Indigenous Land Rights and Legal Pluralism among Philippine Highlanders

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Indigenous people in the Philippine Cordillera Region maintain legal pluralism by invoking several legal orders—customary laws, conflicting national laws, international law, and principles of human rights—to assert claims to ancestral lands. Although the U.S. Supreme Court in 1909 held that Philippine lands that had been occupied from time immemorial are presumed never to have been public, the Spanish colonial Regalian doctrine, derived from the explorer Magellan's claim of all lands in the Archipelago for the Spanish crown, remains the theoretical bedrock on which Philippine national land laws rest. Land not covered by official documentation, such as the highland areas occupied by indigenous groups who have not acquired legal titles, is considered part of the public domain. Recently, dam-building projects, logging concessions, and commercial farming in highland areas have spurred renewed efforts by indigenous groups to assert rights to ancestral lands threatened with flooding, deforestation, and dispossession.

This essay focuses on legal pluralism in the context of indigenous land rights in the Cordillera region of the northern Philippines highlands and on the consequences of the imposition of colonial and postcolonial land laws.

Legal pluralism refers to the existence of different bodies of law within the same sociopolitical space, which compete for the loyalty of a group of people subject to them. One view is that in a colonial or postcolonial state, legal systems are imported from dominant cultures and forced on indigenous populations (Kidder 1979:289). Such imposed law is said to be in conflict with the indigenous legal system, which is better adapted to the socioeconomic situation. Jacques Vanderlinden (1989) notes that if among the regulatory orders involved there is more than one "legal" order, such a dialectical process is called legal pluralism.

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The concept is not centered on a given legal system but on the individual as a holder of rights and duties who can be subject to many legal orders as a member of many networks.

How, then, is legal pluralism created? Gordon Woodman (1991:35) observes that state law and folk law arise in any of three ways: (1) a people observing a folk law may be brought within the field of a state law when already inhabited territories have been brought within the control of a colonizing power; (2) a people observing folk law may migrate into the area of jurisdiction of the state and retain their cultural identities; and (3) a new body of folk law may emerge within a state.[1] The first and second conditions have occurred in the Cordillera region of the northern Philippine highlands, particularly in the Baguio area of Benguet Province. The cases referred to here are mostly drawn from this area.

In the Cordillera region the indigenous people have participated in creating legal pluralism by adopting state regulations to gain access to some kinds of resources and, not uncommonly, by invoking customary law to justify their right to do so. Legal pluralism is therefore seen as an attribute of a social group, not of "law" or a "legal system" (F. von Benda-Beckmann 1983:241). Therefore, our inquiry is not into the behavior of law but into the behavior of people, which the law affects through instrumentalities that link purposes with consequences and produce intended and unintended consequences. Franz von Benda-Beckmann has described the "jungle of legal pluralism" in referring to the complex ways people are influenced by the different legal conceptions, and the purposive strategies by which people use such conceptions and continuously reconstruct the system of legal pluralism. Here, I adopt von Benda-Beckmann's suggestions and examine legal pluralism in the context of land rights—particularly, the introduction of the so-called Regalian doctrine by the Spanish colonial government and its intended and unintended consequences.

For the Cordillera people, recognition of their ancestral land rights has been a primary objective, as it has been for other native peoples striving to obtain a basis of power to protect both their access to decisive natural resources and their way of life (Svensson 1990:30). In the Cordillera highlands, virtually all indigenous communities are land based, and the threat to their land rights, in theory or in fact, has become a critical issue.

The Cordillera

The great chain of mountains that rises abruptly from the sea below Pasaleng on the provincial boundary between Cagayan and Ilocos Norte in the Philippines is called the Gran Cordillera

[1] I use folk law and customary law interchangeably.

Central. The mountains reach heights of 7,000–8,000 feet—the highest peak is 9,600 feet—continue southward to Benguet, then descend to the plains of Pangasinan and run off to the southwest of Baguio. Most of the major river systems of northern Luzon have their headwaters in the Cordillera (Scott 1974:1).

