Recognizing *Adat* Community Rights to Promoting Democratic, Just and Sustainable Natural Resources Management: Indonesia through the Lens of Philippine Experiences

Windu Kisworo, Indonesian Center for Environmental Law (ICEL)
Denni Jayme, Center for International Environmental Law (CIEL)

I. Introduction

Legal assumption on natural resources management in Indonesia as laid down the Indonesian constitution presumes that state has the ultimate authority over the natural resources. It mentions that 'natural resources comprising land, water and air space as well as the natural wealth contained therein shall be definitely controlled by state'.[1] As a result, 'National legislation regulating both village management and natural resources is still based on the primacy of centralized state authority as the ultimate arbiter of national good'.[2]

The state relies on this clause to exercise authority over the management of natural resources. Legislations related to land and natural resources place natural resources as commodity and subject to be explored for the sake of economic development. Accordingly, it gives more benefit to the capital owner and bureaucrat and creates an imbalanced condition in the structure of natural resources management.[3] As a result, the communities, and particularly 'indigenous people',[4] who have significant dependencies on the natural resources, only enjoy little discretion in using the natural resources.[5] The existing legislation is not sufficient in

[1] The Indonesian Constitution, article 33(3), 'Natural resources comprising land, water and air space as well as the natural wealth contained therein, shall be definitely controlled by state', (translated by Emily Harwell in *Whose Natural Resources? Whose Commons Good? Toward a New Paradigm of Environmental Justice and The National Interest in Indonesia* (2002).
[2] Owen J. Lynch, and Emily Harwell, *Whose Natural Resources? Whose Commons Good? Toward a New Paradigm of Environmental Justice and The National Interest in Indonesia* (2002) 54.
[3] Carol J.P. Colfer, and Ida Ayu Pradnja Resosudarmo (ed), *Reforming the Reformists: Challenge to Government Forestry Reform in Post_Soeharto Indonesia* (2001) 12.
[4] Asian Development Bank defines this term on the basis of characteristics they display. Two significant characteristics would be (i) descent from population groups present in a given area, most often before modern states or territories were created and before modern borders were defined, and (ii) maintenance of cultural and social identities, and social, economic, cultural, and political institutions separate from mainstream or dominant societies and cultures. In some cases, over recent centuries, tribal groups or cultural minorities have migrated into areas to which they are not indigenous, but have established a presence and continue to maintain a definite and separate social and cultural identity and related social institutions. In such cases, the second identifying characteristic would carry greater weight.
[5] Justice Kalyan Shretha, 'Keynote Address presented at the North America/South Asia Conversation on Environmental Justice, Sariska, India, 2-5 December 2002 in *BuildingBridges North America/South Asia Conversation on Environmental Justice*, Environmental Justice Initiative (Human Right Law Network), and Center for International Environmental Law (2002) 12.

protecting indigenous people over land and natural resources. Recently, the condition is even more difficult. For instance, the Infrastructure Summit 2005, aimed to invite more investor on Indonesian infrastructure development, provide big opportunities, *inter alia*, Government Regulation No. 36 year of 2005 which is used as a basis to revoke people's property right, including indigenous people, on the ground of public facilities development. The current status of legal recognition of indigenous people over natural resources in the Indonesian Constitution as well as in the 1960 Basic Agrarian Law[6] and the 1999 Forestry Act[7] is not clear.

The intention of this paper is to analyze the existing legal recognition of indigenous people in Indonesia, particularly on the right over natural resources. In doing so, the paper is not going to analyze all of legislation related to natural resources management, rather, it will focus on analyze clauses stated in the Indonesian constitution, the 1960 Basic Agrarian Law, and the 1999 Forestry Act. Examining the Indonesian experience through the lens of Philippine experiences can provide useful insights. Like Indonesia, the Philippines has been subjected to many unjust impacts emanating from its colonial legacy, particularly in regards to land and forest laws.

This essay will start by giving brief background about the ongoing debate on the definition of indigenous people in Indonesia by comparing the definition proposed by non-government organizations and the official definition of the government. Then, the authors will discuss the ambiguity of the Indonesian Constitution in regard to the right of indigenous people over natural resources. This essay will further evaluate the consistency of the existing legislations related to natural resources; the 1960 Agrarian Law and the 1999 Forestry Act, and discuss how the ambiguity and inconsistency of the existing legislation affect the legal recognition of indigenous people over natural resources in Indonesia. This will be followed by a brief summary of the development of, and continuous struggle for, the recognition of indigenous people's rights in the Philippines. Finally, the paper will attempt to compare the struggles in both Indonesia and the Philippines and draw out insights and models from the Philippine experience that might contribute to the legal recognition of community-based property rights in Indonesia.

The Debate on the Term and Definition of Indigenous People in Indonesia

[6] *Undang Undang No. 5 Tahun tentang Pokok-Pokok Agraria*, (the 1960 Basic Agrarian Law). (our translation).
[7] *Undang Undang No. 41 Tahun 1999 tentang Kehutanan* (the 1999 Forestry Act).

Current debate on indigenous people definition in Indonesia is still ongoing among state, non government organizations, and international donors. Many terms have been used to describe these communities; 'native people', 'isolated people'[8], rational forest farmers', 'adat communities' or 'adat law communities', and many others.[9] The last term, 'adat communities' is defined as 'Community living together based on their origin intergenerationally in adat land who have sovereignty over the land and natural resources, socio-cultural life regulated by adat law and adat institutions which manage the sustainability of the communities' lives'.[10] What drives this debate is the number of indigenous people in Indonesian and the conflicts that happened in Indonesia. Indonesia has a population of around 210 Million people, including 500 ethnic groups speaking more than 600 languages.[11] Among this number, Indigenous Alliance of the Archipelago (AMAN)[12] estimates there are 50 -70 million of indigenous people by using 'adat communities' criteria. This essay will further use term 'adat communities' in mentioning indigenous people in Indonesia because it contains the basic requirement for indigenous people such as; living in certain land, having sovereignty, the existence of community law and institutions.

