. One area of the law of importance to the indigenous groups that we have consulted is family law; especially marriage and divorce. In order for a marriage to be considered legal it has to follow the procedures of the Law of the Marriage and Family and the same is true for divorce, the jurisdiction to adjudicate divorce today lies with the Provincial or Municipal courts. A complaint for divorce must be filed directly by the complainant at the court, or at the commune/Sangkat office. In the latter case, the commune/Sangkat office shall conciliate the case within 15 days after receiving the complaint. If the case cannot be conciliated, such case shall be sent immediately to court. Today there is no role for the traditional authority to handle divorces under the Law of Marriage and Family.

#### **Box 14: Case of divorce (of an engaged couple), 1986**

The couple loved each other and decided to live together. They told the elders and did a ceremony to notify the spirits. It was not yet a proper marriage. After less than one year and the wife was pregnant three months already, the couple decided they needed to separate as they couldn't live together. The elders, relatives from the clans on both sides and two *kanongs* participated one day and one night. The elders decided that the husband needs to compensate the wife, because he made her pregnant; one buffalo, two sets of gongs plus one pig (five hands – measurement of the size of the pig's girth) and one jar of rice wine for

<sup>27</sup> Article 128 the Cambodian Constitution.

<sup>28</sup> Article 129 the Cambodian Constitution.

<sup>29</sup> Article 131 the Cambodian Constitution.

<sup>30</sup> Neam, Koy (1998) *Introduction to Cambodian Judicial Process* (The Asia Foundation, Phnom Penh), page 96.

As we have seen in our study, marriage, divorce and compensation in a divorce are matters that are commonly dealt with by the traditional authorities. In order to legitimise such divorces the indigenous traditional authorities would have to be granted authority to dissolve marriages. This role is today only afforded to the Provincial and Municipal Courts and a policy discussion with the Ministry of Justice would have to be undertaken in order to work out what conditions would have to be met in order to grant the traditional authorities the power to dissolve marriages.

### *Civil disputes not resolved through judicial means*

Disputes of a civil nature can however be reconciled by anyone and do not have to be settled by the court. One exception to this being family law with divorce and adoption, which are examples of civil action that cannot be settled outside of court today.

#### (1) Land management

The 2001 Land Law establishes a certain role for indigenous communities in relation to communal ownership of land. The exercise of all ownership rights related to immovable properties of a community and the specific conditions of the land use shall be subject to the responsibility of the traditional authorities. Mechanisms for decision-making of the community, according to their customs and shall be subject to the laws of general enforcement related to immovable properties, such as the law on environmental protection article 26, paragraph two. Also, before the indigenous community is the owner of the collective lands they shall continue to manage their community and immovable property according to their traditional customs, article 23 Land Law, paragraph two. Conflict resolution is an integrated part of the customary rules of collective use and the mechanisms for decision-making in the community and these two articles of the Land Law are therefore very important, as they must, in our view, be interpreted as establishing a formal role for the traditional authorities in relation to conflicts regarding their lands.<sup>31</sup>

Article 25 paragraph three of the 2001 Land Law deals with the measurement and demarcation of boundaries of immovable properties of indigenous communities. This paragraph stipulates that the measurement and demarcation shall be determined *according to the factual situation as asserted by the communities, in agreement with their neighbours* (emphasis added), and as prescribed in Title VI of the Land Law and relevant sub-decrees. The procedure for the (sporadic) Registration of Indigenous Immovable Property (Communal Land) has yet to be adopted. The Sub-decree on Sporadic Land Registration stipulates however that the officers in charge of demarcation may invite persons concerned to give oral information, documents and/or any other evidence, article 3, and the applicant has an obligation to participate and co-operate as above according to article 5 of the same sub-decree.

As we see above the traditional authorities are already recognised by the 2001 Land Law as the managers of the communal property and they should therefore have a similar role in the demarcation of communal land as the concerned persons and applicants under the Sub-decree on Sporadic Land Registration articles 3 and 5.

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<sup>31</sup> This is also the interpretation made in the *Pathways to Justice* report (p. 134) which concludes: "In summary, according to the Land Law, the indigenous communities in Cambodia are legally entitled to have their own authorities (defined and nominated according to their own norms); to follow traditional customs and rules; and use their own mechanisms for decision-making, according to those customs and rules in respect of common land use. We may interpret that this includes the faculty to resolve conflicts, and enforce the decisions adopted by the community in relation to land matters."

Furthermore, the role of the traditional authorities is already specified in article 25 of the Land Law, to determine, in agreement with their neighbours, the factual situation that the measurement and demarcation is based upon.

This demarcation role needs to be further defined under the (sporadic) Procedures for Registration of Indigenous Immovable Property, as the existing draft working procedures being used in the pilot villages for registering communal land do not today mention the role of the traditional authority. Should the Ministry of Land Management, Urban Planning and Construction (MLMUPC) decide not to adopt a specific Sub-decree for the registration of communal land the existing Sub-decree on Sporadic Land Registration should be amended to accommodate this role for the traditional authority.

### (2) Land disputes

The 2001 Land Law sets up a new system for disputes over immovable properties between possessors who don't have legal title. This new system is being implemented by the Cadastral Commissions established at the MLMUPC.<sup>32</sup> The Cadastral Commissions are part of the system to register land in Cambodia. The Sub-decree on the Organisation and Functioning of the Cadastral Commission establishes three levels of the Cadastral Commission: District/Khan, Provincial/Municipal, and National level.

The district/khan and provincial/municipal Cadastral Commissions (DKCC and PMCCs) can only conciliate disputes and do not have decision-making power.<sup>33</sup> The national Cadastral Commission has decision-making power but its decision can be appealed or can be subject to judicial review.<sup>34</sup> If there is an agreement, or a non-contested decision, the parties can register the land accordingly.<sup>35</sup> Once the land is registered disputes over such lands will be handled under the Judicial System.

The 2001 Land Law does provide for formal interface between the formal and informal systems in several provisions regarding land conflicts. Formal interface over unregistered land is provided for in article 5 of the Sub-decree on the Organisation and Functioning of the Cadastral Commission which stipulates that the chief of the DKCC shall invite concerned District/Khan, Commune/Sangkat and village and/or local elder trustees to join as ad hoc members in the Cadastral Commissions at district or khan level. But according to an officer of the provincial cadastral commission in Ratanakiri, there has never been a case where members of the elder group have been called officially as ad hoc members. Commune and village chiefs are usually called to participate. The role of the traditional leaders as "local elder trustees" should be further strengthened in order to accommodate for a functional interface in land conflicts.

From the discussions above land management and also the role to solve conflicts in relation to communal immovable property (registered or unregistered) has been entrusted to the traditional authorities under the 2001 Land Law. Our research points out that land conflicts, especially between communities and "newcomers" who have bought land on communally managed land, can not be solved satisfactorily, neither by the traditional authorities nor by the formal legal system. The official role of the traditional authority under the formal system should be further defined and strengthened in order to deal with such conflicts. Further, the Government of Cambodia must continue to strengthen and reform the formal legal system or the traditional system will also not be able to function.

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<sup>32</sup> Article 47 the Land Law (2001)

<sup>33</sup> Articles 9 and 15 the Sub-decree on the Organisation and Functioning of the Cadastral Commission

<sup>34</sup> Articles 20 and 23 the Sub-decree on the Organisation and Functioning of the Cadastral Commission

<sup>35</sup> Article 24 the Sub-decree on the Organisation and Functioning of the Cadastral Commission

*Other opportunities for interface in resolution of civil disputes*<sup>36</sup>

The local authorities at the village, commune, district and provincial levels can provide for other opportunities for interface that exist in other areas of the legal framework.

**(1) Village Chiefs**

Although the village chief does not have a specific legal role in conflict resolution, he/she is usually the first local authority to receive and attempt to manage local disputes.<sup>37</sup>

**(2) Commune Councils**

The commune council has a formal role to reconcile differences of opinion and encourage mutual understanding and tolerance between residents. This role is found under article 61 of the Sub-Decree on Decentralization of Powers, Roles and Duties to Commune/Sangkat Councils (2002). The legal mandate is to facilitate and conciliate disputes (of a civil nature) but not to enforce outcomes; people must willingly comply with the outcomes, otherwise it goes to the courts. This opens up opportunities for formal interface with the traditional authorities (see below).

According to article 27 of the same sub-decree, a commune chief may have a right to appoint Committee(s) as necessary to give advice and assist in the works. The commune council can set up a dispute resolution committee (DRC) in accordance with this article and this has been done in some communes throughout Cambodia. The Asia Foundation and Buddhism for Development have drafted the Commune Council Dispute Resolution Guide: Good Practice in Cambodia. The aim is to assist commune councils and other dispute mediations throughout Cambodia to facilitate and resolve disputes in their communes; relevant training would be provided to the DRC to perform its duty. As a part of the formal system with a legal mandate to facilitate and conciliate civil disputes, the DRC could be an important instrument in the formal interface between the traditional system and the formal system. In highland areas the traditional authorities would be a natural part of the DRC.

The right to self-determination (or participation rights) forms the basis on which indigenous peoples may share power within the existing state. It gives indigenous peoples the right to choose how they will be governed. Articles 1 of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (Cambodia is a State party to both covenants) in the first paragraph both state that all peoples have the right to self-determination. The same paragraph further stipulates that by virtue of that right they may freely determine their political status and may freely pursue their economic, social and cultural development.

In Cambodia today there is a need to explore ways of enhancing indigenous peoples' right to self-determination (or participation). In his masters thesis, *The Theory of Multiculturalism and Cultural Diversity in Cambodia*, Stefan Ehrentraut (2004:90) notes that: "Cambodia's political system is ill-suited to allow for the representation of indigenous groups. The election formula favours big parties and an indigenous political party – even with the undivided support of the diverse indigenous population – would have no chance to win a seat in parliament. Political representation of indigenous interests in the formal institutions of local governance is problematic as well, because Councillors are elected from party lists."

<sup>36</sup> See Section 4.2. Actors in traditional conflict resolution for a description the local authorities' role.

<sup>37</sup> Pathways to Justice, page 108.

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Considering the size of the indigenous population in Cambodia the commune councils under the present decentralisation process, although foreign to highland indigenous customary structures, still affords the best opportunity for self-determination (or participation) where the indigenous groups are in a majority.<sup>38</sup> Where possible, commune boundaries should be redrawn along ethnic lines to ensure particular groups form the majority in the respective constituency. The law on Administration of Communes (Khum-Sangkat) 2001 provides for the re-determination of these boundaries, article 89 stipulates that the Minister of Interior may request to modify the boundaries to proceed with the election of commune councils for the second mandate (Stefan Ehrentraut, 2004: 105).

An Organic Law presently being drafted under the Mol on the structure, roles and duties of the provincial and district levels of government should take into consideration and address the specific situation and “needs” in the areas where indigenous peoples are found.

### (3) District and Provincial governors

The governmental structure at the provincial and district level is in the process of being put in place. The 1994 “Prakas on the Roles, Responsibilities and Organisational Structure of the Provincial and Municipal Administrations” which outlines the overarching roles of the government of the provincial and district level was enacted long before the concepts of decentralisation were adopted by the government<sup>39</sup>. The Organic law mentioned above is expected to be circulated in June 2006 and the target is to have it adopted by the National Assembly by the end of 2006.

According to the 1994 Prakas, the Chief of Srok (District) and Khan has a role to reconcile civil disputes and impose sanctions on petty offences. According to an annex to this Prakas dated 15 February 1994, the Chief of Srok Khan shall coordinate and urge the implementation of all the court's orders and be responsible for the conciliation of civil cases and to impose fines on the ones who committed minor crimes. The Justice unit set up at the district office in accordance with the 1994 Prakas seems to exist in some districts (*Pathways to Justice*, p. 149), and the Provincial Governor told us there was such an office, while we were told by the District Governor that that institution does not exist any more.

The provincial governor does not have legal competence to conciliate disputes but he/she or the deputy provincial governor is the chairman of the Provincial/Municipal Cadastral Committee. Although they do not officially have legal competence to conciliate disputes, the provincial governors do so and sometimes play an important role in conflict resolution in cases that either the district office has forwarded or people have brought directly to the provincial office.

The methods the district and provincial governors use in their capacity to reconcile civil disputes will decide the level of formal and informal interface with the traditional authorities.

## Summary and discussion of policy issues

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<sup>38</sup> For a further discussion see Ehrentraut 2004

<sup>39</sup> Oberndorf, Robert B. (May 2004) Law Harmonisation in Relation to the Decentralisation Process in Cambodia (Working paper 31, Cambodian Development Resource Institute)



The findings of this research have thrown up many important issues for developing policy to deliver justice for indigenous people. The key finding of the village consultations is that indigenous communities overwhelmingly use and support their customary laws and conflict resolution processes within their community and wish to be able to continue practicing it. The vast majority of the indigenous people that we have interviewed see the traditional system as more fair, more pro-poor and easier for local people to access than the formal system.

As this report has demonstrated, the concept of justice for indigenous communities extends much wider than simply punishing the offender, and also includes compensating the victim, restoring harmony in the community and reconciling the two parties. For these other aspects of justice to be achieved requires wide and active participation of communities in the conflict resolution process. The result of this, as they have repeatedly indicated, is that indigenous community members have a strong and clear sense of what is right and wrong. Seen from the perspective of people who are accustomed to discussing and debating degrees of right and wrong, the decisions they see coming out of the courts do not conform any moral code they use, implement and know.

So perhaps the first point for policy is that at the very least state authorities have a duty to maintain/recognise justice systems that are found to be functioning fairly and are supported by their village constituents. It would be morally wrong to replace a system that delivers justice with a system that at present is not able to. As communities have repeatedly said at present the traditional legal system is delivering just retribution, moral education and maintaining the social fabric in indigenous communities. What is needed is supporting these systems, at the very least, while the formal system is going through a reform process that may take many years. The first duty of justice reform must surely be to retain and support systems of justice which are, and have a proven track record of, delivering law and social order fairly in the most vulnerable and marginal communities. As discussed in the first part of this chapter the Government of Cambodia are under the principles of equality and non-discrimination, obliged to explore ways of retaining and supporting such systems of justice.

The further point is that justice reform also needs to focus on reform of the formal system. While the indigenous system may 'work better' than the formal one, it does not follow that traditional justice systems can be made to substitute for or repair a broken 'formal' system. Indigenous systems derive their authority from their local nature—respected locals make decisions and enforce social norms based on a shared understanding of custom and of justice. For this reason, attempts by the Cambodian state to 'endorse' or bolster the traditional system are likely to backfire in so far as they remove the locus of authority of these systems from villagers themselves and assert the power of the state as the ultimate source of legitimate authority in the resolution of conflict. In thinking about policy interventions, planners should therefore seek to restrain the injustices caused by the formal legal system, as well as allowing the informal system, that is in relatively good working order, to continue to operate.

Like all justice systems the traditional system needs to evolve and adapt to changing circumstances. As this study has also shown (and as is pointed out in Appendix 2) an inherent part of these systems is their ability to incorporate aspects of other justice systems from former (and present) regimes. The Brao, Kreung and Kavet, for example, typically cite legal precedent from different periods of history when deciding on cases, indicating that their legal system is grounded in the concept of following precedent and changing with the times. One of the recommendations from communities is that there should be a stock take/codification of their law by indigenous communities themselves. If this was done it would be possible to understand the diverse influences and the way this body of law has adapted and evolved. It would also be able to see the variations across communities and ethnic groups as it is learned by experience and passed down orally from generation to generation.

Perhaps in the discussion about recognising traditional justice systems two important groups to consider, firstly due to their lesser capacity to access justice, and secondly to understand the degree of support there is for traditional systems, are indigenous women and youth. Indigenous women have even greater difficulty in negotiating their way through the formal legal system and receiving justice than men, due to their unfamiliarity with and very low literacy in Khmer language. They also don't normally take the decision making roles in traditional conflict resolution and women requested they be given more of a role. As they said 'things only improve if there is participation from the women.' Their support roles however are significant and the influence they are able to exert perhaps shouldn't be underestimated. The research shows women strongly support the continuation and 'to reform and strengthen our traditional justice system' (Ka Tieng Village); and to 'effectively integrate our traditional court system into the national law of the government' (Ka Nat Thoum).

Women appeared to strongly emphasise the maintenance of the community social fabric and saw this as a vital aspect of traditional law that the formal system is unable to replace. From a policy perspective, on poverty reduction grounds and out of respect for gender principles, this is an important reason to recognise and support traditional justice systems, so that indigenous communities are able to deal with the many changes they are facing at present.

As well as the interface between the formal and traditional legal systems, the other important interface that indigenous communities have to negotiate is that between the modern and traditional worlds. Indigenous youth (women and men) are at present trying to answer several questions about the relevance of their culture in a fast changing social and economic environment. Understanding the relevance of the traditions for indigenous youth, has been a significant part of the research process for this study, as the researchers themselves were respected elders from the Highlanders Association with support from more literate youth from the Indigenous Youth Development Project. This model we believe can be applied to deal with bridging the modern/traditional interface in indigenous communities and to developing community based legal systems which are based on traditions but cater for new needs and issues.

To achieve these tasks and to allow indigenous communities to deal with the dynamics of change which are impacting on them we believe policy makers need to consider the following issues:

### **What are the poverty reduction impacts of the present conflict resolution functions of traditional law?**

One of the important findings of this study is the very large role that traditional village authorities are still performing in resolving conflicts and in maintaining order and harmony in the village, even in villages which have suffered from large scale land loss and community 'disintegration'. As the indigenous youth explain in Section 6.4.1 the elders and the traditional legal system are responsible for maintaining security, dealing with petty and even serious crime, dealing with arguments and fights, advising and providing moral education, maintaining customs, managing land and forests and generally maintaining village solidarity. The village youth also said because of this function several other serious problems are prevented including violence and possibly murder, gangsterism, theft, the loss of the village lands and forests and actually the break up of the entire village. The elders' role in maintaining social cohesion means those who are short of food, poor or disabled are cared for by the community. Community members are also allocated land to grow their food. In short when the traditional system is working as it should no one is allowed to starve and weaker members of the community are cared for. People in many villages commented on the important role traditional law plays in maintaining this community cohesion.

Where village solidarity is being maintained villagers described it as the 'bridge to protect against any destruction occurring in the village'. People in several villages also said in the past

people had surpluses to pay the fines of rice to make wine, chickens and pigs. Now due to land loss and other socio-economic changes people are short of rice most years, and they have fewer animals. Apart from yearly sales of cashew nuts they have little to sell to pay fines. To operate properly traditional legal systems therefore need intact communities and at the same time these traditional systems help to build, strengthen and maintain the community cooperation which protects all against abject poverty.

