Case Study

The Irony of Social Legislation: Reflections on Formal and Informal Justice Interfaces and Indigenous Peoples in the Philippines

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Acronyms

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

Introduction: The Heuristic

"[A]ll destructive discourses…must inhabit the structures they demolish"
Jacques Derrida[1]

Cayat, an *Ibaloi*[2], was fortunate to have been found languishing in the jail by a young enterprising lawyer. He was convicted of violating Philippine Act No. 1639. That law made it unlawful for any native of the Philippines who was a member of a "non-Christian tribe" to possess or drink intoxicating liquor, other than native liquor. Cayat was inebriated and possessed A-1 gin which was liquor produced in the Philippines but not native to the Ibaloi.

His lawyer challenged the discriminatory act legally by promptly filing an original petition for *habeas corpus* with the Philippine Supreme Court. The legal argument was simple. Act No. 1639 violated the equal protection clause of the Philippine constitution.[3] Therefore, it was null and void *ab initio*. Thus, the continued detention of Cayat, albeit under warrant of a final judgment, was really without any legal justification.

In *People v Cayat*[4] the Supreme Court, recalling established doctrine in the Philippines and in the United States concluded:

> "It is an established principle of constitutional law that the guaranty of the equal protection of the laws is not violated by a legislation based on reasonable classification. And the classification, to be reasonable, (1) must rest on substantial distinctions; (2) must be germane to the purposes of the law; (3) must not be limited to existing conditions only; and (4) must apply equally to all members of the same class."
>
> "Act No. 1639 satisfies these requirements. The classification rests on real or substantial, not merely imaginary or whimsical, distinctions. *It is not based upon "accident of birth or parentage,"* as counsel for the appellant asserts, but upon the degree of civilization and culture. 'The term non-Christian tribes refers, not to religious belief, but in a way, to the geographical area, and, more directly, *to natives of the Philippine Islands of a low grade of civilization,* usually living in tribal relationship apart from settled communities." [5]

[1] Derrida, Writing and Difference (1978), cited in Adler, Amy, "What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression," 84 Cal. L. Rev. 1499, 1517 (December 1996).
[2] The *Ibaloi* is an ethnoliguistic grouping composed of different communities organized by clans found in the lower portion of the Cordillera mountain range of Luzon, Philippines. The area is now covered by portions of the province of Benguet and the Mountain Province. It was customary at that time for the *Ibaloi* to have only one name.
[3] "No person shall be deprived of life, liberty or property without due process of law; *nor shall any person be denied equal protection of the law.*"
[4] 68 Phil 12, 18 (1939). Unless specified citations of cases refer to reports of Philippine Supreme Court cases.
[5] 68 Phil 12, 18 (1939) citing Rubi v. Provincial Board of Mindoro, per Malcolm J.

People v Cayat was decided under the shadow of an earlier case: *Rubi v Provincial Board*[6], penned by no less than Justice Malcolm. Claiming protection from the due process clause, Rubi, a *Mangyan* from Mindoro, filed an original petition for habeas corpus against the provincial government to prevent them from proceeding to forcibly place their communities in civil reservations. The Provincial Government relied on legislation that allowed them to do this for "non-christian tribes". A number of *Mangyans* have been converted to Christianity at the time of the decision.

After reviewing their colonial history in the Philippines and the efforts of colonial administrators, the Supreme Court declared:

> "In resume, therefore, the Legislature and the Judiciary, inferentially, and different executive officials, specifically, join in the proposition that the term "non-Christian" refers, not to religious belief, but, in a way, to geographical area, and, more directly, *to natives of the Philippine Islands of a low grade of civilization*, usually living in tribal relationship apart from settled communities."[7] (emphasis provided)

Justifying the denial of habeas corpus petition, the eminent jurist emphasized:

> "In so far as the Manguianes themselves are concerned, the purpose of the Government is evident. Here, we have on the Island of Mindoro, the Manguianes, leading a nomadic life, making depredations on their more fortunate neighbors, uneducated in the ways of civilization, and doing nothing for the advancement of the Philippine Islands. What the Government wished to do by bringing them into a reservation was to gather together the children for educational purposes, and to improve the health and morals — was in fine, to begin the process of civilization. This method was termed in Spanish times, "bringing under the bells." The same idea adapted to the existing situation, has been followed with reference to the Manguianes and other peoples of the same class, because it required, if they are to be improved, that they be gathered together. On these few reservations there live under restraint in some cases, and in other instances voluntarily, a few thousands of the uncivilized people. *Segregation really constitutes protection for the Manguianes*."
>
> "Theoretically, one may assert that all men are created free and equal. Practically, we know that the axiom is not precisely accurate. The Manguianes, for instance, are not free, as civilized men are free, and they are not the equals of their more fortunate brothers. True, indeed, they are

[6] 39 Phil. 660, G.R. No. 14078 (1919).
[7] Rubi v. Provincial Board, 39 Phil. 660.

> citizens, with many but not all the rights which citizenship implies. And true, indeed, they are Filipinos. *But just as surely, the Manguianes are citizens of a low degree of intelligence, and Filipinos who are a drag upon the progress of the State*." (emphasis ours)

The resulting discrimination was obvious. Even those who are uninitiated in the process of formal legal reasoning can easily unmask the decision.[8] Yet the legal foundation for the State's paternalistic attitude to indigenous groups persisted affecting the allocation of rights of individuals belonging to these communities.

The irony however is that a the very advanced principle on non-discrimination enshrined in no less than the Philippine Constitution was construed to limit the freedoms of significant populations of indigenous groups.

Legal advocates in the Philippines realized quite early that the more general the textual bases of rights, the less chances there are for an interpretation in favor of "minority" or "marginalized cultures".[9] Judicial tendency might be to treat the usual state of affairs as the norm.[10] Or, quite simply resources of those who are privileged by the dominant interpretation of a legal system simply dwarf the ability of those in the margins. Cayat was lucky that a young enterprising lawyer took his case. But, the formal adjudicatory system was simply not ready to expand its existing notions of non-discrimination.

But there have also been cases where the formal adjudicatory processes delivered results that recognized customary informal processes. We examine as additional heuristics for this paper the case of *Pit-og v People*[11] and *Carino v Insular Government*[12].

Erkey Pit-og along with three other *Kankanai*[13] gathered sugarcane and banana trunks in an area which were considered to be part of their *tayan.* The *tayan*, among the *Kankanai*, is an area owned by a collective grouping in their community and is used principally as a watershed. The *tayan* in this case was under the management of specific individuals. It was shown that Erkey Pit-og was a member of that group.

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[8] See for instance the interview statement of noted Philippine Historian Dr. William Henry Scott, Sagada, 29 May 1986 where he says: "I have always rejected the term `cultural minorities' because it seems to divide the Filipino people into two groups--the majority and the minority...I consider it harmful for two different reasons....In the first place, human nature being what it is, it invites exploitation of the one group by the other and is therefore inhumane, un-Christian, and bodes ill for the development of a healthy republic in the archipelago. And in the second place, it disguises the real division of the Filipino people into two groups--the rich and the poor, the overfed and the undernourished, those who make decisions and those who carry them out..."

[9] The same point was made of gender projects by Brown, Wendy, "Suffering the Paradox of Rights," in Brown and Halley, eds., LEFT LEGALISM, LEFT CRITIQUE 422 (2002) citing Catherine MacKinnon, FEMINISM UNMODIFIED 73 (1987). On race Brown suggests Cheryl Harris, "Whiteness as Property," and Neil Gotanda, "A critique of 'Our Constitution is Color Blind,' in Kimberle Crenshaw, Neil Gotanda, et al., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (1995).

[10] Minow, Martha, "Justice Engendered," 101 Harv. L. Rev. 10, 32 (1987). Minow claims that there are five judicial tendencies that contribute to this result: first, that differences are treated as intrinsic rather than constructed; second, that the unstated point of reference—i.e. the usual—is treated as the norm; third, that the judge's perspective, though colored by cultural stereotypes, is treated as objectives; fourth, that the perspectives of those being judged are treated as irrelevant; and fifth, that there is an assumption that the current social and economic situation is neutral and natural.

[11] G.R. No. 76539, October 11, 1990.

[12] 41 Phil. 935 (1909)

[13] Indigneous community that inhabits part of the Mountain Province in the Cordillera Region, Philippines.

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

> "We see this case as exemplifying a clash between a claim of ownership founded on customs and tradition and another such claim supported by written evidence but nonetheless based on the same customs and tradition. When a court is beset with this kind of case, it can never be too careful. More so in this case, where the accused, an illiterate tribeswoman who cannot be expected to resort to written evidence of ownership, stands to lose her liberty on account of an oversight in the court's appreciation of the evidence.
>
> We find, that Erkey Pit-og took the sugarcane and bananas believing them to be her own. That being the case, she could not have had a criminal intent. It is therefore not surprising why her counsel believes that this case is civil and not criminal in nature. There are indeed legal issues that must be ironed out with regard to claims of ownership over the tayan. But those are matters which should be threshed out in an appropriate civil action."[14]

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

Carino v Insular Government[15] also provides another set of problems in the use of formal justice systems.

The operative facts from which the legal issues arose were found by the court to be as follows:

> "...The applicant and plaintiff in error (Mateo Cariño) is an Igorot of the Province of Benguet, where the land lies. For more than fifty years before the Treaty of Paris, April 11, 1899, as far back as the findings go, the plaintiff and his ancestors had held the land as owners. His grandfather had lived upon it, and had maintained fences sufficient for the holding of cattle, according to the custom of the country, some of the fences, it seems, having been of much earlier date. His father had cultivated parts and had used parts for pasturing cattle, and he had used it for pasture in turn. They all had been recognized

[14] supra
[15] 41 Phil. 935, 212 U.S. 449 (1909).

> as owners by the Igorots, and he had inherited or received the land from his father, in accordance with Igorot custom. No document of title, however, had issued from the Spanish crown...In 1901 the plaintiff filed a petition, alleging ownership..."[16]

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

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

The court focused only on the issue: "whether plaintiff (Cariño) owned the land." It did not focus on the kind of property tenure Mateo had with respect to the kind of land involved. The law, which the judge was implementing, was simply not equipped to assist him discover this important point.

It is conceded that Cariño carved out a doctrine which is advantageous in so far as it assists in the creation of an exception to the Regalian Doctrine and perhaps recognizes certain legal rights to these peoples. Lynch observes that:

> ...Cariño remains a landmark decision. It establishes an important precedent in Philippine jurisprudence: Igorots, and by logical extension other tribal Filipinos with comparable customs and long associations, have constitutionally protected native titles to their ancestral lands.[17]

[16] Id, at 936-937, underscoring supplied

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

The Problem

The agenda of this paper is to examine the notions of interface between formal and informal justice systems in the Philippines. It examines the necessary trade-offs in working these two systems and with the interfaces that have been mandated by several statutes. It ends with tentative proposals for future directions not only for considering interfaces between these two systems but also future projects that would enrich this interface.

For obvious purposes, the goal of this analysis is to enrich the opportunities of marginalized populations in the Philippines to invoke the coercive powers of the official national legal system in their favor. In order to focus the inquiry, this paper concentrates on the problems of indigenous peoples.[18]

[18] See annex "A", on Philippine Indigenous Peoples. The annex provides a background on this subject.

Framework and Operational Definitions

Exogenous and endogenous systems

The framework of the study will start from a clarification of the distinction between "formal" and "informal" justice systems.

In existing literature, one approach is to characterize the justice system by its origin. The *exogenous* or externally imposed legal system (formal) is contrasted to the *endogenous* or internally generated legal process (informal). This sometimes fits with what others would identify as "western" or "anglo-american" on the one hand and "indigenous" on the other. Endogenous, for purposes of the case study, need not however only refer to indigenous modes of dispute resolution given the current Philippine legal system's inherent biases in dealing with the term "indigenous".

Opportunities for disadvantaged groups are implied in dichotomizing between exogenous and endogenous justice systems. These are principally based on an assumption that most of the stakeholders within a society are in a better position to understand and hence to work with their endogenous/ indigenous system. The sense of ownership of the system also may provide some confidence in its processes and results. Philippine reality however may be far more complex.

In many societies in the Philippines even indigenous communities, the content and methods of dispute resolution sometimes draw from or are influenced by experiences in other countries. Nor is it necessary that the exogenously imposed or diffused systems do not provide better access to the disadvantaged.

Adjudication and other modes of dispute resolution

The second approach through which "formal" and "informal" systems have been understood and deployed in literature on interfaces of current justice systems would be in distinguishing the adjudicatory and the "alternative" modes of dispute resolution. Formal usually would refer to the system of arriving at the truth with an assumed impartial arbiter that could arrive at a value free narrative of what happened based upon rigid rules of evidence. Parties to conflicts will usually be represented by counsels with each also being assumed to be presenting their stories in a highly partisan way. Formal adjudicatory systems also have elaborate systems of appeal that require highly technical skills. They are thus more accessible to those that can acquire and identify proper legal resources to work the system.

On the other hand, the "alternative" modes of dispute resolution more often entail processes which are more flexible and therefore amenable to objectives and designs of the parties. They can either be incorporated formally in contracts or resorted to when a conflict in the understanding, interpretation or application of what was agreed upon occurs. The technical complications, in respect of the law, usually arise when it is related to the formal adjudicatory system. Hence, the recognition and enforcement of

mediated settlements (whether under the ADR law or the Katarungang Pambarangay) or especially of arbitral awards (local and foreign) provides rich sources of legal jurisprudence. In some cases reference can be made to private or public institutions that have set rules for the necessary requirements for the various modes of dispute settlement (eg designation of place, language, identification of the third party mediator or arbitrator, challenges to qualifications et al).

Compulsory and voluntary

Finally, distinction is usually also attributed to the "compulsory" nature of formal justice systems as opposed to the more "voluntary" nature of informal justice systems. This distinction however may not hold given that some alternative dispute processing methods in the Philippines (i.e. katarungang pambarangay, alternative processes when contained as a contractual provision) are mandatory. Likewise, the adjudicatory system is triggered by some formal process, i.e. the filing of a complaint for civil procedure or the filing of an information in criminal processes, et al. Thus, to a certain extent, the invocation of these processes depend on the will of the parties that are involved.

Hence, the study will not assume that all formal justice systems are compulsory nor that all informal systems are voluntary or optional. Any assumption of this nature misunderstands these two processes entirely.

Parameters of study – operational definitions

"Formal" for the purpose of this study will therefore refer more to the adjudicative and exogenous processes. "Informal" would refer to the more endogenous/indigenous systems.

Formal justice systems typically involve adjudicatory processes. Judges decide on cases based on their best interpretation of the issues as presented by the parties, the facts proven by evidence and the interpretation of the provisions of law that may be applicable. Parties are represented by counsels whose minimum investment in the problem being resolved would be their agency vis-à-vis one party to the case.

Decisions of courts become part of the law of the land. More specifically, they form part of the resources of lawyers to interpret existing law in an official and authoritative way.

In general, informal justice systems would be those processes of resolving disputes outside the formal system. They may be ad hoc, such as in the ordinary bargaining that takes place between the parties. They may also be part of a systematic process accepted within a social structure, i.e. customary law.

Justifications: Resort to informal systems

There are several approaches to justify resort to the informal justice system. In theory, those who have more resources have an advantage in the formal adjudicatory system.[19] Therefore, as a corollary, those who have less resources would far have advantages in the informal justice processes. Another approach is taken by neoclassical law and economics. Coase posits the theory that when transaction costs are low, it is more efficient for society to allow parties to negotiate privately.[20] Intuitively this means that parties would be better off without the intervention of the state. Discussions as to the relative merits of these proposals would be beyond the scope of this paper although it might suffice to say that many of their conclusions are still contested. We shall attempt to be more descriptive, rather than normative, in this paper.