Seven major ethnolinguistic groups occupy the Cordillera: the Ibaloy and southern Kankana-ey in Benguet Province, the Ifugao of Ifugao Province, the Bontok and northern Kankana-ey of Mount Province, the Kalingas of Kalinga, the Itneg of Apayao, and the Tingguian of Abra. There are numerous smaller distinct ethnic groups and subgroups within these provinces as well. The groups vary in their political, kinship, economic, and religious organizations (De Raedt 1987; Prill-Brett 1987; Russell 1986; Scott 1982; Vanoverbergh 1929).

The lowland Philippines was a Spanish colony for more than 300 years, but those who lived in the Cordillera and Mindanao uplands and the Muslim lowland peoples were never subjugated by the Spaniards (Scott 1982).[2] The highlanders of the Cordillera were successful in repelling the punitive expeditions, especially during the 1800s, sent primarily because the highlanders had undermined the Spanish tobacco monopoly. Whole villages were put to the torch and the populations declined—especially in Benguet Province, where smallpox was deliberately introduced through infected clothing (Scott 1974:7). While the lowland Philippines fell under a feudal system of government, where community lands were assigned to Spanish conquistadors as a reward for their services to the Spanish crown, the mountain peoples were in control of their lands and continued to practice their indigenous land tenure system throughout the Spanish colonial period.

The Establishment of Indigenous Land Rights

The general pattern in the establishment of rights to land in the Cordillera is *primus occupantis* (i.e., the first to occupy the land by clearing and using it). Titles are embedded in rituals and are orally transmitted. The various groups have different land-use systems and different kinds of rights attached to land—for foraging, swiddening, wet-rice agriculture, mining, and grazing cattle and water buffalo. It is not uncommon for some ethnic groups to have multiple land-use systems, each governed by different rules.

Those whose livelihood depends on exploiting the products of the forest generally do not have strong attachments to the soil

[2] The mountain peoples of the Philippines who were never colonized and Hispanicized—including the Islamicized groups—have unfortunately become the cultural minorities; the westernized lowland cultures are dominant. I use *indigenous* to refer to the Filipinos who have retained many of their preconquest cultural practices and who are found in the uplands or highlands in settlements and villages that they have occupied since time immemorial.

per se, for no labor has been invested in maintaining or improving it. The interest here is not in rights to the land but in rights to the products gathered within a territory that has been traditionally exploited.

Among swiddening groups (shifting cultivators), access to productive land is acquired by clearing portions of the forest through the slash-and-burn method. The land cultivated within a traditionally defined territory of the community is governed by usufructuary rights. There is exclusive ownership to the crops planted and to the use of the land until the soil is exhausted of its nutrients, when the cultivator allows the land to lie fallow for several years, depending on the regeneration experience with the forest in the particular area. Very minimal improvements are made to the land, for tenure is temporary, limited to some extent by ecological conditions. The rights of usufruct are usually the rule among communities that practice swidden agriculture where land is still plentiful and the population is low. However, more permanently cultivated swidden land among the wet-rice cultivators, for example, assumes a more restricted form of ownership right. There is an investment of labor and material in green-manuring the soil and fencing the area with sod or stone walls. Swidden land may belong to a corporate descent group (Prill-Brett 1987, 1991) or to individuals and may be managed by the family.

Wet-rice irrigation involves investment in permanent structures, such as artificial ponds with retaining stone walls and irrigation canals. This type of land is generally not fallowed, because it is continually productive. Ownership rights become restricted to individuals, and the land is managed by the family, as the primary productive unit of the community. Inheritance rules for such property are more complex (Prill-Brett 1986, 1991).

Pasture lands, or grazing lands, called *estancias* among the Ibaloy, *punchag* among the Bontok, generally belong to the community members, who own the rights in common. Anyone in the community can graze cattle, carabao, and other livestock on the land. It is generally the elite community members with the most animals who are associated with such land. Pasture lands became privatized among the Ibaloy during the American colonial period (Tapang 1985; Wiber 1988:53).