However from the research there were also many comments about a general decrease in mutual sharing and solidarity. When the system responsible for maintaining the social fabric is not valued, undermined and begins to break down, the weaker members become more vulnerable and poverty is likely to greatly increase. This is already being seen in some of the villages of this study, which have lost a lot of their land, and the traditional legal system doesn't function as it should. Even in these situations however traditional conflict resolution is still playing a role in dealing with new problems, social disintegration and increases in poverty, as long as the system remains intact and is able to function.

### **What are the consequences of marginalising indigenous culture and what are the impacts of this?**

The two factors to consider here are the marginalisation of indigenous culture which is being driven from the outside and that which is occurring within indigenous communities.

As this report has described, wealthy and powerful people are better able to take advantage of the opportunities afforded by expanding markets and improved transport. Highland villages have been alienated from their land and lack the necessary capital, resources and knowledge to take advantage of new opportunities. As incidents of land infringement and illegal imprisonment demonstrate, social and economic change in indigenous areas is closely tied to the legal environment and to the safeguards, or lack of, provided by the legal system. As pointed out earlier reform of the formal legal system is crucial in any attempts at alleviating the marginalization and disenfranchisement of Cambodia's indigenous people.

Our research was able to get some understanding of the internal social changes in communities because of influences from the outside. All sectors of indigenous society expressed concern about the impact of foreign cultures and influences coming into their villages and destroying their culture, internal solidarity and self reliance. Villages which have undergone the most change talked about villagers without solidarity destroying their own culture and traditions. Traditions are seen by some younger community members as out of date and the new is seen as 'prestigious'. This is causing increasing internal conflicts and decreased sharing. This in turn means greater hardship and impoverishment for the many, who pay the cost of the few who sell or destroy the village resources for their own personal gain. Increased internal conflict ironically means more need for conflict resolution while at the same time this work and the people who are responsible for it are not recognised and supported.

### **What are the consequences of marginalising important knowledgeable elders and how can this process be arrested?**

This is an issue about leadership and accountability, and could be perhaps summarised as how much authority should be retained within the village and what should be handed over to outside authority. Villagers seemed fairly clear that handing over the power outside their community to decide on justice weakens traditions. The basis of traditional justice is in reaching consensus/agreement (being held accountable) to the whole village. Judges in the formal system don't have this burden so much of being held accountable to the wider community. As this research has shown an elder has to deal with this constantly as he is chosen to adjudicate conflicts on the basis of the wisdom he has shown in past decisions.

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However elders lack the authority and support to deal with new problems which they have no experience of. With the increase of these new conflicts the relevance of the role of the traditional elders is diminishing. In villages where land selling has resulted in social disintegration now only those that have real influence can resolve the increasingly complex disputes. However in other villages 'The decisions of traditional judgment are still obeyed and stable until now.' (Ka Tieng Village).

As this research has shown also state appointed authorities (in some villages anyway) are taking over a lot of the conflict resolution tasks traditionally carried out by the traditional authorities. In some cases interesting partnerships have developed which could be looked at to understand how this state/traditional authority interface is working and could work.

It could be a serious mistake however to assume that the village chief or other state appointees is able to take over these conflict resolution roles and effectively administer justice without the experience and wisdom that elders have built up, and the trust and respect that goes with this. This is especially the case now that the selection of village chiefs is in the hands of the commune councils. As has been pointed out the village chief is expected to know about traditional conflict resolution and expected to implement state law. In reality however (s)he is neither sufficiently trained in either, but (s)he is expected to implement both.

An interesting model that could be explored to deal with the marginalisation of traditional authorities is the one followed in this research process explained above. Elders could be supported to supervise a training process that would allow younger more literate youth to become clerks and perform other support roles. The other discussion that is also required is increasing the decision making role of women elders.

### **What is the impact of the increasing influence of state legal systems and governance in indigenous communities?**

With the increase in the role of the state in peoples lives people said they have noticed an increase in illegal activities. The reason for this people said was even if there is a standard body of formal law, no one obeys the laws. In this situation there is no mechanism to make sure people won't re-offend. Also the cases we have encountered in the Ban Lung prison reveal a malfunctioning legal system that can in no respect be perceived as fair. For policy development positive interaction between formal and traditional systems needs to be promoted and negative impacts need to be dealt with. People felt that if the formal legal system was used properly it could help to defend their rights and interests.

Quite opposite to delivering justice villagers said the formal system 'tramples on poor people' and 'the powerful people oppress the weak people'. They said punishments are not adjusted according to the circumstances, to consider the persons ability to pay for example for widows and the poor, as in the traditional system.

Indigenous communities are arguing that their traditional justice system actually delivers justice, educates offenders and prevents re-offending. This is partly the reason why some villages said 'some people with power want the traditional system to be lost'. People also said offenders with power and connections in indigenous villages are now bypassing the traditional system, and using the formal system when it suits them to pay the necessary bribes to win their case.

Interaction across the formal/traditional has been found to vary, from Commune and District authorities exploiting village land disputes to earn income from land transactions, to state appointed authorities (Village Chiefs, Commune and District authorities) playing a key role in mediating and acting as a higher 'traditional' court when the case cannot be resolved in the village. An interesting finding of this research is that even when these state authorities are involved in conflict resolution they often follow traditional conflict resolution processes, fines and punishments.

Our research also found that some villages (Ka Nat Thoum, UI Leu, Chrong and Trabok) had never had any dealings with the formal system as not a single case had ever been taken outside the village. We believe that on moral grounds, before imposing the formal legal system in villages where traditional law is already functioning, requires that the formal legal system should first be able to deliver true justice as well as or better than the existing system.

### **What is to be done?**

#### *Formal system*

- Reform of the formal system is an absolute necessary prerequisite for successful incorporation of the informal system within the formal system.
- Dealing with the cultural divide including dealing with issues of prejudice, intimidation and language barriers. One indigenous person described the formal court system simply as 'horribleness'. As we have seen people are not confident in Khmer law or language or the whole court environment. They are nervous, are not able to say what they want and they forget important arguments and details. There also a lack of security for community members after a decision has been made.
- Dealing with the socio-economic divide. Indigenous villagers are fundamentally concerned about the high costs in the formal system. People prefer to stick with the system that they know and have some influence over, rather than having to confront the intimidating formal system, which they can't influence and which they feel will almost certainly cost them (mainly in informal charges) more money than they can afford.
- There is a kind of competition between police and traditional authorities. Both of these are involved in local level informal/unofficial conflict resolution. The provincial police representatives we spoke to viewed the traditional system as unjust. However local police are also involved in conflict resolution and they charge an unofficial fee for this

#### *Informal system*

- Villagers' biggest concern about their own system was that the fines were sometimes very heavy and more than what they felt the offence warranted. Because the traditional system is decentralised and flexible it is also open to the accusation of being arbitrary and open to varying interpretations and judgements. A basic legal principle is that punishments for the same crime should be remotely similar and this needs to be dealt with. One way to do this could be by asking traditional judges to develop maximum penalties for various crimes which they deal with.
- Some felt also there was a problem of biased decision making and confusion about some of the decisions the elders had taken. Adjudicators could definitely benefit from exchanges of experiences and discussion about cases amongst themselves.
- People also saw a weakness in not being able to discuss the case again once it has been resolved, even if a new investigation is warranted. How to deal with this needs further discussion perhaps with taking the case to a higher 'appeal court' out of the village. However similar principles apply in formal law with prohibitions against trying a person again once they have already been acquitted.
- As a result of influences from the outside people said that nowadays corruption is creeping into the system as some 'rich people, supporters or relatives who work in higher rank' can afford to pay the adjudicators/elders and influence the decision.

### **What needs to be done about new conflicts?**

Research for this study has also shown the many new conflicts which cannot be resolved by the traditional legal system, and more often than not are not being resolved by the official system either. These conflicts largely centre around the desire for money to buy new goods, and land selling is the predominant means of acquiring money quickly. Land selling has and is creating serious intra and inter village conflict over village boundaries, claims and counter

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claims over ancestral land, secret land sales, planting long term crops on other peoples' land, borrowing land then selling it. etc. Even the claiming of land 'individually' in the village has caused many internal disputes, where in the past none existed. Other conflicts also caused by the increasing desire for money include theft, borrowing money and refusing to repay it, etc. An emphasis on possessions is also leading to more complex marriage, divorce and inheritance procedures and disputes. The overall result is increasing internal conflicts and people felt that they help each other less than in the past.

Other conflicts still are caused by negative outside influences – drugs, glue sniffing, HIV, human trafficking, etc, which the wider Cambodian society is also struggling to deal with. In indigenous communities these new problems are all being dealt with by elders, parents, relations and to a lesser extent the village chief, generally through education rather than punishment. The influx of outsiders presently underway in indigenous areas also bring with them foreign cultures and influences. Systems of land use are different, fences cut peoples access and there are conflicts over wandering village livestock. Traditional methods of conflict resolution cannot be used because these outside people don't recognise them.

Especially with land and logging disputes village elders are being asked to adjudicate cases involving government officials and private business people much more powerful than them. Elders don't not have the authority to make these kinds of rulings and prefer to not get involved. The traditional legal system is still a viable way of maintaining law and order in indigenous villages and training and recognition is required for those who implement to cope with these new realities.

There are several options to deal with these new conflicts. Resolution of inter village disputes over land and boundaries would lead to stability in village land use and reduced possibilities for selling other villagers' land. Other options include providing training to commune councillors and traditional law adjudicators. Participants in workshops as part of this study requested that practitioners of traditional law receive training in the national law. Village based internship programmes for younger community members have already been mentioned. Adjudicators sharing their experiences in networks and workshops would be effective to jointly develop solutions to new problems.

### **What are the key differences between the two systems?**

Key differences include

- Because of the corruption in the formal system - decisions are based on the amount of money people have and not on principles of right and wrong. The formal system is seen as not fair and the perception of fairness is why people support the traditional system. In the traditional system wide participation limits opportunities for corruption
- In the traditional system everyone is more or less equal before the law. This is not the case with the formal system in the villagers eyes inequality is much more pronounced and the indigenous community members are often the far more powerless and handicapped party in the case - 'we are illiterate, do not know about the laws, whatever we say we still lose' (Ka Nat Thoum Village)
- Villagers consider conflicts in the traditional system are resolved by peaceful methods without bribes. This does not mean people get off with light punishments as 17 out of the 18 villages and groups surveyed asked for limits to the levels of fines that traditional authorities could set (See Section 4.3.6. the Strengths and Weaknesses of the traditional and formal systems). People also said the rules and law in the past were much more strict than today.
- In serious cases like murder in the formal system, contrary to the traditional system, the party in the right does not receive any compensation. Instead others (e.g. the court) receive the gifts/compensation in the form of bribes, or if the offender is too poor to pay bribes they also cannot compensate the victims even if they might have been sentenced to do so. In the indigenous concept of justice the guilty must realise his or her mistake and the victim

must receive a suitable amount of compensation. This compensation must also be agreed by the majority who of those who take part in the case (including friends and relatives). In villagers said this is very different from the court where there is only one person to pass judgement on the conflict.

- In the informal system just decisions are considered to come from grassroots participation in resolving the conflict. Wide debates occur in the village over guilt, the degree of seriousness of the offence, the appropriate level of punishment for the offender and compensation for the victim. This participation distinguishes most of all the traditional and the formal legal systems and the reason that villagers overwhelmingly support it.
- Community participation also serves an important educative purpose not only for the offender, but for the whole village and especially its younger members, and as a training ground for future traditional go-betweens and adjudicators.
- The process of reconciliation after adjudication is also another major difference between the formal and informal system with villagers saying through reconciliation 'a serious problem becomes a little problem'. In the formal system on the other hand people said bad feelings are maintained with the serious risk of revenge in the future.
- A further major difference is in the need for justice between indigenous and other groups. The Ban Lung judge interviewed said cases between outsiders and indigenous people are mainly about land and cases where both parties are indigenous are mainly divorce, assault /domestic violence. While the most common cases between Khmer and Khmer people are divorce and contract disputes over loans.

These differences also point to deeper philosophical differences over the reason for law and justice. Moral beliefs/standards about what is right and what is wrong, the principle of compensation, the importance of reconciliation, etc. are engrained in indigenous society. As is seen by the comments of state officials about what they consider are good and bad traditional legal practices, the discussion about reconciling the two systems needs to take place around these philosophical differences.

### **How can the two systems work together and complement each other and what would be the impact of this?**

Analysis of the formal legal framework, and the interface between indigenous systems and state legal systems demonstrates the opportunities that exist for reconciling these two systems. What is clear from this research is that the natural decision making unit for governance and conflict resolution in traditional systems is at the village level. It is necessary to discuss what responsibilities traditional authorities will have within their village areas, taking into consideration what they are doing already and the added authority they require to deal with new problems. As suggested from this research the two systems should be used together, depending on the circumstances.

Villagers themselves suggested possible forms of cooperation. Women and other villagers supported the option of jail for serious cases of murder and domestic violence. Villagers recognised that a strong deterrent 'makes the offender more honest and frightened' to re-offend.

As has also been discussed the two systems supporting each other would mean that an offender could not evade one system to receive a lighter penalty in the other. As has also been discussed cooperation between the two systems in resolving disputes over village boundaries, claims of ancestral land etc. would lead to stability/security in village land use. Ways need to be found to recognise the role of the traditional system in resolving intra and inter-village land disputes within the Cadastral Commission and other land conflict resolution processes.

There are also several problems found in this research to achieving full cooperation. At present we found that police seemed to be using the elders as informants in their investigations rather

than actually working together with them to solve conflicts. It is necessary to build trust between these parties but this will be a long term process. One of the problems and a key point that this report is trying to make is that formal legal authorities highlight the injustice in the informal system but fail to see the injustice in the formal system.

However this study has also shown that cooperation between the traditional authorities and the village, commune and district levels is much closer and there are several examples of co-existence, mutual support and recognition. This could also be partly because a large proportion of these officials are indigenous people themselves. Police officials also recognised that cases that were not so serious could be dealt with by the traditional system, and that they recognised traditional concepts of justice and law that was similar to national law.

From this research the traditional mechanisms are working well for marriage, divorce, inheritance, theft, and disputes within villages. Inter-village disputes are more complicated, with land sales and disputes with powerful external actors increasingly difficult. In order to deal with these kinds of disputes resources and political capital need to go into reforming the formal system if there is any chance of the two systems working together. In the present climate of laws being abused in order to dispossess indigenous people often by government officials (See Box 1), it is really difficult to see how any formal interaction between the two systems would be positive.

### **What legal mechanisms would allow the recognition of conflict resolution under traditional law?**

The legal mechanisms that should be explored to allow for the recognition of conflict resolution under traditional law are to be found in the principles of non-discrimination and equality before the law. The fact that equality before the law and non-discrimination of Cambodian citizens are enshrined in the constitution and international law means that if e.g. formal interface with regard to conflict resolution where the traditional authorities plays a formal role recognised by the formal legal system would be proven to enhance indigenous peoples' access to justice:

- a) the government has the legal authority to pass/amend legislation to strengthen existing interfaces and/or create new ones, and
- b) the local authorities and other mechanisms have an obligation to ensure that the opportunities afforded are taken advantage of in a positive manner.

As this study shows the indigenous peoples chose to go to their own authorities for conflict resolution, especially intra-village conflicts, where they are familiar with the system and where they think justice is best done. If the role carried out by the traditional authorities in conflict resolution would be handled by the formal institutions it would be both time consuming and costly and without further resources to the formal system it would not be able to take over the role. The Ministry of Justice has an opportunity to delegate power to the commune councils under the law on Administration of Communes (Khum-Sangkat). What areas would be best suited to delegate such powers to the commune councils and the traditional authorities under them should be explored with input from the indigenous groups.

In the introduction to this report we discuss the relationship between marginalisation of indigenous peoples and access to justice. As we have pointed out several times in this report the indigenous peoples have been on the losing end of the development process. An important factor to better the access to justice for the indigenous groups is to enhance participation in decision making in the development process. The right to self-determination (or participation rights) forms the basis on which indigenous peoples may share power within the existing state. It gives indigenous peoples the right to choose how they will be governed.

Given the size of the indigenous population in Cambodia the commune councils under the present decentralisation process, although a foreign construct in highland indigenous customary structures, still affords the best opportunity for self-determination (or participation)



where the minority groups are in a majority. The right to participation should be further explored in consultation with the indigenous groups.

### **Who would be given such rights?**

The further question is what groups would be accorded specific rights to implement their traditional justice and how would this be done. Because indigenous groups are found in certain geographic areas allowing these groups to practice their traditional forms of justice will always only be a regionally specific discussion. A key part of the national level policy discussion could be summarised therefore as, what possibilities exist in the judicial system for regionally specific dialogue, partnerships and decision-making. Also in order to deal with this issue of which specific groups, it is first necessary to get reliable and credible disaggregated statistical data to bring to the attention of policy decision makers specific and special needs of the different groups that need to be addressed. The other point is that recognition of the rights of these groups to implement their law needs to be part of a wider policy to support and actively encourage a diverse and multi-cultural Cambodia.

### **How should this be administered and what are the dangers**

The historical analysis in this report has shown that French colonial authorities both recognised and encouraged 'tribal' customary law in special courts as a way to control local populations. The historical analysis presented constitutes a warning about the perils of pulling informal or non-state systems into the sphere of state regulation. As the *Pathways to Justice* report indicates and our research has found, it is their very independence from political state structure that gives these traditional legal processes their legitimacy. In contrast, the fact that village chiefs, commune councils and the courts draw their legitimacy from state authority is what makes them unappealing to villagers. How to balance the independence of the traditional justice system with recognising as part of Cambodia's legal structure is a key policy question.

Obviously pilot activities may be able to answer these questions but even these should be approached and planned with care and with the close cooperation of communities, their representatives and indigenous advisors. This work is necessary to improve (and safeguard) access to justice and support alternative dispute resolution for the benefit of the most vulnerable and marginalised groups in Cambodian society. A key principle in this work is not to harm existing structures and processes which are delivering justice to these groups already. Unwise but well intentioned interventions could cause more problems than they solve.

The final policy assumption that needs to be addressed is – that bolstering alternative/traditional dispute mechanisms will fix the problems that highlanders have. As this research has shown many of the problems which indigenous people face come from outside their communities. Justice in this sense is not something that can operate, be delivered or exist as an island. Indigenous communities of course need the authority to implement their traditional law and to manage their traditional areas. However that authority needs to be supported by an environment where laws are implemented and people are punished for their crimes. If not impunity, corruption, power of position and money will continue to be the defacto law of the country and eventually will infect and poison the lower level traditional courts also.

It should be remembered that the present study was undertaken over a very short time period and a more ongoing in-depth (action) research into this complex area has to be made before policy makers can get a good understanding of the complex issues.