[19] Galanter
[20] Coase, Ronald, "A Theory of Social Cost,"

Traditional Interpenetration of Formal and Informal Justice Systems

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

Thus, litigants in court normally communicate with each other through their lawyer or through other informal channels to arrive at a negotiated settlement. These communication channels go beyond opportunities for negotiation provided by the Rules of Court.[21]

Recently, Congress passed Republic Act No. 9285 or the Alternative Dispute Resolution Act of 2004. This law declared that party autonomy would be the guiding principle in determining the resolution of disputes. Thus –

> "It is hereby declared the policy of the State to actively promote party autonomy in the resolution of disputes or the freedom of the parties to make their own arrangements to resolve their disputes. Towards this end, the State shall encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice and declog court dockets. As such, the State shall provide means for the use of ADR as an efficient tool and an alternative procedure for the resolution of appropriate cases. Likewise, the State shall enlist active private sector participation in the settlement of disputes through ADR. This Act shall be without prejudice to the adoption by the Supreme Court of any ADR system, such as mediation, conciliation, arbitration, or any combination thereof as a means of achieving speedy and efficient means of resolving cases pending before all courts in the Philippines which shall be governed by such rules as the Supreme Court may approve from the time to time." [22]

The law thus recognized "alternative dispute resolution" methods as part of the officially recognized systems. Thus, in section 3 (a) it defines these methods as:

> "Alternative Dispute Resolution System' means any process or procedure used to resolve a dispute or controversy, other than by adjudication of a presiding judge of a court or an officer of a government agency, as defined in this Act, in which a neutral third party participates to assist in the resolution of issues, which includes arbitration,

[21] Rule 18, Revised Rules of Civil Procedure allows amicable settlement and alterative dispute resolution as part of Pre Trial.
[22] Rep. Act No. 9285, section 2:

> mediation, conciliation, early neutral evaluation, mini-trial, or any combination thereof."[23]

However, not all disputes are covered by party autonomy. Thus, the law expresses its preference for adjudication for topics that it considers of the public interest. Hence:

> *Exception to the Application of this Act*. — The provisions of this Act shall not apply to resolution or settlement of the following: (a) labor disputes covered by Presidential Decree No. 442, otherwise known as the Labor Code of the Philippines, as amended and its Implementing Rules and Regulations; (b) the civil status of persons; (c) the validity of a marriage; (d) any ground for legal separation; (e) the jurisdiction of courts; (f) future legitimacy; (g) criminal liability; and (h) those which by law cannot be compromised.[24]

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

[23] Rep. Act No. 9285, section 3 (a).
[24] Rep. Act No. 9285, section 6.

The Indigenous Peoples Rights Act (IPRA)

On October 29, 1997, in the context of a new constitution[25] and after more than ten years of legislative advocacy by indigenous and non-governmental organizations, the President of the Republic of the Philippines finally signed Republic Act No. 8371 otherwise known as the Indigenous Peoples Rights Act of 1997 (IPRA) into law. It became effective on November 22, 1997 upon completion of the required publication[26].

Formally, the law is the legislature's interpretation of some key provisions of the Constitution directly relating to indigenous peoples.

Section 22, Article II mandates that the state "recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development." Section 5, Article XII more particularly commands that the state to "protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural well-being." This is of course subject to the provisions of the Constitution, and unlike any other provision of the same document, "national policies and programs." It also authorizes Congress to provide for "the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain."

The Indigenous Peoples Rights Act of 1997 implements these provisions by:

(a) Enumerating the civil and political rights of all members of indigenous cultural communities or indigenous peoples;
(b) Enumerating the social and cultural rights of all members of indigenous cultural communities or indigenous peoples;
(c) Recognizing a general concept of indigenous property right and granting title thereto; and
(d) Creating a National Commission on Indigenous Peoples (NCIP) to act as a a mechanism to coordinate implementation of this law as well as a final authority that has jurisdiction to issue Certificates of Ancestral Domain/Land Titles.

Civil and political rights

Foremost in the law is its recognition of the right to non-discrimination of Indigenous Peoples. In an unfortunately verbose[27] section of the law it states:

> "Equal Protection and Non-discrimination of ICCs/IPs. – Consistent with the equal protection clause of the Constitution of the Republic of the Philippines, the Charter of the United Nations, the Universal Declaration of Human

[25] After the overthrow of the Marcos Dictatorship, government immediately moved to promulgate a constitution in 1987. The provisions of this constitution were inspired by the euphoria of what was then to be called "people power".
[26] Section 84, Republic Act No. 8371 (1997).
[27] That the section is subject to the Constitution of the Republic of the Philippines is obvious given the heirarchy of our rules and that this law is being promulgated by the same state. International law already forms part of the law of the land so that it would have been best not to reiterate these international instruments some of which already provide *jus cogens* rules. Finally, that "force or coercion shall be dealt with by law" is obviously redundant and considered as a techinical oversight.

> Rights including the Convention on the Elimination of Discrimination Against Woman and International Human Rights Law, the State shall, with due recognition of their distinct characteristics and identity, accord to the members of the ICCs/IPs the rights, protections and privileges enjoyed by the rest of the citizenry. *It shall extend to them the same employment rights, opportunities, basic services, educational and other rights and privileges available to every member of the society*. Accordingly, the State shall likewise ensure that the employment of any form of force or coercion against ICCs/IPs shall be dealt with by law."[28]

Clearly, ethnicity is now an unacceptable basis for classification unless it is in "due recognition of the characteristics and identity" of a member or a class of indigenous peoples. Classification now should be allowed only to provide affirmative action in their favor.

> Cases such as People v. Cayat[29] where the Philippine Supreme Court leaned over backwards and placed judicial imprimatur on government action discriminating against a "cultural minority" are now things of the past. Such notions now, under the Indigenous Peoples Rights Act is not only archaic but also outlawed. Indigenous Peoples are entitled to the same rights and privileges as citizens[30], should not be discriminated against in any form of employment[31] and should receive more appropriate forms of basic services[32].

The IPRA therefore performs, to this extent, the traditional role of social legislation. It corrects an otherwise abominable judicial interpretation.

The new law even goes further to ensure the rights of women[33], children[34] and civilians caught in situations of armed conflict[35].

The law also recognizes the right of indigenous peoples to "self governance" to wit:

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[28] Section 21, Rep. Act No. 8371 (1997).
[29] 68 Phil. 12 (1939).
[30] Section 21, Rep. Act No. 8371 (1997).
[31] Section 23 and 24, Rep. Act No. 8371. The later provision makes it a crime to discriminate against indigenous peoples in the workplace. Section 71 provides the penalties.
[32] Section 25, Rep. Act No. 8371 (1997).
[33] Section 21, Rep. Act No. 8371 (1997) 2nd paragraph ensures that there be no diminution of rights for women under existing laws of general application. Section 26, Rep. Act No. 8371 (1997) mandates among others "equal rights and opportunities with men, as regards the social, economic, political and cultural spheres of life." It also states that "as far as possible, the state shall ensure that indigenous women have access to all services in their own languages."
[34] Section 27, Rep. Act No. 8371 (1997). Although it can be argued that this is a hortatory provision because it requires that the "state shall support all government programs intended for the development and rearing of the children and the youth." The state without a law will certainly support government programs.
[35] Section 22, Republic Act No. 8371 (1997). Although the enumeration of international standards adopt by incorporation the Fourth Geneva Convention of 1949 and no mention is made of the Geneva Protocols. Also, the former international instrument is applicable in times of war among belligerent states and not "armed conflict."

> "Self governance. – The State recognizes the inherent right of ICCs/IPs to self governance and self determination and respects the integrity of their values, practices and institutions. Consequently, the State shall guarantee the right of ICCs/IPs to their economic, social and cultural development."[36]

Taken in relation to provisions that recognize the limited use of customary law[37], it constitutes a significant departure from the unbridled use of national laws which are colonially inspired or are of western or hispanic origins.

This is not the first time that the use of custom is recognized in some way by law. Under the Civil Code, customary laws were only accepted as fact[38]. The Local Government Code also requires the use of indigenous processes in order to facilitate an amicable settlement as a condition precedent for filing actions in court[39]. Under the old system however, tribal courts were distinctly not recognized[40].

The new law defines more precisely the concept of customary law. Customary law will be used not only to arrive at an amicable settlement but also to process it in an acceptable manner[41]. Thus in Section 65,

> "When disputes involved ICCs/IPs, customary law will be used to resolve the dispute."

This provision provides not only for the law to be used to adjudicate the dispute but also gives the choice of dispute settlement process to the community.

In accordance with the provisions of the Constitution[42], customary law will also be the set of norms that would be used in case of conflict about the boundaries and the tenurial rights with respect to ancestral domains[43]. Doubt as to its application or interpretation will be resolved in favor of the ICCs/IPs.

Finally, the offended party for offenses described under the law may opt to use the customary processes rather have the offender prosecuted in courts of law[44]. The penalty can be more than what the law provides for so long as it does not amount to cruel, degrading or human punishment. Also, customary norms cannot legitimately impose the death penalty or grant excessive fines.

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[36] Section 13, Rep. Act No. 8371 (1997).
[37] Section 3(f), 15, 29, 63, 65, 72, Rep. Act No. 8371 (1997).
[38] Article 8, New Civil Code. See also People v. Pit-og where the Supreme Court used knowledge of the tayan system to acquit an accused charged with theft.
[39] See Sections 399 to 422, Rep. Act No. 7160 (1991).
[40] Badua v. Cordillera Bodong Association.
[41] Section 13, 29, 65, Republic Act No. 8371.
[42] Section 5, 2nd paragraph, Art. XII, Consti.
[43] Section 63, Republic Act No. 8371.
[44] Section 72, Rep. Act No. 8371.

Some provisions on governance in the new law simply recognizes existing rights and powers. Among these are provisions which define support for autonomous regions[45], their right to "determine and decide priorities for development[46], the creation of tribal barangays[47], the role of peoples organizations[48] and "the means for the development/empowerment of ICCs/Ips"[49]

Social and cultural rights

Section 29 of the new law lays down State policy with respect to indigenous culture. It states:

> "Protection of Indigenous Culture, Traditions and Institutions. – The State shall respect, recognize and protect the right of ICCs/IPs to preserve and protect their culture, traditions and institutions. *It shall consider these rights in the formulation and application of national plans and policies*."[50]

Pursuant to this policy, it requires that the education system should become relevant to the needs of "children and young people" of the ICCs/IPs[51] as well as provide them with "cultural opportunities."[52] Cultural diversity is recognized. Community Intellectual Rights[53] and indigenous knowledge systems[54] may be the subject of special measures. The rights to religious as well as cultural sites and ceremonies are guaranteed. It is now unlawful to excavate archaelogical sites in order to obtain materials of cultural value as well as to deface or destroy artifacts. The right to "repatriation of human remains" is even recognized.[55] Funds for archaeological and historical sites of indigenous peoples earmarked by the national government may now be turned over to the relevant communities.[56]

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[45] Section 14, Rep. Act No. 8371 (1997). This provision simply "encourages" indigenous peoples who are not within the scope of the Cordillera or Muslim Mindanao Autonomous Regions to "use their ways of life." That this be compatible with the "Constitution of the Republic of the Philippines and other internationally recognized human rights" is obviously redundant.

[46] Section 17, Rep. Act No. 8371 (1997). Also redundant as the previous section already mentions mandatory representation in "policy making bodies and other local legislative councils". The right to participate fully is subject to the provision "if they so choose". All grants of legal rights are of course subject to the option of the holder to exercise if it so chooses.

[47] Section 18, Rep. Act No. 8371 (1997). The creation of a tribal barangay is allowed only "in accordance with the local government code." Since the latter law already exists, this provision could have been safely removed. No new right was created.

[48] Section 19, Rep. Act No. 8371 (1997). This simply reiterates rights of indigenous cultural communities and other peoples enunciated in Sec. 15, Art. XIII of the Constitution.

[49] Section 20, Rep. Act No. 8371 (1997). The State is mandated to establish the "means" for "full development" of indigenous peoples. It also requires that resources be provided "where necessary." The words used make this provision very hortatory.

[50] Section 29, Rep. Act No. 8371 (1997).

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

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

[53] Section 32, Rep. Act No. 8371 (1997).

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

[55] Section 33, Rep. Act No. 8371 (1997).

[56] Section 37, Rep. Act No. 8371 (1997).

Recognizing rights and tenure to natural resources

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

The legal concept underlying the government's perspective to full ownership and control of natural resources has been referred to as the Regalian Doctrine[57]. On the other hand, private vested property rights are basically protected by the due process clause[58] of the constitution.

The Regalian doctrine proceeds from the premise that all natural resources within the country's territory belongs to the State in imperium and dominium[59]. This dates back to the arrival of the Spaniards in the Philippines when they declared all lands in the country as belonging to the King of Spain. Since then, government has mistakenly taken this as the foremost principle underlying its laws and programs on natural resources. The present formulation finds its genesis in the 1935 Constitution[60].

There has been very little change in its framework since them. Successive administrations of government asserted and continues to assert, through legislative enactments, executive issuances, judicial decisions as well as practice that rights to natural resources can only be recognized by showing a grant from the State.[61] *Cruz v NCIP*[62], recently provided the Supreme Court with an opportunity to correct this perspective. Unfortunately, a sufficient majority was not attained to create doctrine.[63]

The constitution however also contains some basis for recognizing rights of indigenous peoples over their lands, even without a law, as being private—that is, not public or government owned or controlled.

Carino v. Insular Government [64] extended the protection to private property rights to any person who has occupied it since time immemorial with or without documentary title. It declared that the burden of proof of showing that a parcel of land or territory held since time immemorial falls within the public domain is shouldered not by an undocumented possessor but by the State.

Carino v. Insular Government has not yet been overruled and is considered to be a definitive interpretation of a class of vested private property rights.[65] Parenthetically, this

[57] Section 2, Art. XII, provides "All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated."
[58] Section 1, Art. III, provides "no person shall be deprived of life, liberty or property without due process of law. . ."
[59] See Krivenko v. Director of Lands; Gold Creek Mining v. Rodriguez, 66 Phil. 259 (1938).
[60] See Consti. (1935), Art. XIII, Sec. 1; Consti. (1973, 1976, 1981), Art. XIV, Sec. 8.
[61] See Rep. Act No. 7942 (1995) or the Philippine Mining Act; Rep. Act No. 6940 (1993); Rep. Act No. 7076 (1993) Small Scale Mining Law; Pres. Dec. No. 705 (1974) as amended or the Revised Forestry Code; Director of Lands v. Funtilar, 142 SCRA 57 (1986) among others.
[62] December 2000.
[63] There were seven justices that voted to declare the IPRA as constitutional, six to declare it as unconstitutional, and only one to dismiss the petition on procedural grounds. The Constitution requires a majority of justices voting to create new doctrine.
[64] 41 Phil. 935, 212 U.S. 449 (1909).
[65] The case has been cited in various subsequent cases. However, it has also been misinterpreted as having recognized the Regalian Doctrine, see Mining Association of the Philippines v. Secretary, 240 SCRA 100 (1995).

has not been the first time that the private character of property rights of indigenous peoples had been recognized. Various laws during the Spanish Colonial Period specifically ensured recognition of even undocumented property rights of the 'natives'.[66]

Thus, Carino, which interprets article III section 1 of the Constitution[67], remains a valid source of ownership. Unlike the Indigenous Peoples Rights Act, there is even no need to undergo any process under the National Commission on Indigenous Peoples (NCIP). Like in this case, all that is required is to prove one's basis for ownership in the proper land registration proceedings.

Another source of ownership are those property rights for members of indigenous cultural communities or indigenous peoples that have vested under the provisions of the Public Land Act. This could include rights that have ripened under the provisions on free patents[68], homesteads[69] or completion of imperfect titles[70]. The rights under completion of imperfect titles are especially instructive.