Stands of trees belong either to the community as communal property or to a descent group as common property; in vast, sparsely populated areas such stands may be open access land. Forested areas claimed by individuals as agroforests, where they manage wild products, are guarded by excluding others from exploitation. Rights to agroforests, such as those found in Ifugao, are owned by families or clans.

Mining sites, particularly in Benguet Province, are traditionally owned by individuals, generally the people who invest labor

and materials in the construction of tunnels. Those who make expenditures have exclusive rights to these sites (Scott 1974:183; Wiber 1988; Bagamaspad & Hamada-Pawid 1985:315–16).

An important characteristic of land ownership in the Cordillera (and also among other indigenous Philippine groups) is the rule of nonalienation of lands to individuals or groups who do not belong to the community. Land transfers are strictly governed by rules that restrict tenure. Land is first offered to the immediate family, then to close kin, before it is finally offered to other members of the village.

Virtually all members of the community have the right to cultivate lands that they themselves own and manage according to certain rules and rituals. Because rights to the land identify a person with a particular community, it is unthinkable for any member to have no access to land—the "source of life" (Cool n.d.:7).

The Colonial Period

Indigenous land rights have always been a focal issue with colonial governments in the Philippines, first Spain and then the United States. The problem confronting indigenous claimants to ancestral lands can be traced back in Philippine history to the legal fiction called the Regalian doctrine. In 1521 the explorer Ferdinand Magellan claimed the Philippine Archipelago for the Spanish crown by planting a cross on one of the more than 7,000 islands that now constitute the nation-state. Thereafter, all lands in the archipelago belonged to the Spanish crown.[3]

Since the Spaniards were never able to subjugate the Cordillera, indigenous land rights were hardly affected except in a few areas where churches were established on indigenous lands that were either donated by the local people or expropriated. Most indigenous groups in the uplands were in control of their lands up to the establishment of the Philippine Republic.

In the Treaty of Paris of 1898, the Spanish crown ceded the Philippines to the United States for $20 million. The Philippine Bill of 1902 and succeeding Philippine acts of the U.S. Congress decreed the transfer of all lands vested in the Spanish crown to the Philippine government and gave authority for various laws to be formulated to deal with public lands, land registration, cadastral surveys, waters, and minerals (Keesing & Keesing 1934:163). The well-known Torrens system of registration, placing the obligation for proving ownership on the landholder, was extended to the Philippines. The U.S. colonial administrators, ignorant of native land-tenure systems, considered lands not covered by land

[3] The Spanish crown owned some land only on paper, for several indigenous groups were never subjugated by Spain and were still in actual control of their lands; some still control their lands today (e.g., in the central Cordillera) but are now being threatened by state laws like P.D. 705.

registration or paper titles to be public land. Although the U.S. administration encouraged land registration among the indigenous groups, the natives thought it an absurd idea, because they would have to pay taxes on lands that they already owned. Only a few, mostly the elites and educated individuals, took advantage of the land registration system (Keesing & Keesing 1934).

During the first decade of the 20th century, Baguio was carved out of Benguet Province and made into a summer capital. With the building of the city, one Cariño, a native of Baguio, was deprived of his land for public and military purposes; no title, it was said, had been legally perfected. Cariño brought his case before the very same courts used under the colonial government and argued that he had a right to the land by customary law. He lost but took his case before the U.S. Supreme Court. In a 1909 Supreme Court decision, penned by Justice Oliver Wendell Holmes, native rights won a place in the Anglo-American legal system:

> It does not follow that, in the view of the United States he [Cariño] had lost all rights and was a mere trespasser . . . when the present government seized this land. The argument to that effect seems to amount to a denial of native titles throughout an important part of the Island of Luzon, at least, for the want of ceremonies which the Spaniards would not have permitted and had not the power to enforce. . . . We hesitate to think that it [the Philippine Bill of 1902] was intended to declare every native who had not a paper title a trespasser, and to set the claims of all the wilder tribes afloat. (*Cariño v. Insular Government* 1909)