## Conclusion

Perhaps a key point in dealing with access to justice for Cambodia's indigenous minorities is that there should be no distinction between the state and its citizens. Unfortunately the Cambodian state has come to represent a centralised authority and whenever indigenous minority groups have come in contact with this authority they have been asked and forced to change who they are and what they do. At present also the Cambodian state is unable to cater for these groups needs and rights for justice and their participation in the government/judicial structure is minimal. In recognising traditional law there is an important opportunity to both promote and protect existing forms of justice which are maintaining indigenous communities and allowing them to base their development on their own governance structures.

The other important point to make is that indigenous peoples' traditional justice systems in northeast Cambodia have long been adjusting and adapting to changing circumstances. Change that is perhaps impacting on these communities at a more rapid pace than anytime in the past, is undoubtedly causing problems for traditional systems. Even in the face of this change and even in communities which have been seriously impacted by land loss, etc. this justice system is managing to maintain a strong moral code and trying to deal with and adapt to many new and more complex conflicts. This work is directly benefiting not only the communities but also the wider Cambodian society through guarding against abject poverty for the most vulnerable community members, maintaining law and order, etc. In this sense the consequences of the social disintegration that is being caused by new development influences described at the beginning of this report is not yet a widespread social issue. To avoid the disintegration of indigenous cultures and societies in the face of this change, communities and their elders need to be supported and their work in maintaining social order needs to be recognised. It could be argued that actually maintaining and supporting these systems is the key to indigenous peoples' development and poverty reduction for the foreseeable future.

Indigenous people themselves argue that their legal systems are built on fairness and this strengthens solidarity and friendship. This solidarity in turn also strengthens their culture, identity and confidence to manage their affairs and resolve their problems. They also argue that allowing them the autonomy to manage their internal affairs and conflict resolution would be a sustainable solution

'...so that their next generations could know that their group also had management rules. This traditional conflict resolution in the community, directly managed by the village leaders with the support of the villagers, would be a good way for them to operate under official recognition. This custom will never lose if the villagers in the village together help and try to conserve it, especially natural resources. If the natural resource lose, everything will lose as well.' (Khuon Village Workshop)

## Recommendations

### Summary of broader recommendations

Emphasis should be on initiating and supporting a process by which indigenous peoples are engaged in documenting their own justice system and conflict resolution processes – including dialogue about dealing cooperatively with tricky issues such as murder cases and how to integrate better with the formal system. It must be emphasised that this is a process that may take several years. It is not possible to come up with a list of instant recommendations to be implemented. Care must also be taken in any attempt to codify customary law, this process should remain in the hands of indigenous people and their representatives. As we have discussed, flexibility is one of the advantages of the traditional system. The aim is to strengthen what is already existing, because the community see it working and to address the internal and external problems.

1. **Create a facility within the Ministry of Justice (1-3 people)**, authorised to liaise with other relevant institutions (e.g. Mr. Khieu Hon in Mol and Dept of Ethnic Minorities in MRD) and to dialogue on a regular basis with designated indigenous representatives, regarding ongoing process of research and documentation of the indigenous customary law/systems, and initiatives to create formal interface, without sacrificing the flexibility that is one of the hallmarks of the traditional systems. Such a facility would have the responsibility of training commune, district and court officials about how to operate on the interface between two legal systems.
2. **Support an ongoing process of consultation, research and documentation with IP communities** (in a number of provinces) led by indigenous organisations/networks, which feeds in to the consultations at national level (as in #1 above). The objective being to build understanding and agreement on recommendations about how the traditional systems can best be recognised by the formal system, and how formal interface can be constructed. The present study should be seen as a starting point for this and a much more in-depth analysis of the situation is needed, including action/reflection research processes.
3. **In the meantime, it is strongly recommended to allow the traditional authorities to continue providing the valuable social function that they are already doing**, including the constructive interface that is already happening between traditional and local authorities (at the commune and district level), while the dialogue (in points 1 and 2 above) is still ongoing.
4. **There needs to be some kind of geographical or social delineation of where traditional justice systems apply** and where it will not apply. One way of doing this would be to say that whenever indigenous peoples are in the majority in the community, then the traditional system should apply. It is problematic for communities in which lowland immigrants have now become a significant percentage of the total population. In these villages, some kind of hybrid system would need to be in place, in which the lowland sector of the community develop their own representation in the traditional system (their own elders, mediators etc).
5. **In communities where highlanders have become a minority**, the indigenous minority in the community should still have rights to practice their traditional justice system within their own group (if it is still intact), and to have representation in the conflict resolution of the wider community. This becomes complex for them, because they will need to adapt/conform to the lowlander system of community justice, as well as keeping their own (if they choose to keep it or aspects of it).
6. **The Government should invest traditional authorities with the formal authority to deal with illicit land sales and mediate boundary disputes, including ancestral land claims.** There need to be guidelines formulated [as a matter of urgent priority] for these land dispute resolutions (in order to follow the existing laws). This also needs to be constructed

in such a way as the traditional authorities retain their accountability to the whole community.

7. **Traditional conflict resolution processes - should be formally recognised in the Sub-decree for Indigenous Land Titling** as an efficient and cost effective method of conflict resolution at least at the village and commune level. Merging traditional and national law needs to be explored at this level.
8. **If indigenous land titling is to proceed without such a Sub-decree** (using existing legal instruments) traditional conflict resolution processes should be recognised within existing government structures (Cadastral Commission, Provincial Land Allocation Committee, etc.) so they are able to deal with land conflicts within their own village territories. This should also include the authority to formally recognising village boundaries that have been decided through agreement of village elders from the neighbouring villages.
9. **Ultimately, it is the traditional legal system that needs recognition, not the traditional authorities.** Certain individuals should not be vested with authority, but the communities should have this authority so that they are able to follow their present practices in choosing different adjudicators and go-betweens depending on certain circumstances. The community utilises the services of the traditional authorities based on their performance and integrity, not based on their position. The system works because the community has ownership and takes responsibility for it – not an outside authority. This is an important check and balancer in the system. Any traditional authority who becomes biased or corrupt is not utilised by the community members.
10. **Develop indigenous legal interns in indigenous communities.** The elders can teach interested young people in the community on the content and practice of the customary law. The prestige of the traditional conflict resolution roles (and attractiveness for youth to get involved) will increase if the state give space/de-facto recognition and stop to undermine the traditional authority roles (e.g. in land disputes).
11. **Improve the formal legal system.** Continue the fight against corruption in the formal legal system. With a view to protect and preserve the indigenous peoples cultures and traditional systems create an environment where the traditional system can function as a separate but integrated system in Cambodia. The government has support for this and an obligation to do so under the principles of equality before the law and non-discrimination stipulated in the Cambodian Constitution and international law that Cambodia is a State party to.
12. **Enhance indigenous peoples' participation (self-determination) to form a basis on which the groups can share power with the state.** In our opinion this can best be accommodated under the commune councils where the indigenous groups are in a majority. The new Organic Law presently being drafted by the MoI on the structure, roles and duties of the provincial and district levels of government should consider the participation rights of to accommodate specific needs in areas with indigenous populations.
13. **Explore the opportunity for the Traditional Authorities to have a more formalised role of Conflict Resolution under the Commune Councils.** As the commune council already is functioning as a higher level for conflict resolution where indigenous peoples appeal or refer the cases which cannot be solved at the village level, exploring opportunities for the traditional authorities to have a more formalised role of conflict resolution under the commune councils is recommended. It is also important to find a balance so that the traditional adjudicators are not overly reliant on commune council members.
14. **Develop the role of the Dispute Resolution Committee.** Such a committee can be set up under article 27 of the Sub-decree on Decentralisation of Powers, Roles and Duties to Commune/Sangkat Councils. This model suits the interface that is already taking place between the traditional authorities and the commune councils. As a part of the formal system with a legal mandate to facilitate and conciliate civil disputes, the DRC could be an important instrument in the formal interface between the traditional system and the formal system. In highland areas the traditional authorities would be a natural part of the DRC.
15. **Delegation of Power to the Commune Councils from MoJ and MoI.** The Ministries can delegate power to the commune councils under article 44 of the law on Administration of Communes (Khum-Sangkat). As this study shows the traditional authorities do solve many cases that under the present legal framework would fall under the judiciary. Discussion

should be initiated between the MoJ and the Mol on what role can be delegated to the traditional authorities and the commune councils under the above-mentioned provision. Such discussion must be in consultation with the indigenous peoples in order to best accommodate for the factual situation.

- 16. Strengthen the official role of the traditional authorities in land conflicts.** Land conflicts have been identified in present study as being the type of conflict that neither the traditional authority nor the formal institutions can solve adequately, and ways to resolve them are urgently required. The official role of the traditional authority under the 2001 Land Law with regard to land conflicts should be further defined and strengthened in order for them to deal with these conflicts. The role of the traditional authority can only be implemented if the formal system for resolving land conflicts is strengthened and the formal interface is well functioning. In particular, as we have seen the DKCCs in Ratanakiri have never formally invited elders to participate as ad hoc members in the commission. The role of the traditional authorities (local elder trustees) as ad hoc members of the DKCC under article 5 of the Sub-decree on the Organisation and Functioning of the Cadastral Commission should be strengthened.
- 17. Measurement and demarcation of communal land.** Article 25 of the 2001 Land Law gives a certain role to the traditional authority in measurement and demarcation of immovable properties of indigenous communities. This role of the traditional authority should be further defined under the (sporadic) Procedures for Registration of Indigenous Immovable Property if such Sub-decree will be developed. Similarly, should the MLMUPC decide to register communal land under the present Sub-decree on Sporadic Land Registration, the role of the traditional authority should be clearly defined.

## General recommendations

### Community recommendations from the village research

These recommendations have mainly come from the several discussions that have taken place in indigenous communities and in the workshops conducted as part of this study.

(From Pa Dol Village): We are the people live in the remote-isolated area in Ratanakiri, Cambodia; our daily life is depending on the forest products as traditional job, we would like to appeal to the NGO and government to:

**Community level** - activities that communities can largely implement by themselves

- 1. Preserve culture, traditions and community solidarity** - (From discussions groups in: Ta Heuy, Raech (youth), Ka Maeng, Kalai Tak, Kalai Tak (women and youth), Ul Leu, In, Kak Thoum, Ten, Ten (youth), Tumpuon Reung Thoum (youth and women), Chrong, and Lut and Kroala Village workshops), Mondulkiri villages.
 

The TA conflict resolution system plays a very important part in maintaining the identity and solidarity of the community as it is based on the community's culture and traditions.

  - 1.1. Strengthen the traditional justice system** - elders lead according to traditional laws for strong and effective communities. Protect our rights and the community's interest.
    - 1.1.1.** Decrease the impact of foreign culture such as music and religions. Establish traditional culture groups in the villages.
  - 1.2. Improve village solidarity** –
    - 1.2.1.** Communicate and cooperate together for the problems that cannot be resolved by the traditional authorities. There should be no discrimination between the poor and the wealthy.
    - 1.2.2.** Look for ways to cooperate to protect and preserve the culture and our own identity.
  - 1.3. Educate and Train villagers and youth**



- 4.2. **Improve women's leadership role in resolving conflicts.** Request men to allow women leadership rights, rights of free speech like men and rights to resolve conflicts. Need a female to be a traditional authority and to be a community leader in the future.
  - 4.3. **Provide training and coaching regularly to women groups and elders** about leading women's groups, about other laws and for mothers to teach their children. Exchanges with other villages could be conducted.
  - 4.4. **Arrange the women's leadership structure in the community.** This should include women's youth groups to educate the young people.
  - 4.5. Invite village elders, village chiefs, and commune chiefs to join women's meetings sometimes.
5. **Strengthen the role of village youth** - (From youth discussion groups in: Tumpuon Reung Thoum, Kak Thoum, Ka Maeng, Raech, Ten, Lalai, In, Ul Leu, Chrong, Ka Tieng, and Kachok Group-Khuon Village workshop, Lut Village Workshop, Mondulkiri villages)
    - 5.1. **Develop indigenous legal interns** in indigenous communities. Select the most capable youths, and get the elders to teach interested young people on the content and practice of the customary law. Encourage them to join and listen during cases. They should also join in village meetings.
    - 5.2. **Youth should set up their own laws** to learn and conserve traditions.
    - 5.3. **Create focal youths and leaders of women's and men's youth groups** for communication and education to maintain the village tradition and law as before.
    - 5.4. **Youth should implement research on the traditional history.** They should study and follow the good points of the elders.
    - 5.5. **NGOs could also assist to educate the youth team.** Parents should teach their children.
    - 5.6. **Create a VCD about the traditional legal system** in local indigenous languages

#### Inter-village, commune, district and provincial level

6. **Recommendations to prevent inter-village conflicts and improve land management**
  - 6.1. **Request the Government to resolve the land problem** which is the major problem facing indigenous people.
  - 6.2. Ask the Government and the Governor to help prevent corruption.
  - 6.3. Ask the Government to confiscate and return all land which was bought and sold illegally (between 2001 to the present, as stated in the Land Law).
  - 6.4. The Government should support the traditional justice system to resolve land and forest conflicts in indigenous communities.
  - 6.5. The indigenous people would like to have the rights to occupy and use land collectively.
  - 6.6. Request the government to recognise clear, community-defined boundaries for villages.
  - 6.7. Strengthen role of traditional authorities in village boundary delineation.
  - 6.8. Formally recognise traditional conflict resolution processes in the sub-decree for Indigenous Land Titling, and/or recognise these traditional conflict resolution processes within existing government structures.
  - 6.9. Ask for some benefit from the development plans on indigenous land, including employment (Mdk).
7. **Document traditional laws and cases** - (From discussions groups in; Raech (women and youth), Kak Thoum, and Lut and Kroala Workshops, Mondulkiri villages)
  - 7.1. **Create a project that will be responsible for drafting and documenting the TA law**, in national and local languages, and assist to secure funding for this undertaking. The aims would be to
    - 7.1.1. Provide material for ongoing dialogue between IP representatives, MoJ and other government stakeholders,

- 7.1.2. Enable dialogue between IP reps of all ethnic groups (in a number of provinces),
    - 7.1.3. Involve and educate the next generation of traditional authorities.
    - 7.1.4. Increase the profile and legitimacy of traditional conflict resolution mechanisms,
    - 7.1.5. Raise the awareness and capacity of the traditional authorities and elders.
  - 7.2. **Communities should write the traditional law as units and articles** of the conflict resolution and make a book. Document the traditional fines for each kind of conflict. Keep the culture and tradition by educating the future generations to know and write in this book.
  - 7.3. This should be a composite of different all ethnic groups in local and the national language. Flexibility would need to be maintained by developing for example maximum penalties for an offence (in line with the national law).
  - 7.4. These documents (the TA law and the fines) must be extended to all indigenous communities to agree with and recognise and to Government institutions to also recognise.
  - 7.5. Help to make reports of cases dealt with and send to the district.
8. **Develop a network of indigenous legal practitioners** - (From Kroala and Lut Village workshops)
  - 8.1. Choose focal persons who have influence to be the leader in conflict resolution who are responsible for the traditional system and for frequent cooperation with government institutions.
    - 8.1.1. **Create a network of focal persons to do extension in their own and other communities**, and to facilitate exchange of awareness between the traditional authorities in the community with outside agencies.
    - 8.1.2. Two people per village and three people per Commune could be chosen to liaise with all government institutions.
    - 8.1.3. Organise provincial level workshops, invite the local Government authorities to recognise the community focal persons and implement a strategy for recognising and supporting traditional law.
  - 8.2. Select women leaders to be trained by Commune and District authorities and NGOs on the Land Law, and solve problems that the elders cannot.
    - 8.2.1. Conduct Commune, District and Provincial workshops so the government authorities recognise and improve women's leadership.
9. **Improve Knowledge of Cambodian Law** - (From discussions groups in: Ka Nat Thoum, Tumpuon Reung Thoum (youth), Kak Thoum, Ta Lav Commune Councillors)
  - 9.1. Request institutions (District, Commune), Highlander Association and other projects to train and disseminate the land law and other national laws. 'Presently, we are facing the problem of outsiders coming into our village to persuade our villagers to sell land to them. We worry the uneducated people will believe outsiders coming to persuade our villagers to sell land to them because of the money and the village will lose its land.' (Ka Nat Thoum village)
10. **Improve the cooperation between the traditional and formal justice system and with the local authorities** - (From discussions groups in: In, Kak Thoum, Raech (women and youth), In, Ten, Kalai Tak, UI Leu, Ta Heuy, Ten, and Jarai Group-Khuon Village workshop, Kroala Village workshop, Mondulkiri villages)
  - 10.1. The relevant government institutions need to understand about the traditional law and authorities, and the traditional authorities need to understand and know the government laws.
  - 10.2. Training is required for commune, district and court officials about how to cooperate between two legal systems.
  - 10.3. Request the Traditional and State Authority System to cooperate to prevent conflicts and rights abuses and to resolve and mediate conflicts fairly. Good cooperation means conflicts are resolved with justice, without bias, without corruption.



- 10.4. Discuss recommendations and exchange experiences for fair problem resolution and good natural resource use.
- 10.5. We need to delineate conflicts that will be solved by the traditional legal system and the more serious conflicts that will be handled by the state authorities. Types of conflict which communities request the Commune, District or judicial authorities to [cooperate in] resolving include:
- murder, assault and battery;
  - theft of cattle, buffaloes or motorbikes
  - rape
  - forest and land conflicts; exploitation of minerals and gems (natural resource conflicts)
  - Claims of ancestral land.
  - Community boundary conflicts
- 10.6. NGOs and government staff assist to strengthen governance and conflict resolution of serious cases and to learn more about the national and traditional law in the village.
- 10.7. Request that the traditional authorities have the opportunity to participate in workshops with state authorities in the future.
- 10.8. Request the government and other organizations to disseminate with television, radio information to keep the culture and traditional law.
- 10.9. Want Government and NGOs help to recognise all traditional ethnic minorities. Statistics about indigenous minorities should be disaggregated for effective planning and looking at trends in statistics, poverty reduction, health improvements, etc.
- 10.10. Request the government to ask the Khmer people who live in ethnic minority communities to respect our tradition (and taboos) and to punish the violators.
- 10.11. Regularly inform government authorities when important cases are solved. When there is a problem the community has to cooperate with the state authorities.
- 10.12. Participate in meetings inside and out of the village when called.
- 10.13. When there is a meeting the community should communicate before to ask the state authorities to recognise the meeting or workshop.
- 10.14. The traditional authorities and the local government authorities need to cooperate closely together in resolving the land conflicts.
- 11. Investigate ways that aspects of the traditional system can be incorporated into formal proceedings** - (From discussions groups in Lut Village workshop, Mondulkiri villages)
- 11.7. Ask the suggestion from the government authorities and invite them to assist in setting the level of the fines during conflict resolution cases in the community. Also assist with the difficult cases which cannot be resolved at the village level.
- 11.8. Study ways that compensation to the victims or families of victims can be part of the sentencing in the formal system.
- 11.9. Look into ways that the traditional authorities have some rights to be part of resolution of cases in the formal system when the case involves their community members and they have dealt with the case at the village level.
- 11.10. The Province Court and other institutions should have a focal person, chosen by indigenous communities, to be responsible for assisting defendants from indigenous communities during court cases and advising the Court.
- 11.11. **Community work/Restorative justice** - Other methods of paying fines and serving sentences for minor crimes should be investigated. These could include sentencing offenders of minor crimes to work to develop their own communities or to compensate a victim of minor crime under the supervision of the village traditional authorities and the representatives of the judicial system.
- 12. Improve the cooperation between the traditional legal system, and NGOs and Networks** - From discussions groups in: Kak Thoum, Ka Maeng, Ka Tieng, UI Leu, Ka Nat Thoum, Ta Lao Commune Councillors, Mondulkiri villages.)