Judicial confirmation of imperfect titles is based upon Section 48 of the Public Land Act which provides to wit:

> "Sec. 48. The following described citizens of the Philippines occupying lands of the public domain or claiming to own any such lands or an interest therein, but whose titles have not been perfected or completed, may apply to the Court of First Instance of the province where the land is located for confirmation of their claims and the issuance of a certificate of title thereafter, under the Land Registration Act, to wit:
>
> x x x
>
> "(b) Those who by themselves or through their predecessors in interest have been, in continuous, exclusive and notorious possession and occupation of agricultural lands of the public domain, under a bona fide claim of acquisition or ownership, for at least thirty years immediately preceding the filing of application for confirmation of title, except when prevented by war or force

[66] Laws of the Indies, Book 6, Title 1, Law 15, decreed by King Philip II, Madrid, November 1574; Book 6, Title 1, Law 32, decreed by King Philip II at El Pardo, 16 April 1580; Royal Cedula Circular of 3 March 1798; Royal Decree of 25 June 1880; See also Royo, Antoinnette G. "Regalian Doctrine: Wither the Vested Rights?", 1 (2) PHIL. NAT. RES. L. J. 1 (1988).

[67] "No person shall be deprived of life, liberty or property without due process of law…" Carino interprets what property means to time immemorial possessors of land.

[68] Section 44, Com Act No. 141 as amended by Republic Act No. 782, Rep. Act No. 3872 (1964), B.P. No. 223 (1982), Rep. Act No. 6940 (1990). Title to the free patent applicant vests only after the free patent application is granted and the corresponding certificate of title unde rhte Property Registration Decree is granted. See Lopez v. Padilla, 45 SCRA 44, Vital v. Amore, 90 Phil. 855. Also, Section 2, Com. Act No. 141 as amended.

[69] Section 12, Com. Act No. 141. Section 21 of the same law specially applies to "national cultural minorities". Rights vests after the application is granted. Balboa v. Farrales, 51 Phil. 498; Quinsay v. IAC, G.R. No. 67935, March 18, 1991. See also Lopez v. Padilla, 45 SCRA 44. Also homestead patents have been held more superior to other agrarian reform instruments, Patricio v. Bayog, 112 SCRA 45 (1989).

[70] Section 48, Com. Act No. 141 as amended by Rep. Act No. 3872 (1964) and Pres. Dec. 1073.

> majeure. Those shall be conclusively presumed to have performed all the conditions essential to a government grant and shall be entitled to a certificate of title under the provisions of this Chapter.
>
> "(c) Members of National Cultural Minorities who by themselves or through their predecessors in interest have been in open, continuous, exclusive and notorious possession and occupation of lands of the public domain suitable to agriculture *whether disposable or not* under a bona fide claim of ownership for at least thirty (30) years shall be entitled to the rights granted in subsection (b) hereof."[71]
>
> Readability, especially for non-lawyers, would improve if, instead of long quotes from Statutes, a summary was used instead.

The distinction included in paragraph (c) starting in 1964 and introduced by Rep. Act No. 3872 was expressly removed thirteen (13) years later by Pres. Dec. No. 1073. The later law became effective 25 January 1977. That law provided:

> "The provisions of Section 48 (b) and Section 48 (c), Chapter VII, of the Public Land Act are hereby amended in the sense that these provisions shall apply *only to alienable and disposable lands of the public domain* which have been in open, continuous, exclusive and notorious possession and occupation by the applicant himself or thorugh his predecessor-in-interest, under a bona fide claim of acquisition of ownership, since June 12, 1945."[72]

Interpreting these changes, the Supreme Court noted:

> "The distinction so established in 1964 by Rep. Act no. 3872 was expressly eliminated or abandoned thirteen (13) years later by Pres. Dec. No. 1073 effective 25 January 1977, only highlights the fact that during those thirteen years, members of national cultural minorities had rights in respect of lands of the public domain, disposable or not. . .It is important to note that private respondents' application for judicial confirmation of imperfect title was filed in 1970 and that the land registration court rendered its decision confirming their long continued possession of the lands here involved in 1974, that is, during the time when Section 48 (c) was in legal effect. Private respondents' imperfect title was, in other words, perfected or vested by completion of the required period of possession prior to the issuance

[71] Sec. 48, Com. Act No. 141 (1939). Emphasis in par. (c) supplied.
[72] Pres. Dec. No. 1073 (1977). Emphasis supplied.

> of Pres. Dec. No. 1073. Private respondents' right in respect of the land they had possessed for thirty (30) years could not be divested by Pres. Dec. No. 1073."[73]

Completion of Imperfect Titles must be filed before 31 December 2000.[74] This however should not be constued so as to defeat private vested property rights. It could not be interpreted to provide a prescriptive period to defeat a substantive right by failing to accomplish a formality. Thus,

> . . ."Nothing can more clearly demonstrate the logical inevitability of considering possession of public land which is of the character and duration prescribed by statute as the equivalent of an express grant from the State than the dictum of the statute itself that the possessor(s) '. . . shall be conclusively presumed to have performed all the conditions essential to a government grant and shall be entitled to a certificate of title. . .' No proof being admissible to overcome a conclusive presumption, confirmation proceedings would, in truth be little more than a formality, at the most limited to ascertaining whether the possession claimed is of the required character and length of time; and registration thereunder would not confer title, but simply recognize a title already vested. The proceedings would not originally convert the land from public to private land, but only confirm such a conversion already affected by operation of law from the moment the required period of possession became complete."[75]

Citing Carino v. Insular Government, the Court emphasized:

> . . ."(T)here are indications that registration was expected from all, but not sufficient to show that, for want of it, ownership actually gained would be lost. The effect of proof, wherever made, was not to confer title, but simply to establish it, as already conferred by decree, if not by earlier law."[76]

The weakness of these two modes of acquiring ownership is that they both entail entry into the tenurial system mandated by the Civil Code. The land registration act simply

[73] Republic v. Court of Appeals and Paran, 201 SCRA 1 (1992?)
[74] The original text of Section 47 of Com. Act No. 141 provided that applications for confirmation had to be filed at the latest on 31 December 1938. This provision has been amended since by Com. Act No. 292 to extend the period to 31 December 1941; Rep. Act No. 107, 31 December 1957; Rep. Act No. 2061, 31 December 1968; Rep. Act No. 6236, 31 December 1976; Pres. Dec. No. 1073, 31 December 1987; Rep. Act No. 6940, 31 December 2000. The later law also provided the same deadline for filing free patent applications.
[75] Director of Lands v. IAC, Acme Plywood and Veneer et al, 146 SCRA 509, 520 (1968) overturning Meralco v. Castro-Bartolome, 114 SCRA799.
[76] Carino v. Insular Government, 41 Phil 935 (1909). See also, Susi v. Razon, 48 Phil. 424; Lacaste v. Director of Lands, 63 Phil. 654, Mesina v. Vda de Sonza, 108 Phil. 251; Marpac v. Cabanatuan, 21 SCRA 743; Miguel v. Court of Appeals, 29 SCRA 760; Herico v. Dar, 95 SCRA 437. In the latter case the Court was most emphatic in saying that: "the application for confirmation is mere formality, the lack of which does not affect the legal sufficiency of the title as would be evidenced by the patent and the Torrens title to be issued upon the strength of said patent."

mandates a proceeding in order to recognize the owner's right to title but the civil code contains the rights of ownership to each of the holders of either ownership under Carino or under the Public Land Act.

The legal policy mandated by these provisions of the constitution implies the following for indigenous peoples:

First, the state views the environment not as part of an integrated ecosystem but as separate and separable resources. Each of these resources are in fact governed by different laws premised on regulating the right to extract.[77] These laws do not even complement each other.[78] This world view is completely different from the perspective of indigenous peoples.[79]

Second, it vests ownership and control of the land found in areas declared as part of the public domain, which includes all the resources in the State to the prejudice of these communities.[80]

Third, it vests ownership and control over all other resources, whether or not found on public or private lands, on the State. Even therefore when indigenous peoples successfully have their lands reclassified as private or even procured documented title, they do not by virtue of that title gain ownership nor full control of waters, [81] timber products, [82] non-timber forest resources, minerals [83] and other resources.

The situation was further complicated by the fact that the State may award rights to these resources regardless of who is in actual occupation of the area. This can be done through licenses, leases or permits, or the present production sharing, joint venture, co-production agreements to any qualified persons, natural or juridical. This has caused untold suffering and precipitated generations of social conflicts in many indigenous peoples areas.

The Indigenous Peoples Rights Act supplements the private vested rights recognized by the constitution by the operation of the Carino doctrine, section 48 of the Public Land Act and similar laws. The IPRA is also the source of a different concept of ownership.

By legislative fiat, ancestral domains and ancestral lands are now legitimate ways of acquiring ownership. Ancestral domains are defined as:

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[77] Private and public agricultural (in the sense of being actually devoted to agricultural activity, Rep. Act No. 6657 (1988) and other agrarian laws; public agricultural (in a constitutional sense), Com. Act No. 141 (1939); forests, Pres. Dec. No. 705 (1974) as amended; water, Pres. Dec. No. 1058 et al. See also LRC-KSK, Law and Ecology (1992) and Field Manuals (1997).

[78] The only notable exception is the Integrated Protected Area System established through Rep. Act No. 7586 (1992).

[79] Leonen, Marvic M.V.F., "On Legal Myths and Indigenous Peoples: Re-examining Carino v. Insular Government," Phil. Nat. L. J. (1991); Gatmaytan, Augusto B., "Land Rights and Land Tenure Situation of Indigenous Peoples in the Philippines," 5(1) Phil. Nat. Res. L. J. 5, (1992).

[80] Most Indigenous Peoples' communities are found in areas classified as "public". See "Land Classification: Preliminary Notes on Implications for Upland Populations, 1 (2) Phil. Nat. Res. L. J. 18 (1988).

[81] Pres. Dec. No. 1058 or the Water Code vests control over waters in a National Waters Regulatory Board.

[82] Section 68, Pres. Dec. No. 705 (1974) makes it a crime to cut, gather and/or collect timber and other forest products without a license.

[83] Rep. Act No. 7076 (1994) or the Small Scale Mining Law and Rep. Act No. 7942 (1995) or the Philippine Mining act are premised on the State's authority to award agreements to exploit its minerals regardless of the owner of the surface rights.

> "(a) Ancestral Domains. – Subject to Section 56 hereof, refers to all areas generally belonging to ICCs/IPs comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by ICCs/IPs, by themselves or through their ancestors, communally or individually since time immemorial, continuously to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth or as a consequence of government projects or any other voluntary dealings entered into by government and private individuals/corporations, and which are necessary to ensure their economic, social and cultural welfare. It shall include ancestral alnds, forests, pasture, residential, agricultural, and other lands individually owned whether alienable and disposable or otherwise, hunting grounds, burial grounds, worship areas, bodies of water, mineral and other natural resources, and lands which may no longer be exclusively occupied by ICCs/IPs but from which they traditionally had access to for their subsistence and traditional activities, particularly the home ranges of ICCs/IPs who are still nomadic and/or shifting cultivators."[84]

Ancestral lands on the other hand are defined as:

> "(b) Ancestral Lands -- Subject to Section 56 hereof, refers to land occupied, possessed and utilized by individuals, families and clans who are members of the ICCs/IPs since time immemorial, by themselves or through their predecessors-in-interest, under claims of indivdiual or traditional group ownership, continously, to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth, or as a consequence of government projects and other voluntary dealings entered into with government and private individuals/corporations, including, but not limited to, residential lots, rice terraces or paddies, private forests, swidden farms and tree lots."[85]

Another type of ancestral land seems to have been created under Section 12 of the same Act. Thus, it states:

> "Section 12. Option to Secure Certificate of title Under Commonwealth Act No. 141, as amended, or the Land Registration Act 496.—Individual members of cultural communities, with respect to their individually owned ancestral lands who, by themselves or through their

[84] Section 3 (a), Rep. Act No. 8371 (1997).
[85] Section 3 (b), Rep. Act No. 8371 (1997).

> predecessors in interest, have been in continous possession and occupation of the same in the concept of owner since time immemorial or for a period of less than thirty (30) years immediately preceding the approval of this Act and uncontested by the members of the same ICCs/IPs shall have the option to secure title to their Ancestral lands under the provisions of Commonwealth Act No. 141, as amended, or the Land Registration Act 496.
>
> "For this purpose, said individually owned ancestral lands, which are agricultural in character and actually used for agricultural, residential, pasture, and tree farming purposes, including those with a slope of eighteen percent (18%) or more, are hereby classified as alienable and disposable agricultural lands."
>
> "The option granted under this section shall be exercised within twenty (20) years from the approval of this Act."[86]

Section 12 sanctions recognition of ancestral lands that have been held not since time immemorial but for a period of thirty years prior to the effectivity of the new law. It also allows registration under the Property Registration Decree rather than through the processes of the National Commission on Indigenous Peoples. Furthermore, it only allows individual application unlike the general specie of ancestral land which can recognize "traditional group rights".

The tenurial rights of *ancestral domains* should not be confused with the concept of ownership under the New Civil Code or the official national legal system. They should not also be confused with the tenurial rights of those that hold *ancestral lands*.

Ownership under the New Civil Code is defined under Articles 427[87] and 428[88]. It is understood as either: ". . . .the independent and general power of a person over a thing for purposes recognized by law and within limits established thereby," or "a relation in private law by virtue of which a thing pertaining to one person is completely subjected to his will in everything not prohibited by public law or the concurrence with the rights of another."[89] Moreover, ownership is said to have the attributes of *jus utendi*, *fruendi*, *abutendi*, *disponendi* et *vindicandi*. One therefore is said to own a piece of land when s/he exercises, to the exclusion of all others, the rights to use, enjoy its fruits or dispose of it in any manner not prohibited by law.

On the other hand the rights of holders of Ancestral Domains are found in the new law. As a concept ownership is:

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[86] Section 12, Rep. Act No. 8371 (1997). This provision was inserted during the bicameral committee and was suggested by a Congressman from the Cordilleras. The citation of Act 496 is an obvious and unfortunate oversight because that has already been replaced by Pres. Dec. No. 1528.

[87] Article 427 provides: "Ownership may be exercised over things or rights."

[88] Article 428 provides: "The owner has the right to enjoy and dispose of a thing, without other limitations other than those established by law….The owner has also a right of action against the holder and possessor of a thing in order to recover it."

[89] II Tolentino, Civil Code of the Philippines 42 (1983) citing Filomusi, Scialoja and Ruggiero.

> "Section 5. Indigenous Concept of Ownership. Indigenous Concept of ownership sustains the view that ancestral domains and all resources found therein shall serve as the material basis of their cultural integrity. The indigenous concept of ownership generally holds that ancestral domains are the ICCs/IPs private but community property which belongs to all generations and therefore cannot be sold, disposed or destroyed. It likewise covers sustainable traditional resource rights."[90]

Unlike emphasis on individual and corporate holders in the Civil Code, the Indigenous Peoples Rights act emphasizes the "private but community property" nature of ancestral domains. Aside from not being a proper subject of sale or any other mode of disposition, ancestral domain holders may claim ownership over the resources within the territory, develop land and natural resources, stay in the territory, have rights against involuntary displacement, could regulate the entry of migrants, have rights to safe and clean air and water, may claim parts of reservations and may use customary laws to resolve their conflicts.[91]

Duties are however imposed on holders of these titles.

All of these rights are subject to Section 56 of the law. This has been a difficult point of debate among advocates. This section provides:

> "Section 56. Existing Property Rights Regimes. – Property rights within the ancestral domains already existing and/or vested upon effectivity of this act, shall be recognized and respected."[92]

Property rights could include those whose ownership are evidenced by a Certificate of Title under the Property Registration Decree[93], those whose rights have vested but have not yet acquired a title and arguably even those who do not possess title but who have been granted rights to use, exploit or develop resources.