Furthermore, in the 1909 landmark decision, the U.S. Supreme Court unanimously held in *Cariño* that when Philippine land has been occupied since time immemorial, it is presumed never to have been public. The Court also made it clear that the land covered by undocumented native titles was protected by due process and by the just compensation clauses in the Philippine Bill Act of 1902: "[E]very presumption is and ought to be against the government in a case like the present. . . . [W]hen, as far back as testimony and memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the way from before the Spanish conquest, and never to have been public land" (*Cariño* at 460). In the 1909 decision Mr. Justice Holmes contradicted the Regalian doctrine by upholding Cariño's customary land rights.[4]

[4] Another case upheld by the Court was filed by another Ibaloy in *Reaves v. Fianza* (Bagamaspad & Hamada-Pawid 1985:263). The former protested to the authorities against the action of an American miner, Reaves, in registering mining properties worked by him and his ancestors. Although Fianza had no patent or other paper title, his customary rights were upheld when presented in an appeal to the Court in 1907 (Keesing & Keesing 1934:183).

Occupants since time immemorial have since 1909 been legally protected by the guarantees of due process and just compensation that are enshrined in the Philippine Constitutions of 1935, 1972, and 1986. There is no need to grant rights; instead, the government is constitutionally obliged to provide for effective protection and recognition of existing rights.

Unfortunately, the successors to the U.S. regime in the executive branch of the Philippine Republic have ignored and continue to ignore the *Cariño* precedent. The fact remains that government concessions or development projects that overlap ancestral domains are unconstitutional unless those whose private property rights have been adversely affected are first accorded due process and justly compensated (LRNRC 1988:4).

The Philippine Republic

The Regalian Doctrine remains the theoretical bedrock on which Philippine national land laws rest. Despite the existence of contrary laws, the doctrine has rarely been challenged. The immediate consequence is that any land not covered by official documentation is considered part of the public domain and owned by the state, regardless of how long the land has been continuously occupied. Furthermore, the occupants may be evicted should the government have a need for the land in question.

The past three decades have been characterized by intensified commercial activities in the name of economic development. Agribusiness, logging, and infrastructure programs and projects have increased. These development activities have encroached into the ancestral domains of indigenous communities, displacing some, especially those practicing swidden agriculture, and threatening to dislocate others. In confronting the original populations who had time-immemorial occupancy, the lawmakers under the Marcos regime manipulated the law to justify state claims to the land. In preparation for constructing the Chico hydroelectric dam in the Cordillera and other such projects, Presidential Decrees Nos. 410 and 705 were enacted. Presidential Decree No. 410 (1974), for example, was an attempt to legitimize the government's claim that land occupied by minorities was part of the public domain and required occupants to apply for land occupancy certificates. People were given 10 years to perfect their titles or else "lose their preferential rights to others more deserving." This law, however, excluded Benguet and Abra provinces in the Cordillera; natural resources in Abra were already being exploited by the Cellophil Resources Corporation. By the end of 10 years, not one individual or group had applied for a certificate because an overly cumbersome procedure had been set up and because, in practice, the certificates were meaningless (Lynch 1982:281).

Although in 1970 the Bureau of Forest Development decreed in Administrative Order No. 11 that all forest concessions "shall be subject to the private rights of cultural minorities within the concession or licensed area as evidenced by the occupation existing at the time a license is issued," the law never was implemented. It was, instead, followed by the Revised Forestry Code (P.D. No. 705) in 1975 contradicting the former; the revised code stipulated that all land with a slope of more than 18% was considered part of the public domain and therefore nonalienable. This rule has virtually knocked out the prior rights of indigenous communities.

Regional Autonomy as a Solution to Conflicts over Land

The intended result of Presidential Decrees Nos. 410 and 705 was apparently to prepare for the construction of a series of hydroelectric dams in the Bontok and Kalinga regions and to award 198,000 hectares of pine forests to the Cellophil Resources Corporation, including the ancestral domains of the Tinggians of Abra (Dorral 1979:118), the Kalingas, and the Isnegs of Apayao. This action led to the explosive Chico Dam conflict of the late 1970s; and the conflict brought the issue of land rights in the Cordillera to the fore.