- 12.7. **NGOs and Networks** should assist to develop and facilitate good communication and resolve conflicts between communities, organisations and state institutions. Take requests from the community to the government. Build greater awareness of traditional legal processes among relevant state authorities.
- 12.8. Assist to explain and disseminate information both nationally and internationally about national and traditional laws. Request NGOs to train and do extension of laws such as the Land Law, Forest Law, land and environment issues, communal land use, and other developments to clearly understand about the laws and articles.
- 12.9. Conduct training for the state officers and community members.
- 12.10. Assist to educate people especially about resolving new problems that happen. Eg. land and forest/NRM.
- 12.11. Lobby the government and other organisations to give more priority to indigenous people.
13. **Improve the functioning of the formal legal system** - (From discussions groups in: Ta Heuy, Ka Tieng, Ten and Jarai group – Khuon village workshop)
  - 13.7. Request the government and commune authorities to find the best way for solving conflict in accordance with the government's legal guidelines (without receiving bribes).
  - 13.8. Find the method to stop corruption in order to decrease poverty that is increasing in Cambodia today. This could include establishing a Citizen Complaints Bureau in northeast and other provinces as outlined in the National Strategic Development Plan 2006-2010.
  - 13.9. Improve reform and strengthen the state justice system to provide fair judgment for people so it can be a model for the minorities. Please stop unjust decisions, taking so much money in bribes, extorting money and exploiting poor people.
  - 13.10. We would like to have intervention when there is an attack of gangsters in the community.
14. **Recognise and allow traditional law** - (From discussions groups in: In, Pa Dol, Ka Nat Thoum, Ta Heuy (women and youth), Raech, Kak Thoum, Ka Maeng, Kalai Tak, Kalai Tak women, Ul Leu, Ul Leu (women), In, Ten, Ka Tieng, and Jarai Group – Khuon Village workshop)
  - 14.7. We would like the village traditional authorities and the government to cooperate and give the opportunity to recognise, support and give rights to the traditional authorities in the village to resolve the conflicts in their community. We would like to have the right to use our own laws freely. Those laws are the village law, judgment law, marriage laws, land law, funeral customs etc. We would like this right to protect the identity and traditions of each minority group and for fighting the poverty.
  - 14.8. Request that organisations cooperate with state authorities to make sure that the traditional court system (penalties, etc.) is generally in line with the national law of the government.



## Appendix 1

Table 8: List of Indigenous research assistants for the field work of access to justice study

Research Team	Highlanders Association Elders	Indigenous Youth Development Programme members
<b>Jarai</b>	Kalan Hen,	Vel Thia,
	Sew Hem,	Sew Blew,
	Al Minh (F),	Koinh Rien (F)
	Hut Bon	Leuan Bunjeuan
<b>Kachok</b>	Sol Pheung	Beung Vanna
	Say Bunyom	Chan Ngok
<b>Kreung</b>	Saech Vong	Lak Samnang (F)
	Hun Kombol (F)	Khio Saroeurn
	Komprong (F)	Preu Buntheuan
		Prang Phiset
<b>Brao/Kavet</b>	Katay Kuak	Bay Socheit
		Ria Sovannara
<b>Tampuen</b>	Baat Chan Seng	
	Seng Thong	Ke' Penh
	Ting Som (F)	Khio Sotha
	Kwes Thon	
<b>Phnong</b>		Vel Thia
		Beung Vanna
		Loeu and Soeurng (Phnong translators)

## Appendix 2

### Legal pluralism and the post-colonial challenge: Contextualizing ethnic minority policymaking in Cambodia

As part of the desk-study and literature review that informed the writing of this report, the authors investigated similar attempts to recognize and support customary law and traditional authority elsewhere in the developing world. The available literature was also reviewed to establish the history these practices in Cambodia and among the related highland ethnic minorities of the region. These investigations, summarized below, serve to contextualize present-day policy initiatives. They also raise an important set of challenges for policy-makers. These challenges are presented throughout the text, and in the final section of this essay. One of the major contentions of this essay is that, like most efforts to legislate different rights for different ethnicities (or races), creating a policy to recognize and support customary law, traditional authority, and traditional dispute resolution mechanisms is a complex and compromised affair. The legacies of colonialism, and the challenges facing multi-ethnic societies, are difficult to overcome. If policy-makers do not acknowledge these challenges, if they do not recognize the legacies of past efforts to establish rights based on ethnicity and race, and if they do not understand the history of such efforts in Cambodia and French-Indochina, then their efforts are surely less likely to succeed.

#### The international context

The situation faced by Cambodian indigenous people vis-a-vis the formal legal system today is not an isolated case. The imposition of colonial rule, processes of decolonization, and the crafting of legal systems for the new national state are experiences shared by many developing countries. The result has often been a formal legal system that is at odds with customary dispute resolution practices (Yrigoyen Fajardo, et al. 2005:27). While Western colonial powers imposed formal legal systems based on foreign models, investigation into customary law and traditional authority structures were also central to the practice of government in colonial states and in the developing countries that emerged from them. It was through the nurturing of distinct forms of rule, including distinct legal rights, for different colonial subject races and ethnicities that British colonial powers sought to 'divide and rule' their holdings in Africa and South Asia. As Cohn (1996) demonstrates, the creation of knowledge about India and Indian society and culture was a critical aspect British colonial rule. British administrators used research on ethnicity and caste to inform the creation of laws to govern ethnic and class groups. In the process, the boundaries between these groups hardened, previously cultural distinctions were now enforced as a legally mandated regime of rights and responsibilities. The British thus ruled through the production of knowledge—knowledge that often reflected the 'orientalist' predispositions of the researchers—the groups in question were themselves often transformed, and new rituals that integrated colonial powers into the top of the symbolic hierarchy were adopted as indigenous. Processes of colonial rule thus not only recorded tradition but transformed it (see also Hobsbawm and Ranger 1983; Said 1979). In respect to the colonial period, then, the phenomenon of legal pluralism, that is, the discrepancy between formal and indigenous law, has often been seen as non-liberatory: the privileged citizens of the colonial states enjoyed the protections of formal, Western law, while their colonial subjects did not enjoy the same rights and protections.<sup>40</sup>

<sup>40</sup> As Ludsin (2003:66) notes,

the colonial governments [in the regions that now constitute South Africa] recognized customary law for pragmatic reasons. First, the colonists feared that the majority of indigenous people would be unhappy under Roman-Dutch law, which would [cause unrest and] threaten colonial power. The British also recognized customary law because they believed that 'English law was too advanced to be applied to the indigenous peoples.' Even so, the application of customary law was limited to areas considered 'of marginal importance to the colonial regime, namely, marriage, succession, delict and land tenure.' Despite these pragmatic reasons, the

Policy makers and social scientists paid close attention to this question from the 1950s on, when decolonization spurred on the reformulation of many formerly colonial systems of law. As Vincent (1990:382-383) notes: “in this age of rapid political and economic change for colonial states and new nations, various aspects of the legal infrastructure attracted the attention of government official, politician and legal anthropologist alike. . . . Above all. . . were problems associated with multiple legal frameworks, the institutionalisation of legal pluralism at the state level, and so-called customary law” A second wave of codification of customary law during this period gradually gave way to the study of dispute resolution as a socially embedded set of cultural practices. Yet in recent years the mobilization of political movements organized around the notion indigenous identity and indigenous rights have again raised the question of the interface between formal systems, seen as imposed from the outside and lacking validity in the eyes of local people, and informal systems, which are said to be representative of the social and cultural reality of the people who practice them (Vincent 1990:418). According to Ludsin (2003:65) “since legal systems are both a part of a culture and a reflection of culture, recognition of the way a culture wishes to be governed contributes to the culture’s self determination.” Ludsin’s reference to the right of self-determination clearly links her support for the recognition of alternative legal systems with the emerging discourse of indigenous peoples’ rights.

The Ministry of Justice’s investigation into the opportunities provided by the existence of locally-respected alternative dispute mechanisms and indigenous customary law may be seen in light of efforts world-wide to bolster these practices where they are seen to provide for social order in more locally accepted, and thus legitimate, ways. Indeed, in many other post-colonial states legal measures have been taken to recognize traditional authority and to reconcile aspects of indigenous customary law with national formal law. It seems opportune, therefore, to investigate the recent critical literature that has looked at these processes in detail, so that policy-planners in Cambodia can learn from these efforts. The arguments have focused largely on the colonial legacy of indigenous institutions, and on the inherent conflict seen to exist between the emphasis on individual rights enshrined in Western law, as opposed to the collective rights central to indigenous customary law.

### *The colonial legacy*

That the recognition of indigenous customary law should be embraced both by indigenous peoples seeking self-determination in the post-colonial era and by the colonial states that sought to exert control over ethnic minorities through ‘divide and rule’ raises an important problem. How can the same corpus of law and custom be embraced as emancipatory and reviled as exploitative at the same time? Indeed, the colonial legacy of indigenous customary law has been a focus of inquiry for scholars. Three aspects of this legacy stand out. The first is the process of ‘invention of tradition’ mentioned above. While ‘traditional authority’ and customary law have remained fixtures in many post-colonial environments, the custom and tradition that has been preserved is one that has been transformed by the colonial encounter. Often the traditions reinvented through this encounter have been naturalized by those who practice them as authentic living embodiments of a pre-colonial past. Yet, in part because of the structural-functionalist school of anthropological inquiry dominant at the time when these traditions were recorded and codified, this past is often conceived of as static, the culture of a ‘people without history’ (Wolf 1983). Equilibrium models of indigenous society, in which a series of customary practices are believed to regulate peoples’ relations with each other (and often with their environment) obscure the dynamic nature of pre-colonial life. Remembrance of an idealized pre-colonial past, when it plays a role in nationalist or indigenist longing for autonomy, may also mask the more unsavory aspects of historical indigenous society—aspects which might include frequent warfare, bondage and servitude, or institutionalized forms of

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colonial governments believed recognition of customary law was a privilege granted to the indigenous population—a privilege that could be taken away.

inequality, to name a few. Idealized presentations of indigeous pasts often say more about the beliefs of foreign observers than about reality on the ground, and therefore make a faulty and indeed compromised basis for the formulation of social policy. Thus in South Africa, where indigenous customary law has been formally recognized by the post-apartheid era constitution, many consider the 'official' customary law enforced by the courts to be a distortion of customary law as practised before colonialism. Scholars argue that the colonists who dominated the common law system interpreted customary law through their own belief systems and to the benefit of the colonial government. In determining customary law, courts often relied on studies by colonists or on the testimony of traditional leaders. Typically, the studies and the testimony reflected the interests of the older males within both societies. Thus, these scholars argue, 'the official version of customary law described less what people previously did . . . and more what the government and its chiefly rulers thought they ought to be doing'" (Ludsin 2003:71 and Rakate cited in Ludsin 2003)

Not only did colonial authorities seek to adapt indigenous customary law to their purposes through the invention of tradition, they also sought to expunge aspects of indigenous society they considered savage, barbarous, and unbecoming of subjects of the new colonial state. This second colonial legacy haunting efforts to recognize customary law and traditional authority is best illustrated by the so-called 'repugnancy clause' governing the application of customary law. These clauses, inserted into the Acts and other measures that recognized or institutionalized customary law, stated that such law could be applied "only when customary law did not clash with the 'general principles of humanity observed throughout the civilized world'" (South African Legal Commission cited in Ludsin 2003:66). Under these clauses, certain punishments were excluded from the range of options allowed indigenous courts, and certain practices considered legitimate aspects of indigenous culture by indigenous populations were outlawed and made subject to state sanction. As several observers have noted, where post-colonial states have recognized indigenous customary law, these repugnancy clauses have remained in place. The maintenance of the notion of repugnancy is revealing. It demonstrates that within the context of the modern liberal state, the realm of indigenous custom and tradition is still understood as primordial and non-modern in important ways. The fact that large numbers of indigenous peoples themselves would find such formerly common practices 'repugnant' also shows that indigenous custom, and indigenous notions of justice, change over time. Recognizing the dynamic nature of indigenous beliefs should serve to warn policy makers against attempts to institutionalize any one set of beliefs seen as a static system at a particular moment, especially at a time when the experiences, understandings and beliefs of indigenous people are changing very quickly.

A third implication of the colonial legacy for those crafting policy concerns the issue of who traditional authorities are and how their power was maintained during the colonial period. While proponents of traditional leaders have often portrayed their authority as being legitimated by custom, by 'culture', and thus by indigenous groups themselves, historically many of these figures maintained their authority only insofar as they were useful to colonial rulers, i.e. for the conscription of soldiers, the provision of corvee labor, the maintenance of social control or the levying of taxes. In South Africa, for instance, these figures included traditional tribal chiefs, who found themselves increasingly dependent on the Department of Native Affairs for patronage following a 1951 Act that recognized their authority; thus 'their powers were increased while their legitimacy was being eroded' (van Kessel and Oomen 1997:563). West and Kloeck-Jenson's (1999) study of the embrace of traditional authorities by both major political parties during Mozambique's recent efforts to encourage decentralization is one of the most coherent critiques of the pitfalls that necessarily accompany such an embrace. They write (p.475):

generally speaking, the broader a chief's authority, the greater his association, historically, with violent conquest and exploitative rule. For as long as living Mozambicans can remember, however, chiefs at all levels have occupied positions betwixt and between their populations and higher authorities, implicating them all in a history of extraction and violence . . . 'Traditional authority' figures were selected – whether by the Portuguese or by preceding African conquerors – as 'legitimate' representatives of their respective populations, and they depended upon the continuing 'recognition' of their populations for maintenance of their titles; should an angered population protest that an *autoridade gentílica* did not truly represent his people, for example, he might be dismissed from office. . . . By the same token, his 'legitimacy' came to depend upon 'recognition' by higher authorities.<sup>41</sup>

### *Individual versus collective rights: Conflicts of identities*

The existence of legal pluralism, while it represents an opportunity for improving governance, is also an indicator of a fundamental conflict between systems of law. Often, the problem is stated in terms of the emphasis on the rights of the individual within society that is the basis of most Western law, as opposed to the emphasis on harmony within the community, and the stability of the social group, that is the focus of much customary law. This conflict raises the important question of whether efforts to recognize indigenous customary law will help to resolve this conflict, or will merely bring it into greater relief, escalating the conflict of values instead of repairing it. This conflict is in fact written into many of the new multi-cultural/pluri-national constitutions that have emerged recently in response to the new recognition of indigenous and communal rights world-wide.<sup>42</sup> One of the major concerns voiced in studies of this phenomenon is its power to reify ethnic and cultural identities, legislating the creation of political divisions between groups of people—settler and subject, majority and minority, national and indigenous, etc. Commenting on the politics of ethnicity that frame the creation and implementation of the new South African Constitution, Comaroff and Comaroff (2005:300-301) assert that customary authority does not live easily with the hegemony of the liberal modernist state. It sanctions alternative orders of law, of justice, of the use of force, of responsibilities and entitlements. . . . The generic citizen of postcolonial South Africa may be the rights-bearing individual inscribed in the new constitution, also the rights-bearing individual—typically urban, cosmopolitan—presumed in much mass-mediated discourse. By contrast ethnopolities and traditional leadership speak the language of subjects and collective being.

They go on to suggest three probable outcomes of the 'collision' between these tendencies (p. 302): (1) that the relevance of ethnically based arguments about rights and entitlements is likely to grow; (2) that the tendency for standoffs between 'the kingdom of custom' and the liberal state is increasingly likely to be pursued by legal means; and (3) that whatever pragmatic outcomes might be reached, these arguments will persist in pitting individual against collective rights, liberal universalism against culture, citizens against subjects. *If anything, they are liable reproduce rather than to resolve the paradox of pluralism endemic to neoliberal nationhood.* (emphasis added)

The Comaroffs are not alone among respected scholars to have significant reservations about the dilemma and the politicized efforts that seek to resolve it. Political scientist Mahmood

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<sup>41</sup> They go on to note that

it is evident that all authority, along with the community over which it is exercised, is 'imagined', meaning invented, created, produced and reproduced in the midst of an ever changing historical context . . . . The essential question is not, then, whether or not 'traditional authority' is legitimate. Rather, larger questions frame these: who claims 'legitimacy,' by what argument, who is persuaded and why? . . . . We can no better define 'traditional authority' in this article than can the myriad actors on the Mozambican landscape. We suggest, merely, that any imagining of 'traditional authority' that ignores its complex and, often, contradictory history is bound to encounter, or create, more problems than one that takes this history into account (p.484).

<sup>42</sup> See, e.g., Van Cott (2000).



Mamdani, whose (1996) book *Citizen and Subject* traces the roots of present-day ethnic violence in Africa to the ethnic identities created, in part, by distinctions in colonial law, is clear on his reservations about the emancipatory potential of customary law:

ethnicities [in colonial Africa] were governed through customary laws. While civil law spoke the language of rights, customary law spoke the language of tradition, of authenticity. These were different languages with different effects, even opposite effects. The language of rights bounded law. It claimed to set limits to power. . . . The language of custom, in contrast, did not circumscribe power, for custom was *enforced*. The language of custom *enabled* power instead of checking it by drawing boundaries around it (Mamdani 2001:654)

Arguing that ‘settler’ and ‘native’ were not only ethnic identities, but also political ones, Mamdani maintains that those political identities have remained in place, and, in the absence of white rulers, they have been occupied by new groups—national majorities and ethnicized minorities. “The idea of custom as some kind of geological fossil from the past, one that cannot be questioned or changed, ... has been key to identifying, buttressing and salvaging a domestic authoritarianism as an authentic tradition. In this context,” Mamdani (2001:662-3) asks, “what are we to do? How are we to support those disenfranchised?... The only way out,” he argues, is to “challenge the idea that we must define political identity, political rights, and political justice first and foremost in relation to indigeneity.”