The right to claim ownership and develop natural resources should also be qualified by Section 57 which grants only priority rights to members of indigenous cultural communities and Section 58 which allows the use of Ancestral Domains as critical watersheds, mangroves, wildlife sanctuaries, wilderness, protected areas when deemed appropriate and "with the full participation of the ICCs/IPs concerned." The use of "full participation" instead of "free and informed consent" had also been noticed.[94]

The right to stay in the territory and protection against involuntary displacement is subject to an apparently contradictory provision:

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[90] Section 5, Rep. Act No. 8371 (1997). Sustainable traditional resource rights are defined in Section 3 (o).
[91] Section 7, pars. (a) to (h), Rep. Act No. 8371 (1997).
[92] Section 56, Rep. Act No. 8371. LRC-KSK had suggested to the bicameral committee to limit its operation to only those with torrens titles and with powers of review given the National Commission on Indigenous Peoples.
[93] Pres. Dec. No. 1528.
[94] See submissions of LRCKSK to the bicameral committee.

> "No ICCs/IPs will be relocated without their free and prior informed consent, nor through any means other than eminent domain."[95]

The power of eminent domain and its parameters are based on the Constitution.[96] It is an ultimate power of the sovereign to appropriate not only public but also private property for public use even without the consent of the owner.[97] This constitutional provision could only be interpreted by the Supreme Court and the process is prescribed as a Special Civil Action under Rule 67 of the Revised Rules of Civil Procedure.

"Taking" in eminent domain cases has been defined as:

> " . . .entering upon private property for more than a momentary period, and, under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it *in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof*."[98] (emphasis provided).

Where "free and prior informed consent" comes in therefore would be problematic and will be subject to several interpretations.

Other rights ensure some degree of respect for holders of Certificates of Ancestral Domain Titles. Thus, a private or public proponent for an infrastructure project therefore must not only comply with the requirement of an Environmental Compliance Certificate[99] and consent from all the local government units concerned[100], it now must acquire a Certification from the National Commission on Indigenous Peoples (NCIP) either that there is no ancestral domain over the area or that the "free and informed" consent of its holders had already been procured[101]. Today, the procedure for acquiring free, prior and informed consent however is under heavy criticism.

Ancestral land owners however do not have all the rights and obligations[102] of ancestral domain holders. Again, a difficult section to interpret is Section 8 which provides:

> "Section 8. Rights to Ancestral Lands. – The rights to ownership and possession of the ICCs/IPs to their ancestral lands shall be recognized and protected.
>
> (a) Right to transfer land/property.—Such right shall include the right to transfer land or property rights *to/among members of the same ICCs/IPs,* subject to

[95] Section 5 par. C, Rep. Act No. 8371 (1997).
[96] Section 6, Art. III, Constitution: "Private Property shall not be taken for public use without just compensation."
[97] See for instance Bernas, The Constitution of the Republic of the Philippines," 347 (1996). Also Visayan Refining Co. v. Camus, 40 Phil. 550 (1919), Association of Small Landowners v. Secretary of DAR, 175 SCRA (1992) among others.
[98] Republic v. Vda de Castellvi, et al., G.R. No. 20620, August 15, 1974.
[99] Pres. Dec. 1586 and related laws and regulations.
[100] Sections 26 and 27, Rep. Act No. 7160 (1991) or the Local Government Code.
[101] Section 59, Rep. Act No. 8371 (1997).
[102] Section 9 which prescribes ecological responsibilities seem to apply only to Ancestral Domains.

> customary laws and traditions of the community concerned.
>
> (b) Right of redemption. – In cases where it is shown that the transfer of land/propery by virtue of any agreement or devise, *to a non-member of the concerned ICCs/IPs* is tainted by the vitiated consent of the ICCs/IPs, or is transferred for an unconscionable consideration or price, the transferor ICC/IP shall have the right to redeem the same within a period not exceeding fifteen (15) years from the date of transfer."[103] (emphasis provided)

Irony of the law

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

The growing consensus in current literature is that their control over their ancestral domains provides the material bases not only for their physical survival but also their cultural integrity.[104] This recognition has been won in the Indigenous Peoples Rights Act.[105]

For purposes of providing some legal argument against the prevalent notion that all resources are still owned by the state, section 5 of the IPRA is a milestone. However, it also brings with it new issues that need to be confronted by any advocacy for indigenous peoples.

Current literature challenges the notion that it is possible to generalize tenurial arrangements for specific cultures.[106] There is growing recognition that indigenous tenure systems change through time. Also, the notion that individual ownership of certain portions of ancestral territory only came through colonialism, in some communities, are now being challenged[107]

For instance, the *Banwaons* of Balit, San Luis, Agusan del Sur understand that while their entire territory belongs to their community, they consider their internal boundaries as fluid and subject to negotiation with others even to the extent of including outsiders

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[103] Section 8, Rep. Act No. 8371 (1997).

[104] See Bennagen…..

[105] section 5, Rep. Act No. 8731

[106] Royo, Antoinette and Bennagen, Ponciano, MAPPING THE EARTH, MAPPING LIFE (LRCKSK: 2000)

[107] See for instance Zialcita, Fernando N., "Land Tenure among Non-Hispanized Filipinos", in Peralta, Jesus T., ed., REFLECTIONS ON PHILIPPINE CULTURE AND SOCIETY: FESTSCHRIFT IN HONOR OF WILLIAM HENRY SCOTT (Ateneo de Manila Press: 2001) 107-132. Zialcita challenges the notions presented in staple "progressive" history textbooks like Constantino, Renato, THE PHILIPPINES: A PAST REVISITED (TALA Publishing: 1975) and Ofreneo, Rene E, CAPITALISM IN PHILIPPINE AGRICULTURE (Foundation for Nationalist Studies: 1980).

who have acquired legitimate claims through hard work. Within their territories, individual claims may prevail.[108]

In 1979, among the *Tiruray*s in Figel, a village in Mindanao, Schlegel observed --

> "…Figel people do not conceive of themselves as formally—either individually or as a group—owning land. Individuals exercise private tenure over the land they are working, and the Figel neighborhood's 'territory' consists in a general way of all land which Figel people over time use or have used for purposes of shifting cultivation. This territory, with its very imprecise boundaries, may be thought of as belonging to the neighborhood in common. People of other neighborhoods would not attempt to mark out a field within its general limits. Due, however, to the low population density of the region and to the distance between neighborhoods, such an issue seldom if every arises. Hunting, and ll other forms of appropriation of wild food resources, may occur anywhere in the forests, and neighborhood territories are not considered to be private hunting or gathering preserves of a given community."[109]

In other words, rights to possession by this indigenous community were conditioned on their ability to make the land productive. Failure to do so would allow the area devoted to agriculture to be reoccupied by other individuals within their village. Within their swidden farms therefore, they were more concerned with making the lands productive rather than establishing individual (private) ownership over the land.

However, in 1981, the same author observed that the introduction of the plow created the condition to induce individual ownership of the land rather than simply exclusive rights to use property[110]. Permanent fields require more investments and energy thus fostering a more permanent relationship to the land.

Kaingin or swidden farming[111] is generally a method of cultivation that uses fire, cutting tools and sticks. After clearing a patch through fire and cutting within a forest, the farmer punches holes on the ground and buries seeds. The method relies heavily on rain and is fertilized by the ashes of the forest and the remains of the plants and harvest of the last cultivation. Although productive, it does not last long. The area is then left to fallow for periods from ten to twenty years within which the soil and the forest regenerate. A new cycle of cultivation and fallow may follow on the original patch.

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[108] Gatmaytan, Augusto B., "Mapmaker: Mythmaker," in Royo, Antoinette and Bennagen, Ponciano, MAPPING THE EARTH, MAPPING LIFE (LRCKSK:2000) 64.

[109] Schlegel, Stuart, "Tiruray Subsistence: From Shifting Cultivation to Plow Agriculture" (Ateneo de Manila Press: 1979) 29. Also cited in Zialcita, Fernando N., "Land Tenure among Non-Hispanized Filipinos". "Private" in this quotation actually means "individual".

[110] Shlegel, Stuart, "Tiruray Gardens: From Use Right to Private Ownership," 9 *Phil. Quarterly of Culture and Society*, No. 1, 5-8 (1981).

[111] Alternatively referred to also as "slash and burn" or shifting cultivation.

The ecological viability of swidden agriculture among indigenous peoples has been amply demonstrated.[112] However, these studies were undertaken of communities where population densities were lower, forests still abundant and the migrant intrusion sparse and controlled.[113] It is therefore difficult to make sweeping conclusions as whether this type of cultivation causes forest denudation or assists in regeneration. Definitely however, the shift in cultivation technology adds pressure in a community's rethinking of tenure rights.

In the Cordilleras, especially in areas where wet rice cultivation is still popular, individual (private) ownership of land dominated even at the start of the twentieth century. Dwelling houses, granaries, camote cultivation, irrigated rice lands were considered by the *Bontoc* as individually owned.[114] Individual ownership of certain land holdings was also observed among the *Kalinga* in the 1920s and 1930s[115], and among the *Ifugao*[116].

The *Calamian Tagbanwa* of Coron filed the first formal ancestral domain claim over "ancestral waters" or their *teeb ang surublien.* The tenurial system of the *Calamanian* Tagbanwa are different from the *Tagbanwa* of mainland Palawan. Distinct from many land based indigenous groups, dependence for traditional livelihood over marine resources also exists among the *Badjaos* of Basilan and Sulu, the *Molbog* of Balabac, Palawan, the *Agta* of Northeastern Luzon and the Ati of Boracay.

In real terms therefore, it is not possible, on a national scale, to generalize the content of tenurial arrangements corresponding to unique communities of specific ethnolinguistic groups. It is only within specific communities that it is possible to understand their existing tenurial systems and also the processes through which these systems change.

Apart from the difficulties attending the process of distribution of Certificates of Ancestral Domains under IPRA therefore, the issuance of the present form of legal tenure instruments does not guarantee that all aspects of indigenous resource holding or management is recognized. Neither does this assure that indigenous knowledge systems and processes will be encouraged.

Legal recognition, in some but not all communities, may be prerequisites for sustainable livelihoods. The present state of the law however does not, per se, assure that this will be achieved.

Understandably, interventions by non governmental organizations have not progressed beyond identifying the boundaries of ancestral domains, resources within them and encouraging a process of "managing" these resources. These take the form of simple delineation of boundaries (with or without using sophisticated equipment like global

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[112] See for instance Conklin, Harold C, HANUNOO AGRICULTURE: A REPORT ON AN INTEGRAL SYSTEM OF SHIFTING CULTIVATION IN THE PHILIPPINES (FAO: 1957).

[113] See Gatmaytan, Augusto B, "Peoples: A View of Indigenous Peoples of the Philippines", unpublished Policy Paper of LRCKSK, 17 (1999).

[114] Jenks, Albert Ernest, THE BONTOC IGOROT (Bureau of Printing: 1905) cited in Zialcita, Fernando N., "Land Tenure among Non-Hispanized Filipinos."

[115] See Barton, Roy, THE KALINGAS, THEIR INSTITUTIONS AND CUSTOM LAW (Chicago University Press: 1949) and Dozier, Edward P., MOUNTAIN ARBITERS: THE CHANGING LIFE OF A PHILIPPINE HILL PEOPLE (University of Arizona Press: 1966)

[116] See Barton, Roy, IFUGAO LAW (University of Berkeley Press: 1919)

positioning systems or GPS), community mapping, writing ancestral domain sustainable development plans or combinations of all these three activities.

Community mapping by indigenous peoples have been encouraged by recent government responses to the clamor for recognition of ancestral domains. Mapping by indigenous peoples is now increasingly a critical activity not only as a prerequisite for tenure recognition but also as a means for empowerment.

Community mapping, which result in written representations, may be a component of planning by communities. Planning comes in a variety of forms. After the passage of DENR Dao 2 s of 1993, Ancestral Domain Management Plans (ADMP) became the legal requirement. Today, this takes the form of Ancestral Domain Sustainable Development Plans (ADSDP)

Community mapping however has its difficulties. As observed by Bennagen:

> "For it is a fact, admitted by indigenous peoples themselves that they are not a homogenous group unified by an uncompromising commitment to the protection of their rights to their ancestral domains. Many of their groups admit that among the ranks of their leaders are tribal 'dealers'. Tribal dealers are those leaders who have in various ways compromised and seriously undermined the integrity of the ancestral domain and indigenous culture. Already, there are reports of outsiders--non-indigenous peoples, military officials, transnational corporations, etc.--negotiating with indigenous peoples for the sale or use of ancestral domains. Given the vulnerability of indigenous peoples to coercive forces as well as globalist market forces and the admittedly weakened cultural roots of some indigenous communities and their leaders, there is the real possibility that the empowering and emancipatory potential of maps and the law may not be realized. And community maps, by showing features selected by the communities themselves, or by stories telling of themselves, could exacerbate their vulnerability."[117]

The experience of the author confirms this statement

The consensus seems to be that when a community is united, deeply rooted in its culture, aware of its rights and able to mobilize itself in alliance with partner or support groups it could then be able to make use of the imperfections in the law to work in its favor. When communities use law that does not reflect how they view the problem simply because it is there, then the law works to divide them.[118]

117Bennagen, Ponciano, Mapping the Earth, Mappint Life: an Introduction, in Bennagen and Royo, eds, MAPPING THE EARTH, MAPPING LIFE (LRCKSK:2000), 11-12, citing Manzano, Florence Umaming, "An Analysis on the Current Status of the IPRA Implementation, (Coalition for Indigenous Peoples Rights and Ancestral Domain: 1999), 65-68; Gaspar, Karl, C. THE LUMAD STRUGGLE IN THE FACE OF GLOBALIZATION (Alternative Forum for Research in Mindanao: 2000); Manaligod, Raffy, ed., STRUGGLE AGAINST DEVELOPMENT AGGRESSION (Tunay na Alyansa ng Bayan alay sa Katutubo: 1990). This author has had direct experiences working for indigenous peoples communities where commercial interests intervened to procure certificates of ancestral domain claims for these tribal "dealers".

[118] LRCKSK experience, ILO study

Based on the experience of this author, deciding to be covered by a Certificate of Ancestral Domain/Land Title (CADT or CALT) can be for the following reasons: (1) it symbolizes control over the area vis-à-vis other government agencies and programs; (2) it is a precursor for getting state "permits" to utilize and exploit resources within the domain; (3) it can be used to legitimize and use the coercive power of the state against paramilitary groups; (4) it provides clarification against other existing titles or land tenure instruments.

It however has some disadvantages, namely: (1) it can be taken advantage of by leaders or by other commercial interests; (2) it can serve to formalize segregation or control by others; (3) it instigates or resurfaces internal as well as external boundary conflicts; (4) it empowers a new elite whether rooted in the community or perhaps connected with a support NGO or even a government agency; (5) it may not produce the results that were expected by the community.

When informal justice systems are accommodated imperfectly by the State, new forms of abuses also become possible.

Definitely, in view of some the experiences of community mapping or acquiring CADTs and CALTs, legal recognition does not always contribute to achieving sustainable livelihoods. The danger of categorizing reality by officially promulgating concepts of ownership or process of procuring such ownership is that it may fail to describe the nuances adequately.

Furthermore, experience has shown that addressing the political need for tenurial recognition may also be intimately related to the capacity to address the economic needs of indigenous communities in unexpected ways. Legal security of tenure may contribute to stabilizing relations with outside entities sufficient to encourage economic and social development. But it may also worsen it. Economic security ensures that political recognition of indigenous ownership becomes less vulnerable. Development interventions should not see these areas as sequential phases but as interrelated dimensions.

The core of any strategy should be to enable communities to decide on the use of appropriate processes that will ensure not only their survival but also their development. It does not really matter whether the process or standards are indigenous—rather that they are chosen by the community in a participative and equitable manner. It does not also matter whether the community chooses to address livelihood concerns first rather than security of tenure. In real terms, these choices will be dictated by their actual circumstances and the real economic and social needs that they have defined through whatever political institution or discussion forums exist within their community.

In other words, legal provisions that provide compulsory process and concepts of ownership that are fixed while divorced from provisions that allow local economic development will eventually become irrelevant and oppressive.