With World Bank financial support, the government under President Marcos planned to construct four hydroelectric dams along the Chico River, which would have displaced 100,000 Bontoks and Kalingas and submerged thousands of hectares of rice and village lands (Cariño, Cariño, & Nettleton 1979:38). The plan ignited a widespread protest and led, in 1980, to the murder by government soldiers of Macliing Dulag, a prestigious Kalinga leader who was outspoken against the construction of the dam.

Once these indigenous groups realized the need to fight for recognition of their right to their own ancestral lands, several sectoral and people's organizations were founded in 1984; they were led by leftist groups like the Cordillera People's Alliance and the Cordillera Bodong Association, which was headed by Father Conrado Balweg, who later formed the Cordillera People's Liberation Army. These groups invoked international law, human rights concepts, and customary law and tried to attract moral and financial support from sympathetic international organizations and the international press. Under the Aquino presidency, after Marcos was ousted, a new constitution was ratified in 1987. The Cordillera People's Alliance and others lobbied strongly for Cordillera autonomy, invoking rights to self-determination, ancestral land rights, and the notion of a Cordillera Autonomous Region. The lobbying bore fruit: the framers of the new constitution recognized indigenous land rights (Rood 1989; Casambre 1991; Cardenas 1991).

In the present Constitution under section 22, article 11; section 5, article 12; and section 6, article 13, are provisions for the recognition and protection of the rights of the indigenous cultural communities to their ancestral lands. The precedent-setting case, moreover, is still *Cariño v. Insular Government* (1909), which has never been overturned or modified. In April 1990 the Department of Environment and Natural Resources (DENR) issued Special Orders Nos. 31 and 31-A, series of 1990, which created a special task force responsible for accepting, identifying, evaluating, and delineating ancestral land claims in the Cordillera administrative region. The DENR aim is to identify the different indigenous cultural communities in the Cordillera, evaluate and delineate the ancestral lands when asked to, and issue certificates of recognition—in short, to extend state recognition of indigenous groups' ownership of ancestral lands.

For indigenous minorities in the Cordillera, the use of legal pluralism was a necessary tactic; without it, claims to ancestral lands and domains would have appeared less legitimate and highly irrelevant (Svensson 1990). From the Cordillera experience, it is apparent that invoking international law, the principles of human rights, and customary law is indispensable for a weak and powerless minority, because they add strength to the articulation. Indigenous people can also influence lawmakers, so the law in turn can influence the behavior of those who deal with indigenous groups. This was the strategy used by the Cordillera People's Alliance in lobbying the lawmakers who would be involved in drafting the 1986 Constitution.

Although the Organic Act to create a Cordillera Autonomous Region was rejected in the 1990 plebiscite (Rood 1988, 1989, 1991; Wiber & Prill-Brett 1991), the struggle for recognition of ancestral lands is still a hot issue. The strategy now is to pressure Congress to recognize native titles to ancestral domains, defined as "[a]reas possessed, occupied, or claimed to have been possessed or occupied by the indigenous cultural community since time immemorial which includes titled properties, forests, pasture lands, fields, hunting grounds, worshipping areas, burial grounds, bodies of water, mineral resources, and air spaces." A consequence of the strategy is the active involvement of some sympathetic senators and congressional representatives, who have authored two bills pending in Congress: Senate Bill No. 909 and House Bill No. 428. Both bills provide for the recognition and delineation of the ancestral domain of indigenous cultural communities and for the creation of a commission to formulate and implement policies toward this end.

House Bill No. 428 proclaims as part of the ancestral domain areas over which the state now exercises complete monopoly and control. Considering the conservative attitude of most members of Congress on a controversial issue such as ownership of natural

resources, it is unlikely that the state will give up control over the mineral resources, waters, and air spaces of the region.