### The Cambodian context

At first glance, the problem of legal pluralism in Africa may seem remote from the situation in Cambodia. Yet a review of the available literature on highland groups in Cambodia and in former French Indochina illustrates a number of clear parallels. A useful place to begin is with the colonial production of knowledge about indigenous customary law. In French Indochina, beginning especially with the tribal administration policies of French *Résident* Leopold Sabatier in the early 20<sup>th</sup> century, “the convergence of ethnography and administration ... resulted in a process of tribalization. Thus, previously non-existent or fluid ethnic identities were constructed or hardened through a combination of ethnographic and administrative practice” (Salemink 2003:98). While the notion of ‘divide and rule’ was perhaps perfected by the British colonial administration, the French encouragement of tribalization served French strategic and military interests; policies providing some measure of autonomy to the *montagnards*, and promises of future autonomy, were invoked to secure highlander support against the Viet Minh insurgency, and were used again by American tacticians during the American-Vietnam War.

One of the key French policies that encouraged tribalization was the ‘collusion of customary law and policing’ that was institutionalized through the detailed study of indigenous customary law and its publication in *coutumiers*, or customary law treatises, and its enforcement through a system of tribal courts (*ibid.*). The existence of a body of customary practices, some used to resolve conflict, to allocate property, or to judge innocence or guilt was remarked on by the earliest explorers in the highlands, and became a focus of inquiry. These sources mention practices that are still in use in the highlands today. Captain Cupet, a member of the original Pavie Expedition, recounts these observations from his own expedition in the early 1890s:

The most frequently used judicial tests are those of water and molten tin. For the former, two sticks are planted in the bed of a river which is sufficiently deep. The two adversaries each grab one, in order not to have to fight the currents, then, when a signal is given, both plunge under the water. The one who comes up first is guilty. For lack of a river, one can have recourse to the test of molten tin. Here is a fact which I was told in Ban Dôn. A rich inhabitant refused a poor devil a small service. Some time later a member of his family fell ill. He accused the solicitor of having cast a spell and forced him, in order to justify himself, to dip his hand into molten tin. 'If he is not burned,' he stated, 'his innocence will be accepted; the

spirits never let anybody but the guilty ones be punished.' The unfortunate man, whose belief in the justice of the spirits is not very great, admits his imaginary crime rather than try the thing out, and he is sold as a slave (Cupet 1998 [1893]:85).

While Cupet's narrative may be somewhat suspect—he was ignorant of the language and tends to exaggerate at times—there is much that is telling in the account. The seeming arbitrariness of the decision-making mechanism, the importance of spirit belief, the use of the system to address witchcraft, and the opportunity for the powerful to abuse the customary system all emerge from the account. Interestingly, even at this time customary law is not presented as a corpus totally isolated from the larger powers in the region. According to Cupet (p. 85), "in Cambodia all these practices are found in the codex. They are even recommended to the judges so that they may clarify the guilt of the accused themselves." A report by the *Commis des Services Civils de l'Indochine* (Henri 1916:30), while noting that the 'Khas' (or savages) did not have any legislation of their own, asserted that they have 'conserved the procedures of the Siamese who are moreover a great influence on them' and that 'the Laotian legislation is equally known to them.' Such early demonstrations of the interrelations between the highland systems of law and those of their powerful neighbors argue powerfully against any romanticized conception of a body of law, or a body of custom, that might be considered essentially and purely indigenous and thus exclusively reflective of the ethos of the indigenous group (i.e. as a regulated 'equilibrium' system...).

As the French established customary law courts (*tribunals coutumiers*) to adjudicate disputes in the highlands (the first was already established by 1913, in Kontum), and as the corpus of indigenous customary law was codified and recorded in *coutumiers* by French ethnographers, many of them administrators or colonial officials, just such a picture of customary law began to emerge. According to Salemink (2003:98), "the colonial administrators and ethnographers who engaged in the composition of a tribal *coutumier* considered it to be—in the words of Lafont (1963:257)—'the reflection of society', at least for the tribe involved...In the French ethnographic tradition within Indochina its composition acquired a status similar to the ethnographic monograph based on fieldwork in the Anglo-Saxon world".<sup>43</sup> The *coutumiers*, and the customary laws enforced by tribal courts, were consciously modified to serve the purposes of the colonial rulers. Modifications included punishment of resistance, prohibitions on the relocations of villages, and support for the village head, a previously non-existent office imposed by the French. Guilleminet was clear about the nature of these modifications:

The customary law [*coutumier*] . . . can be defined as the totality of rules that the authority now has respected, basing itself on the juridical customs of Kontum, in order to avoid that anyone trouble public order or the peaceful life of the community. . . The principles stated at each article express the state of affairs in 1941. they are the result of a slow and modification of customs [*coutumes*] that adapt by themselves, or by the decisions of the chiefs...to the new needs of the era, to the desire that the political Administration has to reform them without shocks (Guilleminet 1952:101 in Salemink 2003:157).

The institutionalization of customary law in *coutumiers* and tribal courts was not as advanced in Cambodia as it was in Annam. From the most extensive research on this question, that of Guérin (2000-2001; 2003; n.d.), it does not appear that the Sabatier reforms, those establishing a tribal court system and the codification of tribal law, were ever fully implemented in Cambodia's highlands. And while *coutumiers* were written for the the Stieng in Cambodia, as well as for the Jarai and the Mnong, two groups found in both Cambodia and Annam, there were no studies done of the Tampuen or Brao groups and sub-groups. Even so, following the establishment of French control in present-day Mondulkiri province at the turn of the century, French colonial officers were instructed "to settle conflicts in accordance with the

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<sup>43</sup> *Coutumiers* were written for all the major language groups in Vietnam, and several groups were analyzed more than once. Important examples include Sabatier and Antomarchi (1940), Lafont (1963), Guilleminet (1952), Gerber (1951) and Dournes (1951).

autochthonous customary law” which they are to learn through consultation with elders (*koragn*). Guérin (2003:79) notes that the law was interpreted in a sense that favored the French position and French morals: executions, reprisal raids, sorcery, and trial by molten lead were all made illegal. The French also spent a great deal of effort trying to eliminate slavery and debt-servitude, but this effort proceeded quite slowly, Guerin (2003:146) notes, because slavery “was totally integrated into the customary law of the [highlander] populations”. By banning these practices on the basis of their failure to live up to the standards of French civilization, the French instituted what colonial African regimes referred to as a ‘repugnancy clause.’

Even though administrative intervention into the system of indigenous customary law was not as complete in Cambodia as it was in Vietnam, it is likely that changes to the system in Vietnam would have had an influence on the system as practiced in Cambodia. Communication among these groups continues today, and ‘hard’ national borders of today were far more permeable for much of the past century. In addition to the gongs, jars, elephants, buffalos and other trade goods that travelled along the networks joining highland peoples, information and ideas about culture travelled as well.. Perhaps the greater question is how much of an effect the colonial encounter had on the local practice of customary law. As remains the case today, only the most important or difficult to resolve conflicts ever make their way into the court system, where codification and alteration of the oral tradition would have been most far reaching. Basic day-to-day disputes were far less likely to require the involvement of judges. Thus the village remained, in the words of Lafont, ‘the conservatory of the common [customary] law tradition’ (1963:257). It must be noted, though, that as highlanders’ understandings of their world have changed, so have their customary practices. While trial by ordeal of underwater submersion remains prevalent in Cambodia, trial by molten tin has been eliminated, as has the practice of inter-village warfare and the practice of debt-servitude and other forms of slavery. As will be demonstrated by the research presented in this report, indigenous customary law continues to play an important role in the lives of highland villagers.

### **Conclusion: Implications for the policy process**

This essay has reviewed the problems faced by marginalized indigenous people in obtaining access to justice, and has attempted to contextualize the existence of legal pluralism in Cambodia through an investigation into Cambodia’s history, and into the experiences of other post-colonial states. What, if any, lessons can be gleaned from this investigation to inform the policy-making process? What light does this body of experience shed on efforts to ‘strengthen and recognize indigenous law and conflict resolution mechanisms’ and to ‘improve alternative dispute resolution options’ for indigenous peoples (Yrigoyen Fajardo, et al. 2005:xi)?

The historical legacy of customary law—its use by colonial states to control restive indigenous populations—suggests that policymakers should proceed with caution in their embrace of the emancipatory potential of indigenous custom. While indigenous peoples’ movements and their advocates have in some cases argued for the recognition of these practices, and while these practices remain an important mechanism for dispute resolution for people in their everyday lives, it must not be thought that just because they are ‘indigenous’ these systems are liberatory or free of abuse. As Cupet’s relation of how a powerful highlander forced a less fortunate ‘poor devil’ into slavery through the threat of trial by molten tin demonstrates, even in their ‘purest’ forms, these systems are not free of the effects of power and inequality. Thus while even the most ‘traditional’ customary law allowed the abuse of power, its formal application by colonial states, both in Africa and in Cambodia, generally has served the interests of the state, and thus of the dominant power-holders in society. By preventing the intervention of the state into everyday disputes, the informal customary law system of today may provide some shelter from this sort of abuse. But the possibility that the system could be turned into a mechanism for further abuse of power, as it has in the past, surely must be considered a possibility in the future.

Nor should indigenous law be considered a 'pure' representation of indigenous culture. Both culture and law have changed, and continue to change, as a result of the changing social, economic and cultural forces affecting indigenous people. Aspects of traditional law that highland people may consider their authentic tradition may in fact be vestiges of the process of 'invention of tradition' that results in new practices, or invests old practices with new meaning, that accompanies social change. Any efforts to institutionalize or respect local practices must be recognized as part of the process through which the invention of tradition takes place.

One of the most important implications of efforts to grant rights or entitlements to groups on the basis of ethnicity is that these rights generally have the effect not merely of assisting marginalized groups, but of creating political and legal identities for those groups. Here, the representations used by indigenous people to obtain redress for grievances are in fact written into law, and the resulting legislation describes different sets of rights and responsibilities for indigenous and non-indigenous people. Colonial-era policies that established political identities where there had previously been cultural ones created the political environment which frames much ethnic violence in post-colonial societies today. Policy-makers seeking to address the demands of indigenous peoples' movements and their advocates must bear this legacy in mind. At the same time, policy makers are now called on to address the failure of the modern nation-state, which never envisioned a future in which ethnicity still divided national populations.

Several other factors with implications for policy makers must also be mentioned. First, the fact that indigenous people make up such a small minority of Cambodia's population must be addressed realistically. The countries where customary law has been formally integrated into national constitutions and the legal framework are those countries where the number of people actually living under the guidance of traditional authorities, or practicing customary law, constitutes a significant part of the population.<sup>44</sup> In Cambodia, where indigenous people make up only about 1% of the national population, it must be recognized that indigenous peoples' social movements do not have a great deal of political power. Judicial systems and mechanisms to establish the balance of power in liberal democracies are supposed to address the problem of the 'tyranny of the majority.' Yet proponents of greater access to justice for marginalized groups must look realistically at the political situation, and at the kind of support that reform measures are likely to receive, when crafting strategy and suggesting policies.

Second, the fact that certain highlander practices that constitute key elements in the customary law system would be considered to be non-rational, archaic, and non-modern, must be taken into consideration. It is one thing to assert the right of indigenous societies to believe what they want, and to have freedom of religion. It is quite another to insist that individuals accused of witchcraft may be found guilty through the means of augury and divination, or to provide legal backing for trials of faith, such as under-water breath-holding contests, as acceptable forms of dispute resolution. The existence of such practices within the traditional system of dispute settlement, practices that some might consider 'repugnant' to the values of modern society, call into question the ability of modern governments to successfully recognize the value of customary law and traditional authority.

Finally, there is the question of how government or other efforts to bolster traditional authority structures may affect the ways that highland people understand the legitimacy of their own systems of dispute resolution. According to Yrigoyen Fajardo, et al. (2005:60), community elders are 'the legitimate authority for indigenous communities, . . . to the contrary, the village chief is nominated by external powers [and] the commune council is elected according to political lists and the councillors respond to the political parties they belong to.' Because of this, "the source of legitimacy of the village chief and commune council is external to indigenous structures." That is to say, elders, traditional leaders, and the customary law system are perceived to be legitimate because they are free from state interference, and their authority

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<sup>44</sup> According to Van Kessel and Oomen (1997:561) 17million people, or "about 40 percent of the people of South Africa and 17 percent of its territory are ruled by traditional authorities." For case studies of states having high percentages of indigenous people that have implemented policies to recognize legal pluralism, see Papua New Guinea (Care and Zorn 2001) and Latin American states such as Columbia and Bolivia (Van Cott 2000), in addition to African examples.

comes from within the community. The legitimacy of village chiefs and commune councillors is diminished because their authority comes from the government, and from outside the community. This raises the possibility that attempts by the government to recognize indigenous customary law and traditional authority may backfire, draining those systems of their current legitimacy. Policy efforts that seek to ‘recognize and strengthen indigenous law,’ to ‘recognise indigenous authorities in conflict resolution,’ and to provide ‘full recognition of indigenous customary law and conflict resolution mechanisms’ (three of the *Pathways* report’s principle policy recommendations for indigenous people) must be pursued without co-opting them, without opening them to political manoeuvring, and without de-legitimizing them by moving the source of their authority from the community to the state. This is a daunting task.

Taken together, there are great challenges of crafting a policy to improve indigenous peoples’ access to justice. This review has sought to illuminate those challenges by contextualizing the policy problem, both through a historical review of the problem in Cambodia, and by reference to efforts to address the challenges of legal pluralism elsewhere in the world. The cases studied and the issues raised have focused more on the possible negative repercussions of a poorly thought-out policy intervention than on the gains to be made, for the simple reason that attempts to alleviate the injustices faced by marginalized peoples should, first and foremost, seek to do no harm.



## Appendix 3: Available Population Data of Indigenous Groups in Cambodia.

(Nb. All population data is indicative only and varies considerably between years and source)

**Table 9: Mondulkiri 2004 population data**

Ethnic group	Population	% of population
Phnong	23,964	52.58
Kreung	598	1.3
Kraol	597	1.29
Jarai	93	.2
Thnon	147	.32
Tampuen	382	.83
Lao	1099	2.4
Vietnamese	118	.25
Cham	1510	3.31
Khmer	15668	34.38
Kampuchea Krom	68	.14
<b>Total</b>	<b>45568 (women 22508)</b>	

Source: Mondulkiri Dept. of Planning

**Table 10: Ratanakiri's population - 2003 and 2004**

Ethnic Group	2003 population	% of Total Pop.	2004 population	% of Total Pop.
Tampuen	27239	23.80	28,266	22.72
Khmer	20875	18.24		
Jarai	20312	17.75	15,398	12.38
Kreung	17683	15.45	16,093	12.94
Lao	10354	9.05		
Brao	8560	7.48	7,938	6.38
Kachok	3383	2.96	1,026	0.82
Kavet	2620	2.29	2,129	1.71
Cham	1073	0.94		
Vietnamese	935	0.82		
Chinese	877	0.77		
Phnong	270	0.24	257	0.21
Lun	267	0.23	300	0.24
Rhade	3	0.00		
<b>TOTAL</b>	<b>114,451</b>	<b>100.00</b>	<b>124,403</b>	

Population by ethnicity in Ratanakiri Province  
2003 Data compiled by PLG Ratanakiri  
2004 Data Ratanakiri Provincial Dept of Planning

The above comparison between 2003 and 2004 population data from ostensibly the same source (PLG supports the Provincial Dept of Planning) shows significant declines in the population of some groups in one year, which is hardly credible. Table 3 summarises this data and trends also shows some serious discrepancies with the overall percentage of the population of indigenous people in Ratanakiri falling nearly 13% (or the disappearance of a minimum of 9,000 people!) in one year.<sup>45</sup>

<sup>45</sup> Even a crude calculation taking 2003 indigenous population figures as a percentage of the overall 2004 population suggests that in 2004 the percentage of indigenous people in Ratanakiri could not be below 64.57%.

Table 11: Population and percentages of IPs in Ratanakiri province.<sup>46</sup>

Year	Provincial population	Population of IPs	Percentage of IPs	Source
1998	94,243	63,953	67.86%	1998 Census mother tongue data
2000	99,721	68,457	68.65%	Helmets and Wallgren (2002)
2003	114,451	80,337	70.2%	Seila/PLG Ratanakiri (2003)
2004	124,403	71,405	57.4%	PDP (2005)

## Cambodia's indigenous populations

Cambodia's indigenous populations are predominantly found in the scarcely populated extremities of the country in the border areas of Vietnam, Laos and Thailand. These are the North and North-East. Kratie (Stieng, Kroal, Mel, Phnong/Bunong, Kuy, Thmaun), Mondulkiiri (Phnong/Bunong, Stieng, Kroal, Roong, Rhade), Ratanakiri (Tampuen, Jarai, Kreng, Brao, Lun, Kravet, Kachok), Stung Treng (Kuy, Phnong/Bunong, Kravet, Kreng, Lun, Brao), Preah Vihear (Kuy), Kampong Thom (Kuy) as well as the mountainous areas in Koh Kong (Khmer Chornng, Poar) and Pursat (Khmer Chornng, Poar), Kampong Speu (Suoy) and Sihanoukville (Saoch) (ADB 2001).

The long-standing presence of these groups in the remote forested border areas of the country explains the use of the term indigenous, as their existence considerably predates the delineation of Cambodia's international borders. In parts of the northeast the Khmer and Lao are more recent arrivals settling along rivers, and in lowland and urban areas. In Mondulkiiri and Ratanakiri the 'minorities' are actually the majority.

Except for the Jarai in Ratanakiri and a few Rhade mixed with the Phnong/Bunong in Mondulkiiri (who are Austro-Thais - or Malayo-Polynesians, linguistically related to the Cham) all the rest of Cambodia's indigenous groups are Môn-Khmers.

While several important distinctions can be made between these groups, a first national level forum of indigenous peoples in Kampong Speu (Sept. 2004) also highlighted their overall similarities with regard to lifestyle, land use, religious beliefs/ceremonial practices, etc. Groups with clearly distinct language and geographic origins such as the Jarai and the Tampuen of Ratanakiri could also be described as having culturally intermarried in some areas. The conclusion being that most of these groups belong to the same cultural substratum usually called the Proto-Indo-Chinese civilization.