Political vulnerability as a result of underdevelopment

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

However, the current economic environment is hostile to these aspirations. It also weighs heavily against the ability of indigenous communities to make truly free and autonomous choices. The relative successes that have been made in the arena of law and policy should also be made with this as a backdrop. This section outlines the economic challenge and then the openings that the present law has opened.

Impoverished economies of indigenous peoples experience pressure from several sources. Increasing population, degradation of their environment due to local and commercial activities coming from varied sources, expanding costs of needed (and wanted) goods and services such as medicines and other health services, gasoline and transportation, groceries, et. al. weigh heavily on different households. To start with, many of these communities are already at subsistence level if not below the poverty line. Many are still dependent on agriculture or related activities.

Communities vary as to whether most of their agricultural production circulates within local economies or whether most of it are “exported” to *poblaciones* or town centers. Most indigenous communities however deal with the reality of having to transact some level of business with nearby communities or with the more economically developed areas within their localities.

Thus, some households will usually transport a portion of their produce to the market and use the excess to pay for needed groceries. Indigenous households mostly have to shoulder the high costs of transportation (or deal with artificially high costs due to the existence of a transportation cartel as in the Cordilleras). They may not be able to include it in the market price. When their products reach the market they too have to compete with lowland production where infrastructure (such as irrigation, electricity, better roads) may be present. Or, in an increasing number of cases, they will have to compete with imported agricultural crops.

Many of the infrastructure needs of communities (i.e farm to market roads, electrification, waterworks) require large amounts of capital which can only logically come from government investment. The others needs (education and health) may already be appropriated by government but are lost to corruption, irrelevant programs which are not culturally sensitive or simply unexpended because of the inability of a local government unit or a government agency to convince the Department of Budget and Management to release the amount.

Parenthetically, indigenous peoples are not represented in these bodies. Except for the Cordilleras, portions of Zamboanga (among the *Subanen*) and very minimal areas in southern Mindanao (such as the *t'boli* areas of Lake Sebu), the level of education and political experience can only assure representation to at most the barangay councils. In the Cordilleras, education that was implemented on an almost universal scale as a result of the entry of religious groups have ensured some degree of upward economic mobility. Many of the indigenous villages also had their share of rich households (*baknang*) who could afford private education for their children. That many universities located in Baguio City which is relatively accessible to many communities in the region gave peoples of the Cordilleras an added advantage.

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

As indicated earlier, indigenous communities are therefore very vulnerable to offers that are made by large commercial interests wanting to extract natural resources within their ancestral domains. They are also likewise vulnerable to government projects that may not be acceptable culturally but provide some relief. For instance, the contract reforestation projects in the 1970s and 1980s, the community forestry program of present DENR, and even the Integrated Protected Area Project conducted jointly by the DENR and the World Bank have had a great deal of participation from some indigenous communities.

To a certain extent, economic need also makes many indigenous communities very vulnerable to acceding to NGO programs which may not be culturally sensitive or that will simply exploit the uniqueness of their processes. Had some communities made genuine choices, it is possible that some may have chosen a livelihood or educational project than a community mapping exercise that will not assure the issuance of title. This is not to say however that community mapping has no value in itself. Just that choices made by NGOs also have to be discounted by the level of participation made by indigenous communities.

The degree of interface between indigenous culture and outside influences therefore could not be worked out a priori, especially in a situation where there are very clear political economic disparities. In many instances, the disparities of power as well as persistent urgent economic need trumps or even motivates collective cultural decisions. At the very least, these realities enhance rather than reduce conflicts within communities.

The Indigenous Peoples Rights Act provides little relief.

Originally intended to recognize ownership of ancestral domains in 1988[119], politicians took advantage of its presence to provide for a virtual magna carta for Indigenous Peoples. It is too broad. Concrete mechanisms for its implementation were not adequately spelled out except for the process of gaining paper recognition of ancestral

[119] S.B. 909 or the Estrada bill originally drafted by LRCKSK.

lands and domains.[120] Thus, while some social, economic and cultural rights are mentioned broadly, no provisions for both budget and program are mentioned in the law.

The result is a National Commission on Indigenous Peoples that focuses more on the struggle to get official recognition of title to ancestral domains. In spite of the seriousness of health, economic and educational issues for the everyday life of indigenous communities, the NCIP has not yet focused evolving its capabilities in understanding these problems and evolving programs for specific communities.[121] The implicit theory of both the law as well as the indigenous peoples movement seems to be that as long as rights to ancestral domain are *officially* recognized by government, the rest (political and economic empowerment) will follow or can be catalyzed.

Current developments however may put these assumptions into question.

In the (lowland) agrarian sector, large multinational corporations[122] have allowed farmer beneficiaries to hold title to their agricultural lands. However these corporations have also entered into either long term leases or contract growing arrangements with them. In many of these instances, coercion is kept at a minimum since farmers or farm workers do not have the capabilities to manage their landholdings to finance, grow and market crops in such a way as to match the amount that a large corporation may offer as rental payment or contract growing shares. (Of course, government does not provide the necessary technical, financial, marketing assistance to the farmers for them to overcome these barriers). In some areas of indigenous peoples, corporations[123] now offer to fund the costs of delineation and the conversion of Certificates of Ancestral Domain Claims (CADC) to Certificates of Ancestral Domain Titles (CADT).

These make a good deal of economic sense to corporations. Rather than having to deal with a bad public image, these investments, which may be less than having to purchase the land, are very reasonable. Furthermore, they could later on simply rely on the impoverishment of indigenous groups and their resulting vulnerability to negotiate terms for their continued operations.

Again, this is not to say that work on community mapping, resource planning and official recognition of ancestral lands and domains are not important. They are, but this always again has to be taken in the context of a more expansive view of empowerment of indigenous peoples communities—one that focuses not only on paper victories, not only on the legal or political nor only on whole ethnolinguistic groups as its base. Empowerment should be seen from the intervention's effect on everyday community life, the autonomy that results from more control of their local economies and whether there still is political vulnerability of *a local community* vis a vis commercial, governmental (and even NGO) interests.

This view of underdevelopment and political vulnerability shows that an Indigenous Peoples Rights Act may not be enough. Perhaps, laws that involve commercial

[120] See Leonen, Marvic, "The IPRA: Will this bring us to a new level of Political Discourse," in Philippine Natural Resources Law Journal (2000).
[121] Interview with Atty. Ruben Lingatin, Chair, NCIP, March 2003.
[122] DOLE and DELMONTE are very good cases studies. The author challenged the former multinational as a lawyer for both farmers and indigenous groups.
[123] Western Mining Corporation for instance funded the CADC delineation of some of the B'laan areas in Sultan Kudarat.

exploration, development and utilization of natural resources must also be reviewed. Legal recognition of indigenous processes mean nothing if economic security/autonomy is a mere afterthought.

Reflections

Elaborating rights in the legal arena is referred to by Duncan Kennedy as "legalism". He notes:

> "Legalism not only carries a politics (and liberal legalism carries a very specific politics) but also incessantly translates wide ranging political questions into more narrowly framed legal questions. Thus, politics conceived and practiced legalistically bears a certain hostility to discursively open-ended, multigenre, and polyvocal conversations about how we should live, what we should value and what we should prohibit, and what is possible in collective life. The preemptive conversion of political questions into legal questions can displace open-ended discursive contestation: adversarial and yes/no structures can quash exploration; expert and specialized languages can preclude democratic participation; a pretense that deontological grounds can and must always be found masks the historical embeddedness of may political questions; and the covertness of norms and political power within legal spaces repeatedly divests political questions of their most crucial concerns. When the available range of legal remedies preempts exploration of the deep constitutive causes of an injury…when the question of which rights pertain overrides attention to what occasions the urgently felt need for the right…, we sacrifice our chance to be deliberative, inventive political beings who create our collective life form. Legalism that draws its parameters of justice from liberalism imposes its own standards of fairness when we might need a public argument about what constitutes fairness; its formulas for equality when we may need to reconsider all the powers that must be negotiated in the making of an egalitarian order; its definitions of liberty at the price of an exploratory argument about the constituent elements of freedom."[124]

What has been referred to as "left legalistic discourse' has three arguments to deny that the discourse of using legal rights undermines progressive projects[125]. Legal norms can act as "legal placeholders" that provide platforms for better formulation. More progressive norms won in legal texts are incremental or simply a tentative arrangement until a more effective recourse is found to address urgent or imminent threats. New interpretations can reformulate old legal labels and therefore neutralize the effectiveness of usual stereotypes against progressive projects.

[124] Brown, Wendy and Halley, Janet, "Introduction," in eds,, LEFT LEGALISM/LEFT CRITIQUE 19-20 (2002).
[125] Brown and Halley, 23-24.

It is clear that procedural and substantive provisions of the Indigenous Peoples Rights Act do not meet the needs of the marginalized sectors of indigenous communities. Reflecting on the content of the law and the experience of indigenous peoples advocates who pragmatically use some of its provisions we can however elaborate more on the dilemma of an imperfect interface.

First, the experience of indigenous and non-governmental organizations in the enactment of the Indigenous Peoples Rights Act is the argument against the fear that making use of this law will unduly constrain the political options of those that would want it to be more nuanced and relevant.

As in the past, failures of the law, even if unintended and unforeseen, motivate political discourse. Articulating rights in legal provisions may weaken efforts to make the political structure more relevant to the needs of indigenous peoples only if those that invoke it are not aware of how the law may be used against them. Ironically, engaging the system and exploring its interstices may be the more effective (and efficient) way to learn how the law should adjust.

Nowhere is this best demonstrated than by the political context of the enactment of the Indigenous Peoples Rights Act.[126] Even with some legal recognition of indigenous peoples' rights, the political discourse in the Philippines remains discursively open-ended, multi-genre, and polyvocal. More non-governmental participation influence "expert and specialized languages" in governmental, media and even international financial forums. Instead of masking fundamental problems, there is now insistence that they be addressed more clearly and specifically. It is not the existence of legal provisions that deadened the inventiveness of the political actors. Instead, it is the dissatisfaction with the current official legal system that prompted more informed action.

Second, on the balance, while attempting to remedy discrimination and recognize more rights for indigenous peoples, the law also reinforces stereotypes. As an example, this essay discussed property rights recognition.

Third, there is great potential for the law to divert by consuming the attention of advocates or those that support indigenous peoples advocacy.[127]

We have seen that the more general rights are, the more it could be interpreted or applied by the more dominant groups. However, the more specific it is made, the more likely it may inscribe a definition that is based on the identity's subordination.[128]

Laws, by their nature, essentialize, reduce or simplify identities[129]. Laws need to freeze a snapshot of reality in order to achieve predictability. They have to define what its

[126] See Annex B
[127] See discussion in Annex A.
[128] The same point was made of gender projects by Brown, Wendy, "Suffering the Paradox of Rights," in Brown and Halley, eds., LEFT LEGALISM, LEFT CRITIQUE 422 (2002) citing Catherine MacKinnon, FEMINISM UNMODIFIED 73 (1987).
[129] Especially if these are "marginal identities". See for instance Young, Iris Marion, "Together in Difference: Transforming the Logic of Group Political Conflict", in Kymlicka, Will, THE RIGHTS OF MINORITY CULTURES (Oxford: 1999), 158. "Social groups who identify one another as different typically have conceived that difference as Otherness. Where the social relation of the groups is one of privilege and oppression, this attribution of Otherness is asymmetrical. While the privileged group is defined as active human subject, inferiorised social groups are objectified, substantialised, reduced to

author's believe to be critical and observable aspects of situations and events so as to guide those that will, in the future, interpret and apply its provisions. Even progressive human rights advocates on the side of indigenous peoples rights who do legal advocacy must contend with these realities.

Those that provided the language in the Indigenous Peoples Rights Act were informed by some dilemma. On the one hand, providing text that would encompass more possibilities for what will constitute ancestral domains or territories would have been too threatening for legislators and their propertied constituents. It would also have been threatening for settled beliefs of some human rights advocates. At the time of its formulation information and understanding might not have been sophisticated enough to provide perfect guidance to the formulation of the provision. On the other hand, a law such as this needed to be passed. The political climate was ripe for its authorization.

Projects and programs that focus only on the implementation of the law will therefore be shortsighted because it will only be limited to the solutions that were knowable at the time of the passage of the law and politically acceptable at that time.

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

Recommendations

One. Projects and programs that involve marginalized cultures by engaging the legal system, must focus on those where the imminent danger is greatest.

From the experience of this author, communities that *most* need legal intervention are those in areas where there usually is a conflicting commercial or governmental interest actually occupying indigenous territory or is threatening to curtail use and possession. Commercial projects mostly take the form of extractive natural resource industries (logging and mining); power projects (hydroelectric mostly) or real estate projects. Governmental interest can be in the form of already existing reservations (forest, mining, military, education), forestry projects (community forestry programs) or even ecological initiatives (protected areas).

Communities that *least* need legal intervention are those where indigenous political and social institutions are still strong and where there is no threat to curtail use or possession. Legal intervention requires the use of existing law as a whole. Many of the laws that could favorably used for indigenous peoples (including the Indigenous Peoples Rights Act) do not entirely square with the interests of specific communities. Using law sometimes brings in a host of new issues totally unnecessary for the community.

Two. The utility of informal justice systems is not only about whether there are alternative processes. It will, to a large part, be about whether the substantive norms in the official national legal system are relevant to the needs of marginalized communities or vulnerable sectors. Hence, studies on justice systems should go beyond the procedural framework. It should, perhaps as urgently, focus on the substantive clarification of norms within a legal order.

Three. A more empirical review of the impact of the alternative systems introduced in the Philippines is urgently needed. Time should be spent not only in documenting cases that have been diverted from the formal adjudicatory processes, but more importantly whether the expectations coming from marginalized communities are indeed addressed by the Katarungang Pambarangay system, the Alternative Dispute Resolution Act or by the Indigenous Peoples Rights Act.

Four. Resources must not only be invested to allow marginalized stakeholders to engage and test social legislation, it must also be likewise invested to continuously examine any other legislation that may have economic or political impact. Thus, while indigenous peoples may avail of all the processes under the Indigenous Peoples Rights Act, they may perhaps be more severely affected by the Mining Act or the Forestry Code. Definitely, they suffer from the misallocation of government resources.

Annex A

Who are indigenous peoples?

"…The poor are those whose greatest task is to try to survive."

Sobrino[130] 159

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

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

> "Social groups who identify one another as different typically have conceived that difference as Otherness. *Where the social relation of the groups is one of privilege and oppression, this attribution of Otherness is asymmetrical. While the privileged group is defined as active human subject, inferiorised social groups are objectified, substantialised, reduced to a nature or essence. Whereas the priviledged groups are neutral, exhibit free, spontaneous and weighty subjectivity, the dominated groups are marked with an essence, imprisoned in a given set of possibilities*. By virtue of the characteristics the dominant group is alleged to have by nature, the dominant ideologies allege that those group members have specific dispositions that suit them for some activities and not others. Using its own values, experience, and culture as standards, the dominant group measures the Others and finds them essentially lacking, as excluded from and/or complementary to themselves. Group differences as otherness thus usually generates dichotomies of mind and body, reason-emotion, civilized and primitive, developed and underdeveloped."[131] (emphasis supplied)

Most of the credible work on Indigenous Peoples in the Philippines start with an admission that it is difficult to define precisely who indigenous peoples are without admitting how peoples in the Philippines have been divided by its colonizers or committing some fundamental error in identities[132]. The question always is for what purpose we are defining who indigenous peoples are.

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[130] Sobrino, J., SPIRITUALITY OF LIBERATION: TOWARD POLITICAL HOLINESS (Orbis Books, 1988), 159.

[131] Young, Iris Marion, "Together in Difference: Transforming the Logic of Group Political Conflict", in Kymlicka, Will, THE RIGHTS OF MINORITY CULTURES (Oxford: 1999), 158. See also Bhabha, Homi K., "Interrogating Identity: The Postcolonial Prerogative," in Goldberg, David (ed), ANATOMY OF RACISM (University of Minnesota Press: 1990); Young, Iris Marion, JUSTICE AND THE POLITICS OF DIFFERENCE, (Princeton University Press, 1990).