Consequences: Intended and Unintended

The Regalian doctrine, a consequence of Spanish colonization, is invoked by the national government to deny recognition of ancestral domain rights unless the land is first certified as alienable and disposable and subsequently covered by a Torrens title, a free patent, or a homestead patent. These documents are issued only to a comparatively small number of individuals who can endure inaccessible, incomprehensible, expensive, and long-drawn-out judicial and administrative proceedings.

The Torrens land registration procedure, introduced by the American colonial government, was intended to redistribute land to the landless. The result, however, was the unintended reinforcement of the aggressiveness of the community elites, educated Filipinos, and lowlanders in acquiring lands, especially lands locally perceived to be common property under the customary land tenure system. It was after the first decade of the 20th century that indigenous peoples like the Ibaloy began to register lands for titling under the Torrens title concept. Fringe home lots in pasture lands, tolerated by the *baknang* (wealthy by traditional standards) in exchange for the *pastol* (cowhand) services of poorer kin, later spawned controversies over ownership of these home and farm lots under the same free-patent titling scheme. Charges and countercharges of land grabbing are being made between former economic partners even today (Bagamaspad & Hamada-Pawid 1985:328).

Another consequence of the paper titling of indigenous lands is the commoditization and alienation of land. People outside the community have now acquired holdings. In Benguet and other centers of commerce in the Cordillera, land tenure tends toward privatization and commoditization, especially in Baguio City and areas in its periphery. In the subsistence communities of the highlands and surrounding lowlands, population pressure has encouraged migration into the city, creating an acute problem with squatters. The squatters occupy the so-called public lands, many of which belong to the Ibaloy, who have not been able to perfect their titles as a result of all the land laws the government has imposed on them.

An unintended consequence of the autonomy issue is that the whole question of rights to ancestral land is now being used by other ethnic groups who have migrated into Baguio and seized the opportunity to trespass on lands belonging to the indigenous Ibaloy, whose claims to the land the government does not recognize. Some migrants have even tried to claim the land on which they have squatted as ancestral. Other squatters claim

that the land of the Ibaloy is public land and demand "urban land reform" to allow them to legally own the land on which they have squatted. In some cases the city demolition squad has tried to carry out their job, only to be met by "people's power." A range of opportunists (e.g., land grabbers)—highlanders and lowlanders alike—is making use of the state's nonrecognition of ancestral lands to gain access to lands belonging to the Ibaloy by using government land application methods or bribing officials concerned with land registration.

Because forests are considered public land, some individuals and groups have used the strategy of destroying forests by illegal logging and burning, which have contributed to environmental degradation of the uplands. Land in Mount Data National Park, for instance, which is the origin of the headwaters of four major river systems in the northern Philippines, is being converted into commercial vegetable farms. The danger that the deforestation poses does not seem to be perceived as yet by DENR and local environmentalists.[5]

Conclusions

Customary law, like state law, both modifies behavior and is itself modified by the strategies of relevant actors. In the Cordillera experience, law has been used as a weapon and a resource by the various actors asserting land rights: legitimate claimants who invoke customary rights and opportunists (illegitimate claimants) who manipulate both legal systems to gain access to land resources. The state also plays a part through official actors who can create new law to rectify perceived wrongs or manipulate (reinterpret) existing law to achieve desired ends. In the Cordillera case, the actors (ethnic groups and the representatives of the dominant legal system) have used different bodies of law and different conceptions of justice to rationalize and justify their claims. The "jungle of legal pluralisms" (F. von Benda-Beckmann 1983:241) in the Cordillera includes not only customary practices and interests in land but also litigation in the U.S. Supreme Court (*Cariño v. Insular Government* 1909), lobbying for Cordillera autonomy, pushing for the ancestral domain bills in Congress, and interethnic competition for access to the land.

[5] DENR has taken a passive stance. There has been no policing of the area being encroached on by vegetable farmers, who have cleared the mossy oak forest. A research team from the Cordillera Studies Center, University of the Philippines College Baguio observed the situation in 1989–91 (Prill-Brett & Salinas 1991).