In the national indigenous peoples forum in Kampong Speu (Sept 2004), some of the criteria indigenous representatives from 14 province used to define themselves included;

- We have indigenous blood (our parents and grandparents were indigenous),
- We live communally,
- We use lands and forests communally.
- We practice rotational agriculture,
- We have ceremonies when we farm
- We have burial forests,
- We respect spirits (neak ta) and hold ceremonies for the village neak ta every year,
- We call (pray) for help and have ceremonies to repay when spirits help,

<sup>46</sup> From Ironside (2006) and Seila/PLG data Table 10 above



- We have our own languages

Table 12: Estimates of indigenous groups in Cambodia

Indigenous Groups <sup>47</sup>	Provinces Found	Approximate population			
		1998 Census	World Bank Study 2002	IMC and other	(ICC 2003)
<b>Phnong (Bunong)</b>	Mondulkiri,			19 000*	31,488
	Ratanakiri	367	121		
	Stung Treng				
	Kratie	3,166		8,306**	
<b>Tampuon</b>	Ratanakiri	22,128	23,765	28,266***	28,471
	Mondulkiri				
<b>Kuoy</b>	Kampong Thom, Stung Treng			14 200*	23,000
	Preah Vihear,		19,496		
	Kratie	546		5,216**	
<b>Jarai</b>	Ratanakiri	15,669	15,794	15,398***	22,226
<b>Kreung</b>	Ratanakiri	14,877	16,052	16,093***	22,241
<b>Lun</b>	Stung Treng, Ratanakiri		136	300***	360
<b>Brao</b>	Ratanakiri	7,132	8,051	7,938***	13,214
	Stung Treng				
<b>Kravet</b>	Ratanakiri,	1,726	1,893	4 000*	
	Stung Treng				
<b>Kachok (Kacoq)</b>	Ratanakiri	2,054	2,645	2 200*	3,377
<b>Ro'ong (Rohong)</b>	Keo Seyma, Mondulkiri				261
<b>Stieng</b>	Mondulkiri, Kampong Cham			3 300*	3,758
	Kratie	1,612		3,311**	
<b>Kroal, Kroy</b>	Kratie,	2,635		1,960*	3,105
	Mondulkiri			2,389**	
<b>Rhade</b>	Mondulkiri			Few*	
<b>Thmaun (Thmun)</b>	Kratie	619		543* 669**	889
<b>Mel,</b>	Kratie	1,260		2,100* 2,496**	2,496
<b>Poar (Samre, Chong)</b>	Pursat, Kompong Thom			1 440	10,000
	Preah Vihear		1,674		
<b>Suoy</b>	Kampong Speu		1817	1 200*	
<b>Saoch</b>	Sihanoukville, Kampot, Pursat			175*	
	Koh Kong				

<sup>47</sup> List is incomplete

<b>Khmer Chornh</b>	Koh Kong				
<b>Lamam (Loemoun)</b>				280*	1,000
<b>Khaonh (Knoung)</b>	Kratie			544**	544
<b>Khe</b>	Stung Treng			1 600	250
<b>Robel</b>				1 640*	
<b>Kola</b>				31*	
<b>Kaning</b>				150*	
<b>Poang</b>				260*	

\* Sources: Bourdier F., Provincial Statistics and Statistics of Ministry of Interior (1995)

\*\* Katie Provincial Dept. of Planning, April 1999.

\*\*\* Ratanakiri Provincial Dept. of Planning 2004.

## Appendix 4

### Jarai Justice Systems – Lut Village Workshop 25-26 April 2006

Notes, mostly on Jarai working group

#### Terminology

*Kha ploi* = elder There are women elders, who attend meetings with male elders and do not talk much.

*Kua iang* = ceremonial leader = (me kantrienh; note Headley Khmer-English Dictionary gives as 'tribal chief, chief of a resistance movement')

*Kua iang me* = #1 me kantrienh

*Kua iang kñang* = deputy me kantrienh

*Nga iang lih kua iang* = ceremony to change the *kua iang* (literally 'sacrifice/ritual to change the *kua iang*')

*Je di* = (niyay reung, to discuss a conflict)

*Kanong* = (me ondaek, which means matchmaker in Kh, is also the term informants used to translate 'kanong.' This is the 'intermediary' in a dispute. Kanong is also the term used for 'oficiant', eg. at a wedding ceremony, in which groom and bride each have a kanong, chosen by the parents of each...)

*Phung* = clan

#### 1. Kua iang

The me kantrienh, or *kua iang*, is a ceremonial leader. According to informants, the role of the *kua iang* has not changed significantly since the pre-colonial period. [It is problematic to invest too much confidence in informants' memories of the colonial and pre-colonial period, however, given the long period of time over which such information has been filtered and transformed.]

**Duties:** The principle duty of the *kua iang* is to lead village ceremonies with assistance of the deputy *kua iang*. To provide advice to individuals on their own ceremonies (i.e., in the house or field). Notably the duties of the *kua iang* among the Jarai do *not* include resolving conflicts, although the *kua iang* may join conflict resolution proceedings as a regular village elder.

**Qualities of the *kua iang*:** He should know the rituals. Must be male, older than 40 years old. Must be of the appropriate *phung*. Must be smart and just (kakadey), must be respected by villagers. Must be sloat.

**Selection of the *kua iang*:** The *kua iang* of a given village always comes from the same clan. Note that although the *kua iang* role was lost during the Khmer Rouge period, during the Heng Samrin regime new *kua iangs* were selected to replace those who had died. Each village selected a *kua iang* from the same clan that had held the *kua iang* position prior to the revolution. The deputy *kua iang* may come from the same clan or from a different clan

[contrary to Jen's notes—I asked a follow up question the second day of the workshop]. New *kua iangs* are selected by a meeting of village elders (and interested villagers). A ceremony is held to inaugurate the new *kua iang*, in which villagers together purchase a buffalo or pig and contribute wine. While the majority of Jarai at the workshop insisted that there were only 2 *kua iang* in any village, one respected elder disagreed and informants suspect that there may be some villages where there are three *kua iang*.

## 2. Kanongs and conflict resolution

In very general terms, disputes are solved by village elders, usually with the participation of one or two *kanongs*, depending on the severity of the case. In the case of theft, which was a principle example we used to elicit information about dispute resolution, the aggrieved party will accuse the suspected thief of having taken his belongings. There is a strong incentive for discovered thieves and transgressors to admit to their guilt, as each escalation of the conflict to higher levels of resolution result in an increased fine and greater sacrificial obligations. If the accused protests that he or she is innocent (I will use 'he' from here on out), the 'plaintiff' will go to talk to the village elders, and ask for their opinion on how to proceed. The plaintiff, in discussions with the elders, will declare how much he wants to fine the other party for the offense. If the elders believe there is a case that must be investigated, the 'plaintiff' then goes to look for a *kanong*. At this point in the proceeding the *kanong's* principle role is to bring the conflict to a close, for example by convincing the 'defendent' to admit guilt and negotiate a settlement. If after the first *kanong* has spoken with him the accused still refuses to admit guilt, the accused will then seek his own *kanong*. It is important to have two *kanongs* in order that individuals' words can not be twisted or misrepresented.

The *kanongs* travel back and forth between the houses of the two parties in the conflict, seeking to understand the nature of the charges, and to obtain responses to all questions that arise in response to their questions. Part of this process may involve the accused's arguments for a reduced fine because of extenuating circumstances. The *kanongs* may therefore act as go-betweens in a negotiation between the two parties over the amount of restitution and compensation to be paid by one party to the other. When the *kanongs* have collected all the information, the elders hear the *kanongs'* presentation of the findings in the house of the accuser, and make the final decision about the case. All the available elders in the village hear the case, and the final decision is determined by a majority of the elders. They may decide to lower the fine if it is believed that the case has already cost a great deal of money, if the original amount requested was too high, if there are extenuating circumstances, or if the accused is too poor to pay the requested fine.

When the fine is paid, each party also provides a jar for a mutual wine-drinking session to insure village solidarity. After having drunk this wine, it is not appropriate for the parties to bring the case up again, especially not to complain that it was settled unfairly. However, it is possible that the guilty party may feel embarrassed to attend this drinking session, and he can send someone in his stead (a family or household member) to the drinking session, which is held in the house of the 'winner' of the dispute.

The *kanongs* receive a portion of the fine, which is given to them by the winner in the dispute. The examples provided all suggested that the two *kanongs* equally split an amount in the range of 10-20% of the fine (the amount on top of the restitution and sacrificial items). The elders who hear the case are also given something, although this may merely be a share in the meat of the sacrificed animal, and participation in the jars shared after the resolution of the conflict.

In some conflicts a *kanong* is not used—when the accused admits guilt immediately upon being accused, or in the case that a father, for instance, is approached by or approaches the aggrieved party and says, for example, 'I'm sorry, I understand my son took this thing of yours, let me pay you back and provide us with a jar so we can be friends.'

**Kanongs and advocacy:** While a *kanong* essentially represents one individual in the proceeding, a *kanong* is not allowed to be closely related to the plaintiff or defendant who selects him. Brothers or other close relatives are disqualified, and this may insure some level of impartiality within the proceeding. There may however be other reasons for the prohibition on brothers and close relatives. For example, one could imagine the situation in which a *kanong* was seen to have done a particularly bad job in representing the facts of the case; in such a case, family harmony might be upset by hard feelings between a participant in the case and his *kanong*. The principal criteria for choosing a *kanong* is that he understand the law. While the prohibition on close relatives is evidence of a need for some distance between a *kanong* and the person who selects him, Jarai workshop participants were insistent that a *kanong* ‘represents’ and ‘defends’ the individual who asks him to become involved. If one party is not happy with the *kanong* chosen by the other party, he does not have the opportunity to object to the selection of that particular *kanong*; the selection of the *kanong* is the decision of the individual plaintiff or defendant who is asking the *kanong* to represent him. Rather than being impartial, the *kanong* is biased (*lomien*) towards the individual he represents, he favors that side (*gancheung*). A *kanong* who does a good job is said to have ‘spoken well.’ However, in cases involving only one *kanong*, the *kanong*’s initial role is one of ending the conflict. While the single *kanong* is chosen by the individual who claims to have been robbed (in the case of theft), and will represent that individual’s interests if the case escalates, the *kanong*’s role is seen as more of a fact-finding role. This remains true even in escalated cases in which *kanongs* defend their appointers—their role is seen to be one of collecting evidence and getting the story straight, first and foremost, even though they are understood to be on the ‘side’ of one individual in the case.

**Disputes involving two villages:** In such disputes, the village elders of both villages are involved in making decisions. *Kanongs* travel back and forth between the two parties, then present their findings to the elders, who assemble at a location near the border of the two villages (if there is one). The participants in the dispute are not present during this deliberation. As in an internal village dispute, the village chief does not have a role in the resolution of the dispute as village chief, but rather may participate in connecting with and making arrangements with the other village.

**Appeals:** cases in which one party refuses to admit guilt and refuses to accept the results of the hearing process can be contested. Contested cases can go in a number of directions. One possibility is that a trial by ordeal will be used to determine guilt or innocence. The most familiar ordeal used by the Jarai is that of *noi ia* (‘bathing in the water’)—participants go to waist- or chest-deep water and simultaneously dunk their heads under water. The individual who comes up for air first is considered to be in the wrong in the dispute. The spirit of the water is said to have intervened on the side of the party in the right. For this reason, these disputes require a sacrifice of at least a pig to the water spirit, and the pig is provided by the loser of the ordeal. As usual, fines also escalate for individuals who refuse to admit their guilt, so a trial that goes up a level to the bathing ordeal will involve a higher fine than one that was solved by an initial round of resolution with elders. Water ‘ordeals’ are still quite commonly used to resolve conflicts, and many individuals questioned expressed their faith that the system always produces a fair result. It should be noted that anecdotal evidence suggests that accused thieves are more often than not found to be guilty in these ordeals, which might possibly imply that accusers might be more willing to accuse--or more willing to agree to an underwater ordeal with-- those individuals whom they thought they could ‘beat’ in an underwater ordeal.

A second avenue for contesting the outcomes of disputes settled by the elders is to engage the semi-formal and formal legal system. The first step in this process may involve taking the case to the village chief, but generally such cases are referred to the commune council. This is ‘semi formal’ because the official legal duties of commune councils do not include resolving disputes. Some commune councils are familiar with Jarai/highlander legal traditions. In any case, the commune council may decide to uphold the rulings of the elders. If individuals are not happy

with the commune councillors' decision, they may go to the district courts and enter a formal legal proceeding.

**Setting fines:** Workshop participants were clear that it is the accuser who first states the amount he wants to fine the other party. He does this, however, in accordance with a culturally shared understanding of the legal tradition. Similarly, negotiations about the amount of fines may involve references to generally shared ideas about the nature of crimes and the kinds of fines they entail. Elders and *kanongs* are both meant to have a considerable knowledge of these traditions, and elders, who have final say in the amount of the fine, assumedly make reference to these shared understandings in determining the final amount of the fine.

**Murder:** Murder and rape are cases that individuals believe to be too big, or too difficult for the elders to resolve. These cases used to be solved in the village. While people were under the impression that "since Pol Pot," murder cases are only resolved by the formal system, when asked to recall the recent murder cases they had heard of, the only case that the elders brought up was a 1993 murder case that was in fact resolved by the traditional system. The case involved a man who killed his wife out of jealousy. Two *kanongs* were involved, and the fine consisted of 2 buffalo, 2 cows, 2 bronze urns, 2 pigs and 2 jars. The murderer was not sent to jail or to the formal system.

**Continuity and change in the system:** Continuity of the system has traditionally been assured by the attendance of interested young men (generally after marriage) at the various phases of conflict resolution. Young men who have shown an interest are allowed to listen to elders deliberate cases. Those who have no interest are not welcome, and are unlikely to be very involved in conflict resolution processes in the future. While workshop participants at first indicated that the roles of individuals within the system has not changed very much in living memory, on further questioning they were more forthcoming about the nature of change to the system more generally. In particular, they noted that money was never used in conflict resolution before. Fines were paid in livestock, jars, gongs and bronze urns. Furthermore, in the past individuals had more possessions and livestock than they do today, according to informants; ability to pay fines has thus decreased in recent years. At the same time, the ability of powerful individuals to maneuver the process into the formal system, or to avoid the traditional system altogether, has increased in recent years. The reasons given for this include the proximity of the state and the formal system today compared to previously (in the French era, for instance, there were fewer districts and sub districts, and administration centers were physically much more distant from most villages). Furthermore, in the past individuals were 'scared' of the state and of officials, whereas nowadays powerful villagers are comfortable involving themselves with the formal system and they have 'learned how' to take advantage of it. For instance, they have learned how to make money by selling land illegally, and they know how to avoid being penalized for doing so. Finally, the nature of conflicts has been changing; new types of conflict, especially those involving powerful outsiders who don't respect the traditional authorities, cannot be resolved within the traditional system. Many conflicts now also involve neighboring Khmers, a new phenomenon in many parts of the province. When Khmers are involved, workshop participants noted, conflicts are resolved following the Khmer system.

### 3. Continuity of the system in the future

The Jarai group was tasked with discussing how the traditional dispute resolution system can be 'strengthened' and how its continuity can be insured in the future. The starting point for this discussion was the measures already in place, namely that of involving interested young men in the system as observers from about the age of 18 or so. Only those deemed to have potential are involved. Workshop participants made the following suggestions:

## Towards Inclusive Governance

1. Respected people in the village should make it a point to explain the system to young people. How can we insure that this occurs? Highlanders Association should go to the villages, meet with elders, and encourage this activity.
2. Organize documents for the traditional system: a book of law documents for the next generation so that they know.
3. NGOs should come to the village and create one person who is the focal person for the traditional authority system. That person would be responsible for coordinating with the NGO, and would represent to the people, and educate and inform the people in the village so that they respect the traditional authorities.
4. Villagers must push their children to learn the Khmer language, so that they can read the traditional law book.
5. The village chief, kua iang, etc. should give advice to villagers so that they know about the traditional system. They should advise parents to inform their children about the system.
6. Each village should create a group of teenagers who will learn about traditional authority with the elders and those involved in the system; this group would meet one or two times per month. these would be the same youths who are already involved in the system (those who are invited to sit in to hear cases being discussed by elders).
7. If land and forest disappear it will destroy the traditional system of conflict resolution. If we want to support the system we must prevent land and forest from disappearing. "Because people are from the earth, if the earth disappears, the people and the traditional system will disappear too."
8. Therefore, the village chief must be made to acquiesce to the agreement of the community any time land is sold; he should not be able to sell land by his thumbprint alone.
9. Make a video about traditional authority. It should include interviews with elders and information about traditions.
10. Making a curriculum for schools is not useful. There are no schools in our villages. If children are going to learn about traditional law, it will be at night.
11. The traditional authority focal person should collect and publish information and inform others of the community's system.
12. Some individuals expressed an interest in 'creating' a part of the traditional system that can deal with murder.
13. Have a national workshop.



## Appendix 5: Brao Justice Systems in Ratanakiri Province, Northeast Cambodia

### Introduction

The Kreung, Kavet, Umba (Brao), Lun and Brao Tanap peoples all speak different but similar dialects of the Brao language (Keller *et al.* 2003)<sup>48</sup>, and they are also all socially organised in similar ways. Therefore, they can be considered to make up all the sub-groups of the Brao in Ratanakiri province, northeast Cambodia, although there are some significant cultural differences between them, and even within the same sub-groups.

The justice and conflict resolution systems developed throughout the world undoubtedly reflect the ways in which those people who developed them see the world and socially organise themselves. Therefore, since the people in all the Brao sub-groups appear to base their social organisation systems on the same fundamental principles, it makes sense to describe their justice systems as a group.

From the outset it is critical to recognise that Brao people generally have very egalitarian views of society (see Matras-Guin 1992). The Brao do not, in fact, have a history of hierarchies beyond the village level, and the French explorers who visited them in the 19<sup>th</sup> century immediately noticed this and commented on it (see, for example, Cupet 1998). In this light, it is ironic that the decentralisation programme of the Cambodian government actually represents a centralisation of power in the Brao context, as the communes are becoming stronger in relation to the villages, which had more power in the past.

The social organisation of the Brao is well represented by their kinship system, which prescribes bilateral residency, and the moving of newly married couples between the houses of the bride's parents and the groom's parents after a particular number of years. This is done in order to ensure that each side of the family has fair and equal access to the human labour of their children. The Brao also do not require any sort of dowry or other payments when married, and both sides are expected to contribute equally to marriages. These same principles apply in terms of inheritance and in other aspects of Brao social life as well. Critically, the Brao have historically gone to great efforts to create an egalitarian society in which all people have essentially equal rights. This may surprise some people who have chosen to see the highlanders of Ratanakiri as backwards politically and structurally oppressive of women, but the Brao system grants women equal rights to men, although child bearing is a burden that women must bear and which fundamentally affects the role of women in society. However, throughout history the Brao have certainly been influenced by other people with more hierarchal worldviews. As Edward Leach (1954) described for the Kachin of Burma, the Brao have, at times, attempted to adopt hierarchal social organisation structures like those of their lowland neighbours, the Khmers, the Lao and the Kinh (Vietnamese). The French have also introduced and promoted more hierarchal systems of social organisation compared to what the Brao have been used to. But like the Kachin, the Brao have often had a difficult time maintaining this sense of hierarchy due to the fundamental conflict that this sort of system implies in terms of their egalitarian worldviews.