[132] A good discussion is found in Gatmaytan, Augusto B., "Peoples: A View of Indigenous Peoples in the Philippines," LRCKSK, Unpublished Policy Paper, 1999. A section of that paper is annexed for ready reference.

Development agencies should be aware that devising programs based on continuing the categorization of Filipinos into indigenous and non-indigenous is an act which is historically and culturally bound. Because it is used to address historically created disadvantages, the distinction needs to be temporary. Because it is a cultural construct, we should always be aware of what other relevant categorization of collectives of human beings that it hides. There is no universal nor unambiguous definition of who are indigenous peoples.

Whoever works for indigenous peoples should therefore craft *an operational definition* which will be heavily informed by its agenda. The operational definition should not be considered as a given but a subject of periodic evaluation.

A number of criteria however have been developed to recognize the identities of indigenous peoples. The National Commission on Indigenous Peoples (NCIP)[133] lists 110 ethnolinguistic groups as belonging to its official category of indigenous peoples partly based on these criteria, NCSO statistics and the categories that it had inherited from the past[134]. NCIP believes that indigenous peoples constitute seventeen percent (17%) of the total population occupying about five million hectares of a total of thirty million hectares of land area.[135] NCIP however admits that they have no way at present to validate the population figures.[136] Nor is it believable that their estimate of total land area occupied has been empirically verified. Depending on how one defines who indigenous peoples are as well as what it means for them to possess or occupy land, the figures could be larger.

Maintaining categories of Filipinos based on being "indigenous" continues but only temporarily corrects the political agenda of the colonizers. Except for those who are naturalized, all Filipino citizens and their ancestors are indigenous in a sense. The distinction however was started by the Spaniards when they made distinctions between those who were pagan "feroces" and those who were *binyag* (baptized). After the Treaty of Paris, the American's following the suggestions of the Philippine Commissioiner later Secretary of the Deparment of Interior, Dean Worcester, the Bureau of Non-Christian Tribes was created. This was the predecessor of the Bureau of National Integration (BNI), the Philippine Agency for National Minorities (PANAMIN), the Office of Southern Cultural Communities (OSCC) and the Office of Northern Cultural Communities (ONCC).

Officially therefore the view of indigenous peoples as backward and barbaric that had been the interpretation of the Court since *Rubi v. Provincial Board of Mindoro*[137] has

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

134 Its predecessor agencies were the Bureau of Non Christian Tribes (early American Period), Bureau of National Integration (Commonwealth), Presidential Agency for National Cultural Minorities or the PANAMIN (Martial Law), Office of Southern Cultural Communities or the OSCC (post edsa) and the Office of Northern Cultural Communities or the ONCC. The Indigenous Peoples Rights Act provide security of tenure for civil servants of the OSCC and the ONCC from Assistant Director down.

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

136 Interview with Atty. Ruben Lingatin, Chair, NCIP, March 2003. According to Atty. Lingatin it would take about one million pesos more or less to include one question in the survey instruments of the NCSO.

137 39 Phil. 660 (1939). The racial slurs have been apparent in other cases such as U.S. v. de los Reyes, 34 Phil. 693 (1916), People v. Cayat, 68 Phil. 12 (1939) and Sale de Porkan v. Yatco, 70 Phil.161 (1940). People v. Cayat defined the concept of classification in the principle of equal protection before the law.

been changed. Defining "non-christian" peoples, the revered Mr. Justice Malcolm in that case wrote –

> "In resume, therefore, the legislature and the judiciary, inferentially, and different executive officials, specifically, join in the proposition that the term "non-christian" refers, not to religious belief, but, in a way, to geographical areas, and more directly, *to natives of the Philippine Islands of a low grade of civilization, usually living in tribal relationship apart from settled communities*."[138] (emphasis ours)

The specific use of the term "indigenous cultural communities" in the Constitution was a constitutional recognition of the intricacies and complexities of culture and its continuity in defining ancestral lands and domains.[139] The choice of "Indigenous Peoples" in the IPRA as well as the recognition and promotion of their rights was a departure from the negative stereotypes instilled by our colonizers. These prejudices against the "cultural minorities" and the "non-christian tribes" effectively pictured indigenous peoples then as backward and therefore incapable of reasonable resource management.

In a way, maintaining the distinction between indigenous and non-indigenous is a way of providing for some affirmative action, some way to correct a historical injustice by specifically defining more rights and entitlements for those who were systematically discriminated in the past.[140]

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

The Cordillera region comprises the provinces of Abra, Kalinga, Apayao, Mountain Province, Ifugao and Benguet. This is home to the Tingguian or Isneg (Abra), Kalinga (Kalinga), Bontok (Mountain Province), Kankana-ey (Mountain Province and Benguet), Ifugao (Ifugao), Kalanguya (Benguet and Mountain Province), and the Ibaloi (Benguet).

The Sierra Madre Mountain range span the breath from Isabela in Northeast Luzon down to the Bicol region in Southeast Luzon. This is home to the Agta and the Dumagat (Quezon and Rizal Province), the Remontado (Rizal) and the Ati (Bicol Provinces).

The Caraballo Mountain range starts from the southeastern portion of the Northern Cordilleras and joins it with the Sierra Madres. Here will be found the ancestral territories of the Ikalahan, Kalanguya, Isinay, Ilonggot or Bugkalot who occupy the provinces of Nueva Viscaya and Quezon.

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[138] 39 Phil. 660, 693 (1939)

[139] See for instance exchange between Regalado, Davide and Bennagen, 4 Records of the Constitutional Commission, 33-34 (August 28, 1986) during the Second Reading of P.R. No. 533. The definition of Indigenous Peoples is further refined in section 3 (h) of the challenged law.

[140] See LRCKSK, Memorandum for Intervenors, Cruz v. NCIP, 2000 in LRCKSK, A DIVIDED COURT 2001.

The Ayta is traditional to the provinces of Zambales and Bataan. They are also found in Tarlac, Nueva Ecija and Pampanga.

"Mangyan" often refers to indigenous peoples found in Mindoro Island found south of Luzon. This general reference however refers to several peoples which include the Iraya, Alangan, Tau-Buhid (or Tawbuid), Tadyawan, Buhid and the Hanunuo. All of these peoples posses their own language and have distinct practices.

Palawan island is a separate province in itself and is found to the southwest of Luzon. It is home to the Batak, the Tagbanua and the Palawanon.

Scattered in the Visayan Islands are small groups of Ati peoples. There are also various Buhid groups found in Negros Islands.

Mindanao, the second largest island is home to a large number of indigenous peoples collectively referred to as the "lumad". Among the various indigenous peoples groups in Mindanao are the Mamanwa, Higaonon, Banwaon, Tala-andig and Manobo of the Agusan-Surigao region; the Mandaya, Mansaka, Ata-manobo, Mangguangan, Dibabawon, Bagobo, Tagkaolo and K'lagan in the Davao provinces; the B'laan, T'boli, Teduray, Tiruray, Ubo and the Manobo of the Cotabato provinces; the Bukidnon, Higaonon, Tala-andig and Manobo of the Bukidnon and Misamis provinces; and the Subanens of the Zamboanga peninsula.

However, several severe limitations need to be understood when dealing with the current list of indigenous peoples based on ethnolinguistic affiliation.

First, the categories as well as the statistics are class and gender blind[141].

For instance, while many households of indigenous peoples are still very dependent on agriculture the NCIP do not reveal the exact relationship of indigenous peoples' households to agricultural production or use or development of natural resources. Their data can not validate the claim that many indigenous peoples in Northern Mindanao are becoming farmworkers more rather than owner cultivators[142] or the causes of these phenomenon. They do not differentiate between the farmer-gardeners among the Kankanaey and Bontok and the tenant farmers of Ifugao peoples in their rice terraces. They do not also capture the reality that while some indigenous peoples have diversified their crops, many have retained traditional methods for staple crops (eg. rice and corn).

Categorizing indigenous peoples based on ethnolinguistic affiliation also fails to capture the differences among groups which have had a greater possibility for upward mobility and those that are still especially economically vulnerable. For instance, indigenous communities in the Cordillera have greater possibilities of succeeding through education as compared with groups in Palawan and Mindoro. Thus, it is more likely that there would be a lawyer from most of the groups in the cordillera than from the Batak of Palawan or any of the Mangyan groups in Mindoro.

[141] There are no available statistics that could reveal these more useful categories.

[142] Intervention of Datu Tony Lumadnong (Higaonon), Focused Group Discussion, Cagayan de Oro, March 2003.

Neither is the government sensitive to making distinctions among indigenous groups or among communities within ethnolinguistic groups in so far as their dependence on natural resources are concerned (eg forest dependent vs non forest dependent, small scale miners, those dependent on tourism et al.)

More importantly, statistics for indigenous peoples groups do not identify the number of women within the population and fail to distinguish roles that they have taken within communities in general.

It is difficult to make these generalizations within an ethnolinguistic group much more so among all those considered as indigenous peoples. All of these categories will be extremely important for any intervention for any development agency. Priority should be given to indigenous peoples that are still vulnerable in terms of their livelihood. This would most likely be communities that are still agricultural and have had the least possibility for upward mobility. If found within areas which are resource rich, their economic vulnerability will also most likely translate to political vulnerability as government and commercial interests take advantage of their poverty.

Second, some of the categories which are based on language fail to make distinctions within groups.

For instance, the Subanen (number 91 in NCIP's list) is considered as one ethnolinguistic group. However the reality is that this classification is comprised of a number of communities speaking different dialects and occupying territory in northwestern Mindanao which stretches from the Zamboanga peninsula to Misamis Oriental. They share in many customary political structures, such as multilevel *timuay* (village leader) but differ in details regarding their customary laws. The Kalinga peoples are grouped into *ili* (villages) some of which are *binodnan* areas or areas that still use the *bodong* (peace pact) negotiated through their *pangat* (peace pact holder). A minority of the villages however do not have this institution either because it has not been used or had not been present customarily.

The existence of at least one of those identified by the NCIP as a legitimate indigenous peoples group, the *Tasaday* (number 96), is even questionable among anthropological circles.[143]

Significantly, categorizing based on ethnolinguistic affiliation fails to capture the discussions and debate within communities regarding the use of customary law, their relationship to outsider's culture, the role of local government institutions vis-à-vis their own customary political units et al. The cultures of almost all indigenous communities in the Philippines are open to interactions with outsiders. In fact, it is possible to identify many customary norms in some of them which pertain to rules governing treatment of "aliens". Their various histories also show a great deal of trade and other forms of contact with other indigenous groups even those coming outside the Philippines. As a result, cultures have been dynamic. They have evolved in various ways as a result of

[143] See for instance University of the Philippines v. Court of Appeals, where the existence of the Tasaday was a tangential issue between anthropologists like Elizalde and Bailen. NGOs working with indigenous peoples are aware that the existence of the communities labeled as Tasaday is real but the attribution of a separate category might be due to the political and economic interests of Elizalde who was then Chair of the PANAMIN.

interaction with outsiders and changes in the economic, political and social system outside their communities.

Within their communities, there are a number of ways in which the dimensions of the interfaces between indigenous culture and the outside world is discussed. Again, there is significant variation among communities within ethnolinguistic groups as to how this discussion takes place or whether it takes place at al. For instance, younger *datu* (community leader) may debate with elder *datu* on how non-formal education institutions should be set up within their community.[144] Community reactions as to how gender issues are discussed with communities by outsiders (which includes NGOs) may reveal their preferences as to this interface.[145]

Ethnolinguistic categories identify groups but do not suggest a priori assumptions about the dynamics of their communities and the individuals within them.

Third, the implicit distinction between Muslim indigenous peoples and non-muslim indigenous peoples has been carried over in the list of the NCIP. The NCIP wrongly does not consider them as indigenous peoples.

Many members of communities within specific ethnolinguistic affiliations have embraced Islam as a religion. Identification dominantly based on the political agenda of Muslim collectivities is largely due to a common history of discrimination and oppression. They were minoritized also because of their religion which, as part of the colonial agenda, was kept at the fringes considered from the government center of the Philippine Republic.

The distinction between muslim/moro indigenous peoples and the non-muslim indigeneous peoples might make sense in terms of defining the political institutions that meet demands for genuine autonomy and the relationship of the *sharia* to these autonomous areas.

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

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

[144] Intervention of Datu Tony Lumadnong, Higaonon, Focused Group Discussion, Cagayan de Oro, March 2003.
[145] Focused Group Discussion, Davao City.

Table

Ethnolinguistic goup from NCIP prspective[146]

1	Adasen	41	Gubatnon (Mangayan)	81	Mandaya
2	Abelling/ABorlin	42	Hanunuo (Mangayan)	82	Palaranum
3	Aeta	43	Hanglulo	83	Pullon
4	Aeta/Abiyan	44	Higaonon	84	Palawanon
5	Agutayon	45	Itneg	85	Remontado
6	Agta	46	Inlaud	86	Ratagnon (Mangyan)
7	Alangan (Mangyan)	47	Ibaloi	87	Sulod
8	Applai	48	Ibanag	88	Sama (Badjao)
9	Ata-Matigsalog	49	Igorot	89	Sama/ Samal
10	Ati	50	Ifugao	90	Sama/ Kalibugan
11	Arumanen	51	Itawes	91	Subanen
12	Balatoc	52	Ikalahan/Kalanguya	92	Sangil
13	Binongan	53	Ilongot/ Bugkalot	93	Tadyawan (Mangyan)
14	Bago	54	Isinai	94	Talaandig
15	Bontok	55	Isneg/ Apayao	95	Tigwayanon
16	Balangao	56	Iwak	96	Tasaday
17	Baliwen	57	Iraya (Mangyan)	97	Tuwali
18	Barlig	58	Itom	98	Talaingod
19	Baluga	59	Ilianen	99	Tagabawa
20	Batak	60	Ivatan	100	Tingguian
21	Batangan/ Tao Buid	61	Kirintenken	101	Tao't Bato
22	Buhid (Mangyan)	62	Kalinga	102	Tagkaolo
23	Bantoanon	63	Kankanaey	103	T'boli
24	Bukidnon	64	Kalanguya	104	Tiruray/ Teduray
25	Badjao	65	Kalibugan	105	Umayamnon
26	Bugkalot	66	Kabihug	106	Yakan
27	B'laan	67	Kalagan	107	Yogad
28	Bagobo	68	Langilad/Talaingod	108	Zambal
29	Banwaon	69	Masadiit	109	Banac
30	Coyonon	70	Maeng	110	Ubo
31	Cimaron (Agta)	71	Mabaca		

[146] NCIP, Indigenous Peoples Rights, undated document.

32	Camiguin	72	Malaueg		
33	Danao	73	Bangon (Mangyan)		
34	Dibabawon	74	Magahat/ Corolanos		
35	Dumagat	75	Manobo		
36	Eskaya	76	Manobo Blit		
37	Gubang	77	Mangguangan		
38	Gaddang	78	Mamanwa		
39	Giangan	79	Mansaka		
40	Guinan/Clata	80	Matigsalog		

Annex B

Context of IPRA

Excerpts from the Author's Papers

On November 22, 1997, the Indigenous Peoples Rights Act[147] became effective. This was the result of close to ten years of advocacy within legislative forums.

For the advocate, it is never sufficient to know only what the law contains. Laws are not sterile mechanisms that stand apart from the dynamics of society. Whether national or international, they exist because relevant political players see its historical value. At times it is not even its implementation but the fact of its enactment that makes for good political copy. It is thus important to examine, if only cursory, the context of the Indigenous Peoples Rights Act.

Community struggles

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

Examples of campaigns against public or private infrastucture projects include the concerted action against the Chico River Hydroelectric Dam Project in the 1970s, the Task Force Sandawa campaign against the Commercial Geothermal Power Plant in Mt. Apo in the early 1990s, the coalition against the Agus River Project in Mindanao, and the present day efforts to block the construction of the San Roque Multipurpose Dam in Benguet.