It is essential to have at least a basic understanding of local worldviews and social organisation systems before conflict resolution and justice systems can be easily and accurately investigated. That is the reason that the above explanation is crucial as a prelude for discussing Brao justice systems.

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<sup>48</sup> In fact, Keller *et al.* (2003) recognize all these linguistic groups, and also split the Umba or Brao into two groups, the upland and lowland Brao. However, the Brao rarely emphasize this difference themselves.



Fundamental grassroots democracy is the basis for the Brao system of justice. For example, unlike some legal systems, adulterous men are subject to the same conditions and punishments as adulterous women. I have been unable to find any Brao laws that prescribe different punishments for women and men. There are apparently not any structural class differences that affect local justice systems either. Theoretically, everyone is treated equally under the local system. The Brao, unlike other groups in Asia, do not generally desire male or female children, as both are considered equal in their eyes. The egalitarian worldview of the Brao fits well with modern and progressive legal systems, and this is probably one of the main reasons why we have often been surprisingly impressed with local systems of justice amongst the Brao. However, this should not imply that the Brao system of justice is based only on egalitarian principles. Justice systems from the outside have certainly also influenced the Brao system over time, and Brao traditional justice facilitators frequently refer to Lao, Siamese, French, Khmer and even Japanese law from different stages in history as a basis for making decisions. Therefore, the Brao draw on their past legal experiences in order to determine the best way to proceed, but ultimately the Brao legal system remains largely based on egalitarian principles.

### How does the system work?

It is now time to turn to the practical ways in which the system operates. Like other highland systems, most Brao 'legal cases' (*khadi* in Brao<sup>49</sup>) originate in a conflict arising between two or more parties (usually two). One person can generally be described as the plaintiff (*me tranej* in Brao) and the other as the defendant (*me bij khadi* in Brao), although sometimes the positions of both sides can be essentially equal, with both sides making similar claims against the other. When it is a matter of one party violating tradition or taboo, retribution usually comes directly from spirits that cause misfortune or illness to the violator or family members. Violating more serious village taboos can lead to retribution against the whole community. In all these cases the violators are expected to appease the angered spirits through conducting rituals associated with domestic animal sacrifices, and a specific adjudicator is not required. For minor offenses, chickens are sacrificed, for moderate offenses pigs are sacrificed, and cows and especially buffaloes are sacrificed in the most serious cases. However, *khadi* almost inevitably involve dealing with some sort of a conflict between two or more parties.

A case generally begins with one party accusing another of causing a punishable infraction. For example, one individual is accused of stealing from someone else, or someone is accused of having sexual relations with someone else's wife or husband, etc. When this happens the first step in the process of setting up a *khadi* is for the aggrieved party or plaintiff to arrange for one or more individuals to facilitate or adjudicate the proceedings. This can be done by a plaintiff directly asking someone, usually a respected elder with experience in judging cases, to preside over the case, or by the plaintiff using an intermediary (often a close relative) to find an appropriate adjudicator (*kanong* in Kreung, Lun and Brao Tanap, and *Ya Weu* in Uмба and Kavet) to oversee the case. If the defendant is from the same village as the accuser, and agrees that the chosen facilitator is likely to be fair handed, and if the case is relatively minor or easy to deal with, only one facilitator may be chosen to adjudicate a case. However, if the case involves people from two different villages, it is not unusual for each side to choose one facilitator each to hear the case. It is critically important that both are seen to be impartial facilitators able to judge the case fairly and mediate without bias to one side or the other. Also, if a case is complicated or serious, it may be seen as beneficial to designate two or even more adjudicators. There is no set number of judges or mediators, but it generally true that the more serious the case, the more adjudicators are involved. The Brao recognise that the more judges involved, the more likely it is that the verdict will be balanced and fair. Most of the time Brao

<sup>49</sup> *Khadi* is a word adopted by the Brao but of Lao origin, indicating Lao influences on Brao justice.

adjudicators are men. However, there were, for example, cases in the past when exceptional Brao women played important roles as local judges, and one old woman in Touay Umbil village in Cha Ung Commune, O Chum District still plays that role today. But it is generally considered more appropriate for men to act as adjudicators, because they tend to know more about history and be able to speak publicly with more confidence. There is nothing preventing women with these skills from filling the role, according to Brao men and women I have interviewed, as the Brao egalitarian nature prescribes that everyone has equal rights in society. In addition, there is never any specific reason for having to choose any particular people as adjudicators. Although it is common for experienced adjudicators to be continuously called on to help, especially if they gain a reputation for being fair, there is nothing to prevent people from choosing other individuals if both parties have confidence in the impartiality and the decision-making abilities of those individuals. In other words, if an adjudicator does a bad job, he or she will probably not be called on by people to adjudicate cases in the future. Therefore, local judges must earn respect, as there is nothing preventing people from getting someone else to decide on a case.

Once the adjudicator or adjudicators have been chosen, the case proceedings begin. This involves the adjudicator(s) moving between the plaintiff and his or her family and supporters, and the defendant and his or her family and supporters. It is important to keep the two groups separated during the proceedings in order to avoid escalating the conflict. For example, if both parties are from the same village, one group might stay in the village's communal house (*rong*) while the other might stay outside and a little away from the communal house. If the parties are from different villages, the adjudicators may have to travel back and forth between two or more communities. In these cases, it is generally seen as useful to have two or more judges, so that there is someone to ensure that a single adjudicator is not altering statements made by one side or the other. The adjudicators move between the two groups many times or possibly just a couple of times, depending on the complexity and importance of the case, until they have heard both sides of the story and feel that they are in a position to come to a decision about the case. The process is called "*mang char*" in Kreung, Brao Tanap and Lun, and "*mang khadi*" in Uмба (Brao) and Kavet. During this process, all adults with some sort of involvement in the case have a right to make statements and have their views heard, regardless of gender, class or position in society. Again, the egalitarian principles of the Brao are clearly manifested. Discussions about cases can go on for a long time, until everyone has had the opportunity to input into the process.

When the adjudicators feel that they know enough to make a decision regarding a case, they indicate their decision to both sides separately and propose measures for resolving the conflict. This may involve one side paying a fine to the other side, or it may involve both sides contributing a jar of rice beer and an animal to sacrifice to the group, as a way of reducing conflict through both sides eating and drinking together. Or it may involve both. However, if one side is to be fined, it is rare that the initial fine prescribed by the adjudicators will end up being the actual amount paid. It is simply the starting rate, and the one who is obliged to pay the fine almost invariably requests a reduction in the fine. Depending on the circumstances of the case and the economic ability of the fined party to pay, there will usually be a process of bartering on both sides with the adjudicators moving from one group to the other until a fine that is acceptable to both sides is finally determined. At that point, both groups are brought together and the decision is reiterated by the adjudicator(s) and the already agreed upon fine is formally stated to both parties. If the case is not a difficult one, the one who wins may get to keep all the fine, but if the adjudicator(s) have had to invest considerable time and energy in resolving the case, they may receive some payment or compensation for their services. This varies from case to case. Sometimes adjudicators are satisfied to simply eat and drink with the group at the end of a case. Importantly, poorer people are generally fined less than richer people, because the former are recognised as not having the ability to pay large fines. Many poor Brao people see this as an advantage of the Brao system of justice – it takes the economic circumstances of different people into account.

Apart from one party receiving a fine from the other, there is also the matter of ensuring that the conflict is laid to rest and does not rise up again and cause more social conflict in the future. In fact, the whole Brao justice system is fundamentally designed to reduce possibilities for escalating conflict and for ensuring that conflicts are effectively resolved. The process usually involves both parties contributing a jar of rice beer and a chicken or pig to sacrifice at the end of a case, or it might just involve one party providing a chicken and the other providing a chicken or various other possible variations. The point is that both parties contribute equally and are expected to drink and eat together in order to ensure that there are not any latent bad feelings that will jeopardise community solidarity in the future. Of course, one session of drinking and eating cannot entirely ensure that the matter will be laid to rest, but Brao rules prescribe that once a final case drinking and eating session is over, it is an offense to bring the matter up again, and if either party complains about the outcome of a case afterwards, he or she is liable to be fined twice the original penalty for unnecessarily causing conflict. This process clearly indicates the emphasis put on long-term conflict resolution and compensation rather than punishment and revenge, which is the basis for most Western legal systems.

But this does not mean that either side has to silently accept whatever decision the adjudicators come to. In fact, in all cases either side has the option to appeal (*dawk geu* in Brao) the verdict. That means that either new adjudicators can be found to judge the case a second time, at the village level, or the case can be brought up to the next level of government, first the commune, and then the district. Often officials at the communes and districts play essentially the same roles as village-level adjudicators. Finally, if either side still refuses to accept the outcome, the case can be taken to the formal justice system at the provincial level. However, this is rarely done, unless necessary, as going this route is generally both costly and time consuming, and both parties usually prefer accepting local level decisions, based on precedent and prescribed traditional Brao law. Local people are also not very confident that decisions taken in the formal court system will be fair, and they believe that many cases are determined by the amount of money paid to the judge.

One of the advantages of the Brao system of justice is that fines can be negotiated and can also be paid over time and in installments. If the fine is large, part of it may be paid initially, with an agreement to pay the rest within a reasonable length of time, based on the economic circumstances and ability of the fined party to pay. In the past, people unable to pay heavy fines essentially became debt slaves to those who they were indebted to, with some people having to work for years or even generations to pay off large debts. However, this type of pure debt slavery is no longer permitted by the Cambodian government (actually, since the French colonial period), or by most Brao themselves, but fined individuals and their families may still be required to work for those they owe to pay off debts, especially in cases when they have no money, animals or other valuables to pay the fine, and this can result in the provision of labour for many years.

The Brao system of justice mainly involves paying fines, and those fines are generally stated in terms of buffaloes. So, for example, a murdered individual was historically valued at 12 buffaloes according to Brao law. However, when fines are paid they may not be paid just in buffaloes. Apart from pigs and chickens, and potentially money and gold as well, other valuables frequently used to pay fines include valuable rice beer jars, sets of gongs and large metal urns used to hold water (*go gung* in Brao). So if a fine is three buffaloes, the actual amount paid might be one buffalo, two jars valued at half a buffalo each, and one set of gongs valued at one gong. There are obviously many possible combinations.

Brao adjudicators determine fines based on various factors. In some case, Brao law precisely sets initial fine levels, although these amounts can still be negotiated down after the adjudicators initially pronounce them. For example, fines associated with adultery are highly structured and are generally very predictable and easy to determine, based on precedent within Brao law. However, other offenses, such as stealing, do not come with fixed fines. As one

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Brao adjudicator explained, small infractions can lead to big fines, or large infractions can lead to small fines, depending on the circumstances. If someone is accused of theft and immediately admits to the offense, shows remorse, and agrees to compensate the aggrieved party appropriately, the thief might not have to pay much, as cases like that are easy to solve and do not take up a lot of time. However, on the other hand, if someone accused of theft denies the charges and chooses to fight the case to the bitter end, but is later, after hearing the evidence and potential witnesses, found to be guilty, the thief may be fined a large amount, not only because of the theft, but also due to all the time that has been wasted resolving the case. In short, those who immediately admit to their offenses are likely to receive more favourable treatment by the judges. This is obviously a good way to encourage people to settle “out of court” or during the early part of the case proceedings. It also helps ensure that cases do not escalate conflict between different parties unnecessarily.

It is important to emphasise once again that the Brao system of justice is fundamentally based on resolving conflicts and compensating victims, not on retribution and incarceration like many Western systems. This is why Brao villagers often prefer to solve even the most serious crimes, such as murder, using their own legal system rather than going to the official courts. If they go to the official courts, the murderer may end up in jail, but this system does not usually result in the family of the murder victim receiving any compensation for their loss. Moreover, if an individual goes to jail, the community as a whole suffers due to the loss of labour, and this may result in serious hardships for other members of the community who did nothing wrong to begin with. Local decisions may not result in a jail sentence for the murderer, but they are likely to result in a large amount of compensation being paid to the family of the murdered person. It may take years for large fines to be paid, so there is certainly an important incentive to not murder again. Moreover, the murderer is able to continue to work in order to pay the fine, rather than being behind bars and unable to work to compensate the family of the dead person. But in some cases, such as when a pregnant woman and her three children were brutally murdered in Taveng District in 2005, the option of simply getting the murderer to pay a fine was not considered, as the crime was seen as being too heinous, and there were also concerns that the husband and father of the dead might seek his own retribution if the murderer was not put behind bars. Also, a murder case can only be resolved at the local level when the family of the victim accepts the verdict. They always have the option to take the case to the provincial court and have it resolved there. However, in recent years a number of Brao villages in Ratanakiri have apparently resolved murder cases locally, with the Commune council’s assistance, but it appears that in all these cases there were extenuating circumstances associated with the murder that made it possible for them to be resolved locally. According to Brao elders, higher levels of government have never tried to overrule cases that have been resolved at the local level, even murder cases.

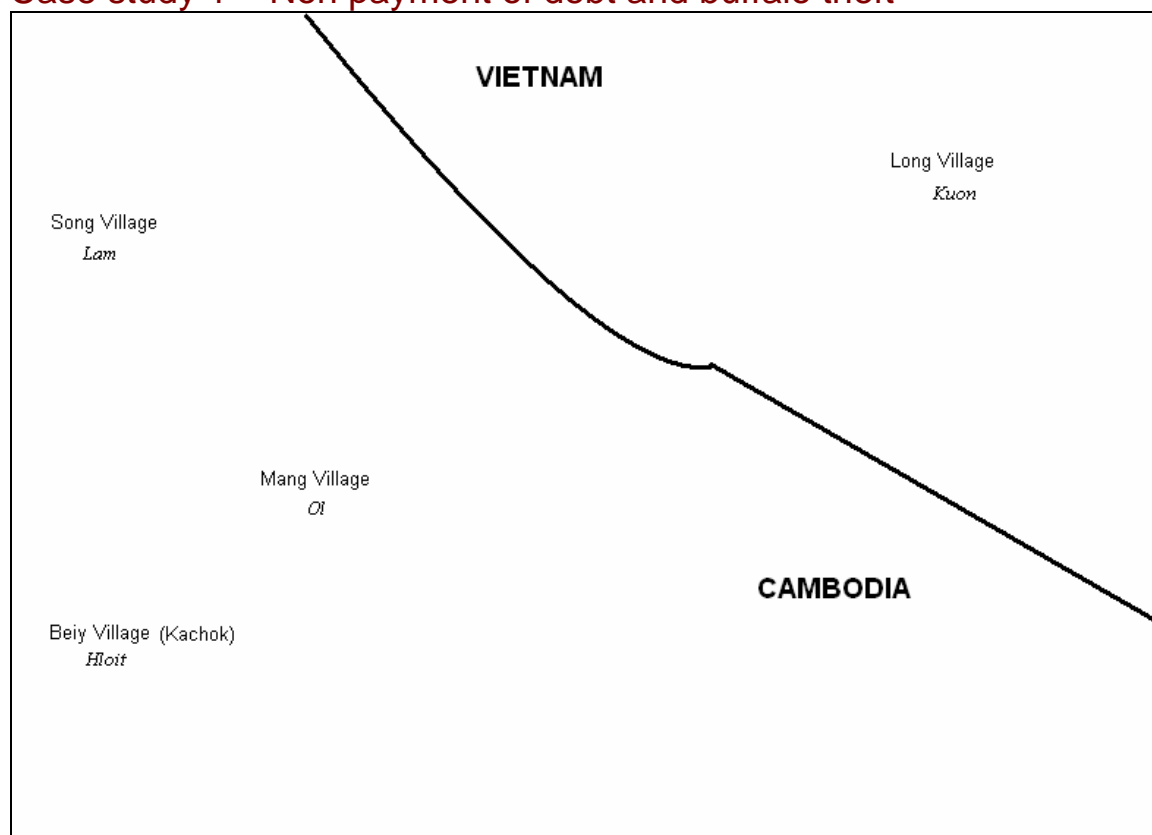
## Conclusions

The Brao system of justice appears, all in all, to be well recognized and respected by local people and governments in Ratanakiri, at least at the commune and district levels, and local people generally do not conceive of there being a huge conflict between the two systems. That may be because the Brao system of justice, while different from the formal justice system in some important ways, serves an important purpose and helps to resolve conflicts that the government would rather not deal with. Even in the centre of Ban Lung, it appears that Brao people are still relying a great deal on their own systems of conflict resolution. The Brao legal system is also, according to Brao adjudicators, based on the same fundamental principles that are supposed to be applied by the formal legal system in Cambodia. However, most Brao believe that the formal court system favours those who have the means to bribe judges and other government officials, whereas local proceedings are less costly and are truly accessible to poor people seeking justice. Local justice may not be perfect, but it is the best system that most Brao people know.



## Appendix 6: Case Studies Illustrating the Interface between the Traditional and Formal Government System.

### Case study 1 – Non payment of debt and buffalo theft



**Sketch map of Jarai villages (and 1 Kachok village) involved in the case.**

The villages in Cambodia are all in the same commune.

Individuals involved are listed below the names of their villages.

All names of individuals and villages are pseudonyms.

Kuon, a Jarai from Long village in Viet Nam, forms a 'business' together with Hloit, a Kachok villager who is the village chief of Beiy village. They arrange that Hloit will search for a buyer for a *ceng bat* (the most expensive type of gong traded in the region) owned by Kuon. Hloit finds a buyer, Lam, in Song village, and, together with Kuon, makes the sale of the gong for 7 buffalo. According to the arrangement between Kuon and Hloit, Hloit is entitled to 1 buffalo as a finder's fee for having obtained a buyer for the gong. At the time of the sale, Lam, the buyer, only has 6 adult buffalo available to pay for the gong. They arrange that Kuon will take the 6 buffalo back to Vietnam, and the remaining buffalo will be paid by Lam to Hloit when the buffalo is mature.

At around the same time, Kuon also arranges to purchase 7 or 8 *bao* of rice and 2 *bao* of cashews from Ol, a villager in Mang village, in exchange for 1 buffalo. Kuon tells Ol that Lam in Song village has one of his buffalos, and that Lam will give the buffalo to Ol. Having arranged that the buffalo held by Lam will be used as payment, Kuon takes the rice and cashews with him to Vietnam.

After some time, Ol goes to visit Lam to ask for the buffalo that is owed to him. Lam refuses to give him the buffalo, indicating that the buffalo is intended for Hloit, the village chief of Beiy. At this point, Kuon dies in Vietnam, and word of his death reaches the involved parties in Cambodia. Ol then returns to Song village and asks Lam for the buffalo a second time, and

Lam refuses, saying that the buffalo is owed to Hloit. OI later returns to Song a third time, asks for the buffalo, and is again refused by Lam.

OI then returns to Song village a fourth time, and goes to Lam's farm. Lam is not there, and OI takes the buffalo without telling Lam, and returns to Mang. Upon realizing that the buffalo has been taken, Lam goes to Mang village and asks if the villagers have seen his buffalo. They tell him that OI has taken it. Lam states to the villagers that OI has stolen his buffalo, and then he calls on OI to go to Song village to discuss the case. OI goes to Song village, along with his son and his nephew, who go with him in an unofficial capacity to *pojok* (defend) their relative. The case has not yet become a formal 'case' but is still in an exploratory phase in which it may be possible to avoid a hearing before elders.

At Song, OI and his son and nephew speak with Lam and his friends and relatives. Village elders listen as the two discuss the situation "so that it is clear" (*bue ñu jel*). OI insists: "I didn't steal it, I captured it (*ma'*)". Lam insists "you stole it." He asks "why did you take it with out seeing its owner first?" OI responds "I didn't see you, but you owed me, so I took it." The elders present say that OI has stolen the buffalo, and that this must be settled by a hearing or case (*je di*), and they instruct the two individuals to obtain *kanongs*. Both individuals find *kanongs*; OI's *kanong* is a relative, but not a close relative. The *kanongs* are from different villages, not from the villages of the principal individuals.

The *kanongs* now travel together first to speak with OI. Then they go to hear Lam's side of the story. Lam asks "why did he take the buffalo without telling me?" OI maintains that "Lam told me he would not repay me the buffalo I was owed. I asked him for it several times and he didn't give it. That's why I took it when he wasn't present." The *kanongs* go back to Lam, who says "Kuon instructed me to give the buffalo to Hloit, so I won't give it to OI."

At this point, a big meeting is arranged to discuss the case in Mang village. Lam, his *kanong* and some elders from Song travel to Mang, where they discuss the case with OI, his *kanong*, and the elders there. the village chiefs from both villages are present, as is one policeman from the commune. At the meeting, Hloit from Bei village turns up and accuses Lam of giving away the buffalo that Lam owes him. He says "why did you allow OI to have the buffalo. If it is true that you are going to allow OI to have it, then I will fine (*do*) you two buffalos, in addition to the buffalo that you owe me!"

The village elders ask Hloit not to fine Lam—it makes the case too difficult to resolve. Hloit says "if you don't want me to fine him, then give me the buffalo." OI responds that "I've captured this buffalo, it is owed to me." Lam then says that he wants to fine OI, and demands a fine of 5 additional buffalos from OI, in addition to the buffalo he claims OI has stolen. OI refuses.

The elders of both villages together decide that OI and Hloit must share the buffalo. Importantly, they indicate that OI did not steal the buffalo. OI's reputation is thus preserved by this compromise agreement and he is found to be "innocent"; although he does not get to keep the whole buffalo, the ruling is understood to have been in OI's favor. However, Lam doesn't agree to this decision. He decides that he will appeal the decision to the commune council. OI, Hloit and Lam then go to the commune council, along with the village chiefs and the village elders from both villages, but without the *kanongs*. The commune council upholds the elders' decision.

Lam again does not agree to the ruling. "OI stole the buffalo" he insists, and he goes to the district governor, who is a close relative of his, and asks that the district hear the case. The district governor assigns the *athikal srok* to hear the case, and Lam discusses the case with the *athikal srok*. The *athikal srok* says that the decision was 'wrong', because "the accused took a buffalo without the owner seeing it." He then sends a letter to OI calling for him to come to the district. He goes, along with Lam, and they speak with the *athikal srok*, who determines that OI is in the wrong and must return the buffalo to Lam. If he doesn't, he will be sent to jail in Ban

Lung. He is also required to pay a fine of a small pig and a buffalo to Lam, to provide Lam with a jar, and to pay the *athikal srok* 100,000 for hearing the case.

OI provides the 'stolen' buffalo to Hloit, gives a small pig, a jar, and 800,000 (the equivalent of the price of a buffalo) to Lam, and 100,000 to the *athikal srok*. Rather than delivering the obligatory jar to Lam in person, OI sends his nephew as a surrogate to drink wine with Lam. It is rumored by many in Mang village and elsewhere that Lam has manipulated the case at the level of the district, both through the intervention of his close relative the district governor, and also by paying a bribe of 130,000 to the *athikal srok* prior to the *athikal srok* hearing the case. Villagers also say that the reason OI did so poorly at the district is because he is "not good at talking" in public. His *kanong* was given a lot of credit for being "good at talking" and therefore for having arranged the original decision to go in OI's favor.

### Case study 2: Case of accidental death from traditional wildlife trap

In 1994, Pa Dal Villagers made a "Chomrong" (traditional trap which shoots sharp arrows) to catch gaur (Kating) which was eating rice in the upland field. Two farmers saw that the gaur were destroying their upland rice crop. One of the farmers (Tiew) convinced the other (Thoeurn) to help him make the trap. Before they set it up they informed the villagers not to walk through the field, in case they set off the trap. He also made a sign along the path to warn people from neighbouring Pok Nyay Village, not to go into this field (if they are in the area for hunting).

One day a gaur ("*myam*" in Jarai) was caught in the trap. The two farmers called the villagers from Pa Dal to join them for eating the gaur and drinking at in the farmer's field. One villager from Pok Nyay (Ven) also joined the feast as he had a field nearby. While they were all together, Tiew told Ven to be careful. They agreed together that Ven would not walk through this field. If he did and was wounded or killed by the chomrong, then he would be fully responsible on his own. Tiew gave a section of gaur meat to Ven to seal the agreement and asked him to inform all the villagers at Pok Nyay, also.

Not long afterward Ven was hunting wild pig. He followed the pig to nearby the field with the trap. When it cut across the field, he forgot about the trap. He followed the pig through the field and set off the trap. He was shot through the middle (lower chest) by the spear from the chomrong trap. He was still conscious and made three shots into the air as a distress signal to the owner of the field. Tiew found him, barely conscious and took him to the field house. He cut off both ends of the arrow and took Ven to his parents at Pok Nyay Village so they could see him and know the actual situation. In the evening they agreed to remove the arrow. They agreed that if he died, they would share the cost of the funeral and would invite elders from Pa Dal to join. When they removed the arrow, Ven died, because the arrow was through his heart. After the funeral was over, the parents of the dead man demanded compensation for Tiew's life. They demanded two elephants, seven cows, two pigs, clothes, one set of gongs, and two brass cauldrens. But Tiew did not agree to this because he had already made an agreement with Ven that he would not take responsibility for any accident; and gave him a section of meat to bind the agreement. So the farmer took the elders, and village leader to Pok Nyay to discuss the matter with the dead man's parents. The elders were witness to the agreement made between the farmer and Ven. The village leaders (from both villages) were not able to make an adjudication because they saw that Tiew had made an agreement with Ven in advance already, that he would not take responsibility.

Because the village heads could not adjudicate, the Village Heads and Commune head sent the case to the District Head. The District Head adjudicated according to the traditional law, because he was acting on the report (advice) from the Commune and Village Heads. He ruled that there was no need for Tiew to compensate as he had made an agreement with the dead



man already. However he ruled that Tiew and Thoeurn should make compensatory gifts of one loincloth, one shirt, one mat and one blanket, one pig (five hands) and one jar of rice wine for the two men to eat and drink together with the parents to reconcile and restore solidarity together. Head of the District instructed them to have solidarity and not hold a grudge or dig up the case again. So, until now, the two parties treat each other like relatives and the case has not been re-opened.

### Case study 3: Cooperation between the traditional authorities and the district

The Brao traditional legal system is today, while maintaining many autochthonous characteristics, closely intertwined with local government. In Ta Veang District, Ratanakiri Province, most conflicts are resolved at the village level, but if both parties are dissatisfied with village-level decisions regarding a particular case (*khadi* in Brao), it is possible for either side to appeal the case (*dawk geu* in Brao) and send it up to the commune for resolution, and if the conflict cannot be resolved there, the case is sent to the district. When a case cannot be resolved at the district, it is finally sent to the formal Cambodian legal system at the provincial level.

This case study also illustrates how government officials frequently adopt elements of traditional law in their own legal proceedings, and shows the level of close cooperation between village-level legal decision-makers and government officials.

About ten years ago there was a case in a village in Ta Veang district in which a valuable jar for drinking rice beer was mysteriously broken. The jar, called “*wun ja baw*” in Brao was valued at about ½ buffalo. The owner of the jar accused his uncle of having broken it, since his uncle had been at the field house where the jar was located on the day that the jar was found broken. His uncle, however, denied being at all responsible for the broken jar. An elder was asked to act as the *Ya Weu*<sup>50</sup>, or traditional judge, for the case. The *Ya Weu* listened to both sides of the story and determined that the accused could not be held responsible for the broken jar, because there were no witnesses linking the accused to the broken jar, and there was no other evidence capable of doing so either. Due to the lack of evidence, the *Ya Weu* decided that both sides should resolve the conflict by sacrificing a chicken and providing a jar of rice beer each. However, both the accuser and the accused were dissatisfied that a definite ruling on the case could not be made due to a lack of evidence. Therefore, they chose to disregard the decision of the local *Ya Weu* and take the case to the district chief of Ta Veang to rule on.

After explaining the details of the case to the district chief of Ta Veang, he asked why a case like this was being brought before the district when it seemed to him that it would have been more appropriate to resolve it at the local level. The plaintiff and the accused both claimed that the local *Ya Weu* had not dared to come to a decision regarding the case, and that therefore the case had to be taken up with the district. In fact, they were lying, because the local *Ya Weu* had come to a decision to the case, but the lack of evidence had prevented any fines from being collected. The district chief, a Brao himself, was well aware of traditional Brao law, and had also worked closely with the local *Ya Weu* earlier. He therefore immediately suspected that the uncle and nephew were not telling the truth about the *Ya Weu* not daring to come to a decision about the case. He also recognised that a decision could not be made without some evidence, which was clearly lacking. He wanted to teach the two a lesson, so he told them that he could come to a decision about this case, and he asked both parties to first prepare a large jar (*khouap*) of rice beer each to drink and for each to sacrifice a large pig (4 *taping*) to eat. He

<sup>50</sup> Note that the Kreung call these traditional conflict resolution facilitators, *Kanong*, but the Brao in Ta Veang and the Kavet in Veun Say call them *Ya Weu*.

said that after eating and drinking he would be able to come to a decision. So, the two provided the jars and the pigs and after drinking and eating everything together with the district chief, he declared that he was ready to decide on the case. First, to the satisfaction of the jar owner, he ordered the uncle to pay his nephew 100,000 riel as compensation for the broken jar. However, after the money was paid, he ordered the nephew to pay the uncle 100,000 riel for being wrongfully accused of breaking the jar. The result was the same as the original *Ya Weu's* decision, instead that both parties had to provide a pig to eat instead of a chicken. Once the decision was made, the district chief told the nephew and his uncle that he had gone through this process to teach them a lesson, which is that they should not bring cases to higher levels of government when the local level is fully capable of resolving cases on their own, and that anyway, both the local level and the district follow the same principles of justice, so nobody should expect that there will be any differences in decisions made at the district as compared to the villages.

### Case study 4 - Resolving three accidental deaths between villages - Ten village in 1995

In 1995 one man from Kajork village and three others in Ten Village were killed and two people were wounded when they tampered with an unexploded bomb. They wanted to use the bomb for fishing.

The participants that came to resolve the problem was the commune chief, commune councils, village chief, village elders, parents and relatives of the both sides. Both sides negotiated about the fine. The relatives of the man from Kajork village who found the bomb had to compensate the relatives of the people killed. The relatives from Kajork village had to compensate 600000 riels \$US150, three pigs, and three buffaloes. Each of the families whose relatives were killed received 200000 riels, a pig and a buffalo. If the man who caused the deaths was still alive he would have to pay more than this, but as he was dead they lowered the price. After the each side received the compensation they still are reconciled and no one has spite for each other.

### Case study 5 – The theft of 10 buffaloes and trial by ordeal: 2003

Kalanh Balon (Muay V) accused Ksol Sin (In Village) of stealing the buffalo (one by one) and selling to Vietnam; this was an inter-village conflict with Muay Village. All village members in both villages joined the resolution (for two days at Muay Village). Participants included the Commune Police, Commune Heads, Commune Clerk, and Village Heads (both villages are in Talao Commune). Muay villagers supported Balon in the accusation and In villagers supported Sin. Because there was no resolution, it was decided to take to a swearing ceremony. Police joined to prevent violence from the angry protagonists. Elders from both sides were the facilitators and led the swearing ceremony: one pig and one jar of rice wine to inform the arak in the water and land to defend the innocent party and punish the guilty party. Sol Sin was able to breather under the water. Kalan Balon saw crocodiles in the water and couldn't breathe, therefore he had to come up quickly and lost the test. Therefore concluded that Balon had unjustly accused Sin. He had to pay Sin 20 head of buffalo (two for each which he was demanding from Sin). So he had to pay 20 sets of gongs (because not enough buffalo) – the gongs were gathered from different relatives (own village and relatives in other villages, too). He had to pay for one pig (two hands) and one jar of rice wine in order to facilitate the reconciliation by the elders. Both sides contract to not raise the issue again or will have to repay double (40 head of buffalo)

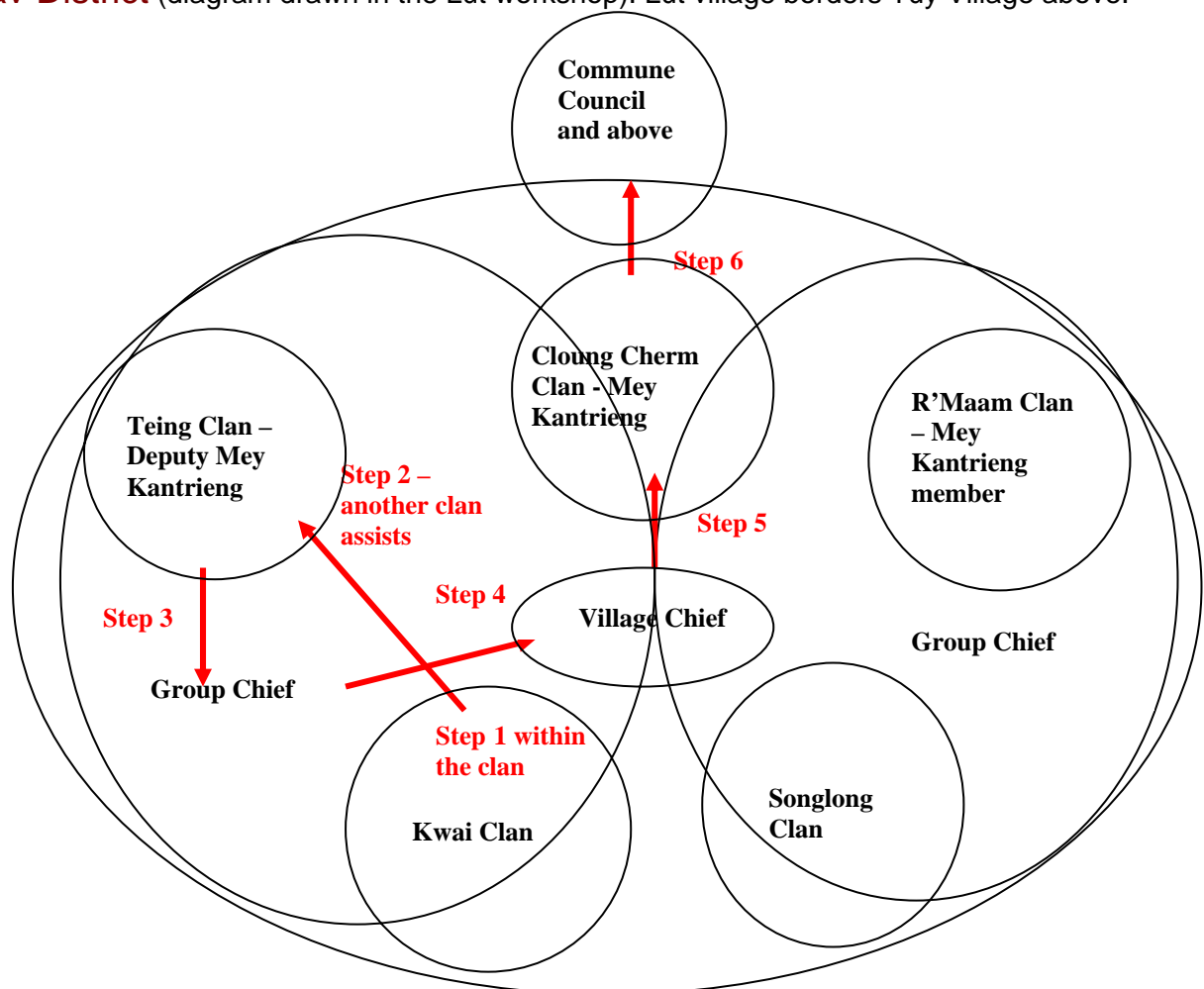
### Case study 6 – The break-up of Tuy Village, Bor Keav District.

The break up of the village was caused by a conflict between Deh and Cherip. Deh is a village leader and has been involved in land selling, land brokering and logging. People in the village are afraid of Deh because they believe he has the power to put a curse that can cause sickness and death. Cherip is a returnee from the former Khmer Rouge base, Anlong Veng. Tuy villagers saw Cherip was capable in resolving problems and capable in Khmer as he had a 6<sup>th</sup> grade education. He became influential in resolving disputes etc. Deh was jealous of Cherip's influence and insulted him constantly especially when he was drunk.

Deh went to Cherip's house with a crossbow and a poisoned tipped arrow. Someone was able to stop Deh and get the crossbow off him. Cherip complained to the Village Chief, who was afraid to get involved, then to the Commune Chief who couldn't resolve it, then to the Bor Kaev police and finally to the District. The District fined Deh \$200, but Deh asked for a reduction as he was poor and the fine was reduced to \$100. Deh borrowed \$100 to pay the fine to Cherip and Cherip gave the Bor Kaev police \$25. When the fine was paid Cherip and Deh signed a contract saying that whoever created problems in the future would be taken to the District again.

After one month Deh started insulting Cherip again saying he was a forest person from the Khmer Rouge and he took his \$100. Cherip then called all villagers and asked four Commune Councillors to also attend. Deh didn't answer questions and acted as if he didn't hear. Cherip and his relatives and others then decided they would have to leave and start a new village before something happened.

**Case study 7 – Lut Village – Steps in conflict resolution processes, Bor Keav District** (diagram drawn in the Lut workshop). Lut village borders Tuy Village above.





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