Examples of actions against commercial extractive natural resource industries include the campaign to declare a commercial logging ban in the 1980s, the public furor over tree plantations styled as Integrated Forest Management Agreements (IFMAs), and the present concerted efforts against the Philippine Mining Act of 1995 and its implementing rules and regulations.

Projects that masquerade as sustainable development projects that have drawn concerted and relatively organized campaigns include contract reforestation, the Community Forestry Program and even the National Integrated Protected Areas Project.

[147] Rep. Act No. 8371 (1997)

In many of these struggles, transnational corporations or international financial institutions have had large influences.

In most of these actions, communities have involved themselves in direct action. In the Cordillera peoples struggle to stop the Chico River Hydroelectric Dam campaign the bodong (or peace pact) along with its threat of violence as part of the communities effort to defend itself has been resorted to along with other creative activities. In the Sandawa campaign, the dyandi (peace pact) evolved along with blockades have been used. In Lamcuah, South Cotabato B'laan families physically reoccupied strategic portions of DOLE Philippines' pineapple plantation to force a settlement based on their claims to their ancestral lands. In Carmen, North Cotabato, reoccupation of ancestral domains of the Manobos was also used in order to gain leverage against the encroachment of the Bureau of Plant Industry. In Davao del Norte, there is still an ongoing pangayao (tribal war) declared by the Ata-Manobo against the tree plantation activities of a corporate holder of an Integrated Forest Management Agreement (IFMA).

As a response to continuing encroachment, non-governmental organizations, coalitions and alliances have been set up for the principal purpose of partnering with indigenous peoples in their continuing struggle for self determination. Aside from the local communities and their organizations[148], there are also strong independent national[149] and regional[150] federations of indigenous peoples toughened by the subtle and coercive actions of the State. It is also hardly surprising, given the reality of this issue that formations such as the National Democratic Front[151] include recognition of the right of indigenous peoples to their self-determination as part of their political platform.

It is common if not a standard for these non-governmental actors to evolve alliances with international organizations and participate in various international forums.

Direct actions, statements of positions on issues and features on indigenous peoples have been reported by various local, national and international media. Some have even produced response from the international community. Not a few of these issues have elicited public statements, not only from government officials, but also from their corporate sponsors.

The Post Edsa governments attempt to respond

148 KALASAG in Surigao del Sur for instance include seven communities; the Ancestral Domain Committee (ADC) in Agusan is a coalition for the genuine recognition of Ancestral Domain of communities in the Caraga region and in Surigao Sur.

149 Examples include the Kalipunan ng Katutubong Mamamayang Pilipino (KAMP).

150 "Regional" depends on one's standpoint. Formations include the Cordillera Peoples Alliance (CPA), the SAKABINSA in the Sierra Madres, KPLN and SBMM in Mindoro, NATRIPAL in Palawan, Lumad Peoples Federation in Mindanao. There are also loose networks such as the Cordillera Peoples Forum (CPF) and the PANAGTABO in Mindanao.

151 Item 14, National Democratic Front Agenda (undated). "The revolutionary movement will always recognize and respect the right of minorities to self determination, ranging from the right to autonomy under a non-oppressive state to the right to secede from and revolt against an oppressive state….The revolutionary movement consistently supports the minorities and their organizations in their struggle for self determination and encourage them to aim for democracy and all-round progress according to their own will, conditions, and needs. Sison, Jose Ma. , The Philippine Revolution: The Leader's View,173 (1989).

Traditional politicians survive by accommodating public interests. Whatever their real agendas are in the official position that they hold, they could not do away with the fiction that they too have to respond to public issues that catch media and public attention.

Thus, every President after the EDSA revolution, from the first State of the Nation address of President Corazon Aquino[152], to the last State of the Nation address of President Fidel V. Ramos[153], the agenda of Joseph Ejercito Estrada and finally the first State of the Nation Address of Gloria Macapagal Arroyo.

Even government sponsored initiatives for consultation revealed the extent of advocacy for indigenous peoples rights. The National Unification Commission[154] tasked with consulting with various sectors in order to recommend a viable peace process reported in 1993[155], as part of the government's effort to pursue a strategy of addressing the root causes of the conflict, the need to come out with a viable ancestral domain law. This eventually also found its way in to the present government's social reform agenda[156]. The passage of the Indigenous Peoples Rights Act had always been a major component of this agenda.[157]

Perhaps in part as a show of bravado to communities struggling against encroachment, and in part to blunt criticism towards its economic program, the then President Fidel V. Ramos recognized the policy and administrative failures of the past which led to the conversion of important forest lands to unsustainable production modes. In a policy speech before the influential International Tropical Timber Organization (ITTO) he declared:

> "Forestlands and resources were regarded as open-access resources, benefitting only those with financial and political clout. The administrative system itself was biased in favor of those with vast influence, and biased against indigenous peoples and local communities."

He went on to declare:

> "This community-based strategy stems not out of a theoretical view of rural communities and people empowerment. It is based, in fact, on an objective assessment we have made of the state of our resources, environment and population."
>
> "That is why we are determined to restore the rights of local communities and indigenous peoples to the

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[152] July, 1988.

[153] In the context of bills included in the Social Reform Agenda that should be passed. July 1997.

[154] Created by Exec. Ord. No. 19, September 1, 1992.

[155] Exec. Ord. No. 125, September 19, 1993. The term of the NUC ended in July, 1993.

[156] Exec. Ord. No. 203, September 27, 1994 created the oversight committee.

[157] Statement of Usec. Buendia of the Social Reform Council at the Local Peace Partners Conference sponsored by the Office of the President Adviser for Peace (OPAP), December 4, 1997.

> enjoyment of our natural resources. People who are organized, who have a real stake in the forest, who have effective ownership, acknowledged rights of use, and who have accepted the protection and management responsibilities over these forests can now be depended on to achieve our vision of sustainable management of natural resources."
>
> "We believe that only by empowering organized local communities and indigenous peoples would we be able to arrest the degradation and loss of our forests. That is the core of our sustainable management of our forests."

As to corporate interests, the President stated:

> "We therefore envision a scenario where primary production of raw materials is done by organized communities while secondary and further value added processing, distribution, marketing are handled by the corporate sector."[158]

It was therefore ironic that at the same forum, the delegates approved two projects that encroached upon the Ancestral Domain of Manobos in Surigao and favored a local logging concession.[159]

Congressional hearings were also held focusing on particular community interests and also on major themes involving indigenous peoples rights. Before the EDSA putsch in 1986, there were already some attempts to address the land struggle of indigneous peoples. This included Rep. Act No. 3872 otherwise known as the Manahan amendment which allowed the process of completion of imperfect titles for lands occupied by "national cultural minorities" regardless of whether this lands were classified as alienable and disposable.[160] Pres. Dec. No. 410 already introduced the concept of making a five (5) hectare grant of Land Occupancy Certificates to "national cultural minorities" over specific areas.[161]

After 1986, in recognition of the strong advocacy, there were some pieces of legislation that incorporated some concept of ancestral land.[162] The Comprehensive Agrarian

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158 Speech of Fidel V. Ramos, "The Philippine Strategy for Sustainable Development," Opening Ceremonies of the 20th Session of the International Tropical Timber Council (ITTC) and the International Tropical Timber Organization (ITTO), Manila Hotel, Manila, Philippines, 10:30 am, May 15, 1996.

159 KALASAG, an organization of seven communities retained LRC-KSK to respond to a letter from the PENRO Edilberto S. Buiser requiring them to give access to a Sustec Biodiversity Assessment Team funded from the ITTO (PD 35/96 Rev. 2 (f) projects. Letter, November 14, 1997.

160 Adding Section 48-c of Com. Act No. 141. This was however deleted by Section 4, Pres. Dec. No. 1073. The Manahan amendment came after Congress commissioned a study on the condition of cultural minorities.

161 Pres. Dec. No. 410 (March 11, 1974). This was possibly in response to the Chico River Dam Project opposition and the pending arrival of the IMF Board of Governors in the Philippines. The decree was so unknown and involved a process so cumbersome that there is no record as to whether there was any application.

162 Among others that have mentioned ancestral lands are Exec. Ord. No. 122 (A,B,C creating the Offices of Northern Cultural Communities, Office of Southern Cultural Communities, Office of Muslim Affairs), Exec. Ord. No. 229 (1987, preceding the Agrarian Reform Law), Exec. Ord. No. 292 (1987, instituting the Administrative Code), Rep. Act No. 6657

Reform Law provided that ancestral lands will be dealt with by the Presidential Agrarian Reform Council and that agrarian reform could be suspended over ancestral lands in order that it be "identified and delineated."[163]

The National Integrated Protected Areas Law also allowed indigenous peoples to participate in the Protected Area Management Board[164] and provided that they should not be relocated without their consent.[165]

Even the Small Scale Mining Law[166] and the Philippine Mining Act[167] also had to succumb to some lobby to enact some provisions that had some relation to Indigenous Peoples.

The approach to ancestral land recognition was initially piecemeal. In most of the early efforts it simply protected the right of the indigenous community to possess. In others, it also required studies to be done. Every regular Congress since 1988 however had some form of Ancestral Domain Bill pending in their chambers.[168]

The Department of Environment and Natural Resources, having borne the brunt of community criticisms also had to respond.

Thus in 1991, responding to a concerted lobby coming from the Baguio Benguet Indigenous Cultural Communities Council (BBICC), Secretary Fulgencio Factoran[169] issued a Special Order[170] which constituted a task force to oversee the delineation of ancestral lands in the Cordillera. This was initially in response to the threat in Baguio City to speed up processing of townsite sales applications. The initial concept was to require the DENR to process applications for a Certificate of Ancestral Land Claim. This

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(1988), Rep. Act No. 6734 (1989, creating the Autonomous Region of Muslim Mindanao), Rep. Act No. 7076 (1991), Rep. Act No. 7586 (1992), Rep. Act No. 7611 (1992, adopting the strategic environmental plan of Palawan et al.), Rep. Act No. 7942 (1995).

163 Section 9, Rep. Act No. 6657 (1988).

164 Section 11, Rep. Act No. 7586 (1992).

165 Article 13 provides: "Ancestral Lands and Rights Over Them. - Ancestral lands and customary rights and interest arising shall be accorded due recognition. The DENR shall prescribe rules and regulations to govern ancestral lands within protected areas: Provided, That the DENR shall have no power to evict indigenous communities from their present occupancy nor resettle them to another area without their consent: Provided, however, That all rules and regulations, whether adversely affecting said communities or not, shall be subjected to notice and hearing to be participated in by members of concerned indigenous community." Section 4 (d) provided for a definition for Indigenous Cultural Communities as "a group of people sharing common bonds of language, customs, traditions and other distinctive cultural traits, and who have, since time immemorial, occupied, possessed and utilized a territory".

166 "Sec. 7. Ancestral Lands. - No ancestral land may be declared as a people's small-scale mining area without the prior consent of the cultural communities concerned: Provided, That, if ancestral lands are declared as people's small-scale mining areas, the members of the cultural communities therein shall be given priority in the awarding of small-scale mining contracts." See also Section 9, Rep. Act No. 7076 (June 27, 1991). As of this writing many have criticized this law as being ineffective.

167 Section 16, Rep. Act No. 7942 (March 3, 1995) provides "Opening of Ancestral Lands for Mining Operations. - No ancestral land shall be opened for mining operations without the prior consent of the indigenous cultural community concerned." Section 3 (a) defines ancestral land as "all lands exclusively and actually possessed, occupied, or utilized by indigenous cultural communities by themselves or through their ancestors in accordance with their customs and traditions since time immemorial, and as may be defined and delineated by law." This contains two concepts of ancestral land. See Leonen and Begonia, Mining: Legal Notes and Materials (1996).

168 S.B. 909 (1988) introduced by Estrada and Rasul, H.B. 595 (1992) introduced by Andolana are noteworthy examples.

169 Factoran was later given the honorary Ibaloi name "Kafagway" for this act.

170 Special Order No. 31, s. January, 1991.

would give the occupant rights to possess, fence and exclude the area from the operation of grants from townsite sales applications. Before its issuance, the Special Order was expanded so as to cover the entire Cordilleras. This project was eventually expanded to cover Palawan.[171]

In 1993, as a result of the studies of the USAID funded Natural Resource Management Project (NRMP), a proposed Administrative Order[172] was signed by then Secretary Angel Alcala. This administrative order allowed the delineation of ancestral domains by special task forces and ensured the issuances of Certificates of Ancestral Domain Claims (CADC) or Certificates of Ancestral Land Claims (CALC). This ensured possession and the right not to be included in any prospective DENR project.

Responding to public clamor and pressure from international funding institutions[173], DENR even had to address the socio-cultural aspects of their commercial programs. The Asian Development Bank for instance provided a loan and technical assistance to develop policies within the Philippines' forestry sector.

Thus, aside from allowing community organization to apply for an agreement to establish an industrial tree plantation[174], the initial regulation for Industrial Forest Management Agreements (IFMA) also included a condition that it respects the rights of other forest users.[175] Subsequent revisions added more requirements on notification[176], actions on objections expressed from concerned individuals and communities[177] and additional responsibilities of IFMA holders[178]. Responding to a concerted campaign, it even provided for giving priority in favor of ancestral land claims[179] and required community consultations.[180]

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171 DENR Admin. Ord. No. 61, s. November, 1991.

172 DENR Admin. Ord. No. 2 (1993).

173 Asian Development Bank (ADB) has a loan and several technical assistance projects for IFMA. Loan No. 1106-PHI is for $ 25 million. Technical Assistance No. 1577-PHI is for the "Management, Supervision and Institutional Inspection to the Industrial Forest Plantation Program". Technical Assistance No. 1578-PHI is for "Tree Improvement and Industrial Tree Planting." Experience in advocacy of key staff from the LRC-KSK witnessed involvment of ADB staff on specific aspects of the implementation of this project.

174 Sections 2.1, 7.4 of DENR Admin. Ord. No. 42, s. 1991 (August 22, 1991). This was of course unimplementable since communities would not be able to put up the capital requirement and many did not want to engage simply in monoculture. DENR would later outdo itself by issuing guidelines in 1997 for Socialized Industrial Forest Management Agreements (SIFMA).

175 Section 13, DENR Admin. Ord. No. 42, s. 1991 (1991). This provides: "13.1.9. The Lessee shall not unreasonably impede, obstruct or in any manner prevent the passage of legitimate licensees, lessees, permittees, and/or other forest users and the public, by virtue of the IFMA."

176 Section 2, 8, DENR Admin. Ord. No. 60 (1993).

177 Section 8.2, DENR Admin. Ord. No. 60 (1993).

178 Section 20.11, DENR Admin. Ord. No. 60 (1993).

179 "Section 2 of DENR Admin. Ord. No. 60 provided that "Conflict of IFMA Areas with other DENR Projects - In view of DENR thrusts on community based forest management, the recognition of ancestral land claim and protecting the integrity of IPAS sites; projects such as ISF, CFP, IPAS and ICC claims in accordance with DAO 2, 1993 and similar projects shall be given priority over IFMA Areas in cases of conflict."

180 DENR Mem. Ord. No. 15 (July 13, 1994) provided "Sec. 3.1.4. Community consultations - Upon verification of the availability and suitability of the area for IFMA, the concerned CENRO in coordination with its ancestral land desk officer shall prepare public notices to concerned communities that the area is being considered for IFMA following the format shown in Annex "A". Within thirty (30) days upon written notice, the CENRO, shall in coordiantion with the concerned LGU's, conduct a consultation meeting with the community residents/representatives. Depending on the outcome of the consultation, the CENRO shall either exclude the controverted portions of the proposed IFMA Area or prescribe special conditions to be included in the IFMA. Where there are ancestral domain or land claims, procedure to check and verify their claims in accordance with DAO No. 2, s. 1993 and other pertinent regulations on the matter shall be initiated."

The Department of Agrarian Reform (DAR) also had very short lived campaigns that attempted to address ancestral domain claims with the issuance of Certificates of Land Ownership Awards (CLOAs).[181] Today, local units of this agency still issue these certificates or Certificates of Beneficiary Claims (CBCs)[182] that would entitle the holders to some form of support services.

The international environment

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

In 1988, the World Bank issued a study entitled "Forestry, Fisheries and Agricultural Resource Management Study"[183] which made the assertion that:

> "The natural resource management question in the Philippines is inextricably bound up with the poverty problem. . .The issue is also closely related to the problem of unequal access to resources, and *this study concludes that any strategies for improving natural resource management will founder if they do not simultaneously address the issues of impoverishment and unequal access*."[184] (emphasis provided)

Referring to Pres. Dec. No. 705 or the Revised Forestry Code, it went on to specifically observe with displeasure that forest occupants were technically considered as squatters and that their numbers were understated.[185]

This study provided the technical backdrop for subsequent World Bank projects in the Philippines and imposed a heavy pressure on the Philippine government to seek alternative ways to recognize tenure for upland occupants.[186] The financial resources to come out with draft legislation for a National Integrated Protected Areas Law also came from the World Bank.

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181 In the Cordilleras this was called "Operation Higland Wind" under then Regional Director Llames. (1991).

182 In the Cordilleras, under a program managed by Regional Director Aydinan.

183 This is also known as the Ffarm Study. This study was done by Country Department II, Asia Region. The White Cover version was distributed for comment on May 16, 1988.

184 Executive Summary, World Bank, Ffarm, I (1988). See also p. 58, 81 which defines the core strategy.

185 World Bank, Ffarm, 52 (1988). The passage reads: "4.31. Dwellers in the public forest have become illegal occupants as a result of this legislation and a series of measures was implemented to control settlement and land use, and to resettle farmers from within forest land. Those affected included both indigenous communities, who used predominantly swidden agriculture practices, and recent migrants who imported lowland technology to the hills. Regardless of the length of occupancy, forest land occupants are legally considered as squatters, and their numbers were chronically understated in official statistics."

186 See for instance the Environment and Natural Resources Sectoral Adjustment Loan (ENR-SECAL) and its relation to the enactment of Rep. Act No. 7586 or the National Integrated Protected Area Systems Law in 1992.

The influence of the Asian Development Bank was even more specific. A technical assistance granted to the government through the DENR resulted in a Master Plan for Forestry Development. Like the World Bank study, it called attention to the minimal participation and benefits that reached upland farmers.[187] It recognized the claims made by cultural communities to their ancestral lands and goaded government to proceed to survey, delineate and give them privileges to manage forest resources.[188]

The Master Plan also proposed a policy to "recognize the right of indigenous cultural communities to their ancestral domain" and provided for a rough timetable for its accomplishment.[189]

Subsequently, the Asian Development Bank became heavily involved in the natural management sector. On the one hand it provided funds for contract reforestation[190] and, after its debacle, the present community forestry program[191]. On the other, it provides the loan for the Industrial Forest Plantation Project[192]. Two technical assistance grants for the same program were approved[193]. The initial negotiations for the Second Forestry Sector Loan included funding for ancestral domain recognition. However, before the loan documents were submitted for Board approval this proposal was scuttled.

Parenthetically, international financial institutions like the World Bank and the Asian Development Bank have been the focus of a lot of advocacy from peoples and non-governmental organizations[194]. In 1994, partly as a result of this lobby, some governments notably the United States refused to allow a general capital increase of the Asian Development Bank unless projects addressed social and environmental concerns.[195] This resulted in crucial meetings of the Task Force on Project Quality in 1995 and in the existing policy of the ADB to allocate 50% of its resources to "soft projects" as opposed to the "hard" infrastructure projects. The forestry programs for the Philippines fall under the category of soft projects.

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[187] The passage read: "There is very little participation of upland farmers and community members except as laborers in the concession or processing plant. Having very minimal or no participation at all, upland farmers do not benefit or have very little benefit from the use of the resource. To promote a true participation of the people in the use of and to benefit from the resource, a policy of active participation of the people in the use of and to benefit from the resource, a policy of active participation is necessary. The leasehold mode of access in various sizes is recommended."

[188] DENR, Master Plan for Forestry Development, 324-325 (1990). Thus, "Some portions of the public forest lands are the subject of claims by cultural communities as ancestral lands. These same lands are also the subjects of conflicting claims by migrant farmers. These claims have impeded the development of the uplands. The government should now recognize authentic claims of indigenous cultural communities, survey and delineate the areas, and grant the privilege to the communities to manage the forest resources within the claims."

[189] DENR, Master Plan for Forestry Development, 331-332 (1990). 1991 to 1992 was supposed to be used to "clear the concept", 1992 to 1993 was allocated for "piloting" and 1993 to 1995 was "plan implementation."

[190] ADB First Forestry Program Loan, Loan No. 889-PHI, $ 60 million, approved on June 28, 1988.

[191] ADB Second Sector Program Loan, Loan No. 1466-PHI, $100 million, approved on Jaunuary 2, 1991.

[192] ADB Loan No. 1106-PHI, $25 million approved on October 17, 1991.

[193] Tech. Asst. No. 1577-PHI "Management, Supervision and Institutional Inspection to the Industrial Forest Plantation Program," $683,500, approved on October 17, 1977. Tech. Asst. No. 1578-PHI "Tree Improvement and Industrial Tree Planting," $535,000, approved October 10, 1997.

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

[195] 27th Board of Governors Meeting in Nice, France (May, 1994).

The US Agency for International Development (USAID) through its Sustainable Natural Resource Assessment Report also as early as 1989 already made almost the same observations as the World Bank and the Asian Development Bank.[196]

It was not until 1992 through the US Agency for International Development that real funding came in to devise legal instruments for drafting executive issuances.[197] This resulted in the technical draft of DENR Admin. Ord. No. 2 which became the main delineation program from 1993 to 1997. This was also the basis for the delineation process outlined in the Indigenous Peoples Rights Act.

Obvious in the policy recommendations from these agencies were linkages between conservation or natural resource management and indigenous peoples. Very little had been said about recognizing their rights to correct historical injustices.

Since Indigenous Peoples concerns have been closely linked with well funded ecological concerns, it is no wonder therefore that there has been an unfortunate prevailing view that their rights should be recognized only because they would be better ecological managers. Thus, the new law provided an obligation to reforest[198] and to condition rights recognition to a priority for watersheds.[199]

The obligations to ensure ecological stability do not attach to any other private owner except those that wish to hold ancestral domains. Also, the determination of whether or not a particular part of the domain is necessary for critical watersheds is to be done by the appropriate agencies with the "full participation" of the ICCs/IPs concerns. During the deliberation in the House of Representatives, LRC-KSK formally presented a

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[196] USAID Project No. 398-0249, September 1989. Thus, "The team sees four general areas where support to land tenure development and application is needed: coastal common lands, such as mangroves and coral reefs; A & D lands; upland agriculture development on variously held lands; and upland tree farm or agroforestry developments. We recognize that this is a very sensitive and legally difficult area. Protection from abuses and prevention of potentially catastrophic upland land rushes are necessary. Moreover, between an absence of sound survey data, a poor census base, conflicting legal and quasi-legal land claims, and a very modest ability to process land tenure paperwork, it will not be a problem area easily resolved. Nonetheless, stable tenure for municipalities, barangays, and individuals, incorporating such concepts as "land to the tiller" where needed, appear to us to be a vital tool toward eliciting proper land (and area) protection behaviors. This appears to us to be a program that will largely involve DENR and DAR."

[197] USAID, Natural Resource Management Program, grant of $125 million. Task A was given the responsibility to draft policy and legal tenure instruments.

[198] Section 9, Republic Act No. 8371 (1997). This provides: "Responsibilities of Indigenous Peoples to their Ancestral Domains. – ICCs/IPs occupying a duly certified ancestral domain shall have the following responsibilities: (a) Maintain Ecological Balance. – To preserve, restore, and maintain a balanced ecology in the ancestral domain by protecting the flora and fauna, watershed areas, and other reserves; (b) Restore Denuded Areas. – To actively initiate, undertake and participate in the reforestation of denuded areas and other development programs and projects subject to just and reasonable remuneration; © Observe laws. – to observe and comply with the provisions of this Act and the rules and regulations for its effective implementation."

[199] Section 58, Republic Act No. 8371 (1997). This provides ""Section 58. Environmental Considerations. – Ancestral Domains or portions thereof, which are found to be necessary for critical watersheds, mangroves, wildlife sanctuaries, wilderness, protected areas, forest cover, or reforestation as determined by appropriate agencies with the full participation of the ICCs/IPs concerned shall be maintained and managed and developed for such purposes. The ICCs/IPs concerned shall be given the responsibility to maintain, develop, protect and conserve such areas with the full and effective assistance of government agencies. Should the ICCs/IPs decide to transfer the responsibility over the areas, said decision must be made in writing. The consent of the ICCs/IPs should be arrived at in accordance with its customary laws without prejudice to the basic requirements of existing laws on free and informed consent: Provided, that the transfer shall be temporary and will ultimately revert to the ICCs/IPs in accordance with a program for technology transfer: provided further, that no ICCs/IPs shall be displaced or relocated for the purpose enumerated under this section without the written consent of the specific persons authorized to give consent."

proposal to make this condition subject to "the prior informed consent" of the community. This however did not make it to the bicameral committee's technical draft.

The recognition of indigenous peoples rights is an aspect of human rights advocacy more than simply an environmental concern. These provisions clearly reflect how much of the environmental agenda has taken over the need to correct historical and social injustices.

Indigenous Peoples, Commercial Enterprises, Globalization and the Environment.

It is hardly surprising that it was the Department of Environment and Natural Resources that took responsibility for spearheading government's efforts to attempt to recognize rights to ancestral domains. Many of its local offices are found in upland areas where indigenous peoples affected by commercial natural resource extractive projects. It is also the most criticized in upland rural areas.

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

The result is an administration that has been eager to project its compliance with international environmental obligations and at the same time zealous to privatize its assets and utilities, deregulate so as to facilitate more private transactions and liberalize so that it becomes "competitive" to the world market. This agenda has proven to be contradictory especially in the natural resource management sector.

On the one hand this administration promulgated Philippine Agenda 21 or "A National Agenda for Sustainable Development" this year.[200] On the other, the budget of the principal agency that is supposed to operationalize community based programs as well as its performance show a different record.

A study of the 1998 to 2001 Department's budget proposals[201], drew the following conclusions:

First, despite policy rhetoric to the contrary, the government continues to support commercial forestry as the primary means for forest resource management in the country, regardless of the detrimental effects this type of forest management have on biodiversity, ecological sustainability, and community rights. Under the FY 1998 proposal, for the first time since FY 1995, funding for the DENR's commercial forestry support services *will exceed funding* for its SRA and CBFM programs;

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

[201] Legal Rights and Natural Resources Center (LRC-KSK), "Tinted Tiger: Some Truths About The DENR's 1998 Budget Proposal" (1997).

Second, community-based forest management programs continue to be primarily backed by foreign funding. The funding and implementation of these programs, furthermore, face the prospect of being cut by more than three-fourths. The political will of the Government to fully implement CBFM as its national strategy for sustainable forestry and social justice is doubtful. It also puts in question the constitutional framework for genuine community participation in this program.

Third, pollution control is still not a priority for the Government, notwithstanding the fact that under the DENR's own guidelines for drafting its budget proposal, environmental management (which includes pollution control) is ranked as the first priority program of the agency. The lack of sufficient funding for pollution control coupled with the minimal penalties imposed by current pollution control laws create a situation where Government legitimizes pollutive behavior through its inadequate action; and

Fourth, large-scale mining under Republic Act No. 7942 experienced a boom from 1998 to 2001, as the MGB gears up to fully implement the law and provide the necessary regulatory and support mechanisms needed for mining companies to take full advantage of the opportunities opened by the law by having its budget increased by more than four-fifths. These actions will occur despite community opposition to the implementation of the law and the adverse effects of large-scale mining on the environment and community rights. This simply highlights how the Government values commercial over community interests in the management of the country's natural resources.

The agenda of this administration is clearer when we note the various funding opportunities that this government has tapped in the name of indigenous peoples and ecology. These includes the Asian Development Bank (ADB)[202], The Danish International Development Assistance (DANIDA)[203], the United Nations Development Programme (UNDP)[204], the World Bank[205], Australian Aid (AusAID)[206], the Food and

[202] "The Asian Development Bank (ADB) - the funding of development projects which have social benefits. Some $20 million has been committed for the integrated planning process of sundry livelihood projects for the IP's in addition to the earlier ADB funding of $300 million."

[203] "The Danish International Development Assistance (DANIDA) which has indicated that it bears a global strategy for the IP's and that $5 million annually for four years will be made available for funding IP projects in the country.

[204] "The United Nations Development Programme - Small Grants Program (UNDP-SGB) - has ongoing projects involving IP's and environmental management. Small grants of up to $50,000 is available for funding IP projects. The United Nations Development Programme (UNDP) has also pledged support to projects on IP's. It has a program for IP's under the next cycle (UNDP 6th Country Programme) which will buttress Ancestral Domain Management Plan (ADMP) preparation, capacity building, strengthening IP organizations, mass mobilization and advocacy, and interface of IP's in national issues. Some $2 million is also available to finance specific proposals from IP's."

[205] "The World Bank (WB) is "open" to long-interm investment projects involving relatively large amounts of loan money for the IP's. The WB policy stressed that IP's should also benefit from development projects and should not be negatively affected.

[206] The Australian Agency for International Development (AusAID) is willing to support grant projects on IP's through non-government organizations and peoples organizations of up to P 750,000.00 per project.

Agriculture Organizations (FAO)[207], the International Labor Organization (ILO)[208], European Union (EU)[209], the Netherlands government[210] and others.[211]

The Philippine government's control over "community based" resource management projects weaken as more and more of these projects are backed by foreign sources. International financial institutions such as the Asian Development Bank and the World Bank have their own guidelines, standards and procedures. Their project officers will also have their own interpretations of how a specific program should proceed, of the degree of flexibility to be given to the Government, and of the relationship between the public officials in the National Office and those in the localities.

Even those that provide grants, such as bilateral official development aid sources (Germany, USAID), also set conditions. It would be pure naïveté to assert that they have no interest except the welfare of the beneficiary-communities.

The concept of a specific "community based" project funded by foreign sources therefore does not come from the communities. They are negotiated at a level where local communities rarely participate. Loan Contracts as well as Grant Agreements containing the framework of these "community based" projects are not routinely consulted with the beneficiary community. In fact, there is no real effort (as seen in the budget of the DENR) to have them translated into a form intelligible to the ordinary citizen.

Due to the financial and technical responsibilities coming from these foreign assistance project, it is hardly surprising for the Philippine government to exempt these projects from devolution.[212]

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

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[207] " The Food and Agriculture Organization (FAO) has expressed interest in bolstering elements in the drat national programme on IP's especially with regard to the improvement of government effectiveness in Geographical Information System (GIS), mapping and information support.

[208] " The International Labor Organization (ILO) will continue to share its experiences with the IP's in the implementation of pilot projects for full implementation."

[209] "The European Union (EU) supports IP's and uplanders through Integrated Area Development Programs. It has given assurances that program activities under NIPAP will not harm IP's."

[210] "The Netherlands Government has confirmed that protection of the IP;s as one of its priorities. It will accept proposals on IP's for assistance through the DENR and NEDA."

[211] See for instance "Foreign donors to support IP's" in Buklod, the official newsletter of the DENR, May 1-15, 1997 (Vol. II, No.7), p. 1, 7.

[212] DENR Adm. Order No. 30, s. 1992, Guidelines for the Transfer and Implementation of DENR Functions Devolved to the Local Government Units, 30 June 1992.