Legal Paradigm on Natural Resources Management in Indonesia

The Indonesian constitution implicitly acknowledges the right of 'adat community' over natural resources. It acknowledges and respects traditional societies along with their customary rights.[13] In addition, the constitution mentions that every person shall have the right to own personal property.[14] It means that every property owned by an individual is recognized, including the right to manage and use the natural resources. In contrast, sectors of

[8] The Social Ministry Decree No. 5 of 1994 defines isolated people as 'groups of people who live or are nomadic in geographical remote and isolated areas and are socially and culturally alienated and/or still underdeveloped compared to other Indonesian communities in general'.
[9] *Adat Communities in Indonesia; Identification and Issues*, Asian Development Bank (ADB), chapter 2.
[10] The defition by Aliansi Masyarakat Adat Nusantara (AMAN) or Indigenous Peoples Alliance of the Archipelago.
[11] The 2nd draft of Indonesian Population cencus 2000, Biro Pusat Statistik (Indonesian statistic Agency).
[12] Aliansi Masyarakat Adat Nusantara (AMAN) or Indigenous Peoples Alliance of the Archipelago is an independent social organisation composed of indigenous peoples communities from the whole of the country.< http://dte.gn.apc.org/AMAN/english/eng.html> retrieved at 14 January 2006.
[13] *The Indonesian Constitution*, Article18B(2), 'the state shall acknowledge and respect traditional societies along with their customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law', (translated by Emily Harwell)
[14] Ibid, the amendment, Article 28H(4) 'every person shall have the right to own personal property and such right may not be arbitrarily interfered with by any party' (translated by Emily Harwell).

production which are important for the country and affect the life of the people shall be controlled by State. [15]

The abovementioned clauses are used by the state to exercise authority over management of the natural resources - with the state widely interpreting 'the greatest benefit of the people' as developments that give a lot of benefit to people such as power plants, dam, road, and public facilities, and also any development, including private industries. As a consequence, communities, especially indigenous people are sometimes being ignored, their rights over their land and natural resources is taken by the authority and companies. They don't have access to ask their right. For example, indigenous peoples who lived in the area of 'Lore Lindu national park' were forced by state to move from their land.[16] The fact that they have been lived there for many years since the existence of their ancestral was ignored by state. State claimed that the land is determined by the state as National Park Area. In addition, based on the research that was conducted by Abdias Yas, villagers discovered that the Ketapang district government has issued the oil palm company PT Bakrie Brothers Plantations II a license for a 13,000-hectare concession, without any notification to or consent from the affected community on whose land the plantation was to be located. [17]

The first legislation enacted after Indonesian independence is the 1960 Basic Agrarian Law (BAL). It has a basic foundation to protect the right of indigenous people. It states that 'this law, which is proof of the importance of land rights in Indonesian history, was explicitly intended to erase remnants of colonial agrarian laws, to foster national unity, and to lay the foundation for land reforms that would benefit the rural population'.[18] However, this act still contains weaknesses in its formulation, and it often causing misinterpretations. It can be seen in existing regulations which are not relevant to the spirit as stipulated at BAL. For example: the spirit on the 1999 Forestry Act which puts the natural resources as economic commodity instead of for the benefit of rural population.

BAL acknowledges the customary *adat* right, however in practice no clear formulation was obtainable. According to Budi Harsono, one of the academics that took part in establishing the Basic Agrarian Law, the law still contains weaknesses in its formulation, and it often

[15] Ibid, Article 33(2) 'sectors of production which are important for the country and affect the life of the people shall be controlled by State and exploited to the greatest benefit of the people' (translated by Emily Harwell).
[16] Hedar Laudjeng, 'Seeking Space for the customary Law in Pakava Tribe' (2000) 8.

[17] Abdias Yas, 'The Struggle of Policy Transformation Toward People's Sovereignty in Natural Resources Mangement', Pancur Kasih Foundation (2000) 23.
[18] Ibid, Chapter 1 of the General Elucidation.

causing misinterpretations. It can be seen in existing regulations which are not relevant to the spirit as stipulated at BAL. He also concluded that this was due to the fact that before BAL was fully implemented, a change occurred from the old order, new order, and reformation era.

To acknowledge the customary *adat* right, the Ministry of Agrarian affairs/Head of the National Land Agency issued the regulation No. 5 of 1999. However, this regulation should only be a guideline for the resolution of *adat* land problem. It itself does not sufficient to regulate *adat* right only by Ministerial regulation. Hence, with higher level of regulation, Law No. 21 of 2001 regarding Special Autonomy for the Papua Province acknowledged and protected the existence of *adat* rights. A form of protection that has been stipulated in that law, mentions that if another party needs such land then deliberation should be performed (real deliberation producing a dialogue) between the party needing the land and the *adat* leader.

Both BAL and the Legislation No. 5/1990 explicitly mention that adat communities can have hak ulayat property only if they have obtained formal recognition of those require: (a) the existence of peoples which entailed by their implemented adat law (b) the existence of certain place which adat communities live and acquire their daily needs, and (c) the existence of implemented adat law which regulate the management, use, and control over ulayat land of those are obeyed by the member of adat communities. However, all of those criteria must be approved by government by involving many stakeholders including member of adat communities and local government organization and further be formalized by Local Regulation (PERDA). Furthermore, after obtaining the formal recognition, adat communities is given the right to (a) use of natural resources for their daily needs (b) conduct forest activities based on the existing adat law and not contravene with prevailing law, and (c) obtain the empowerment to improve their welfare. Today, related with this formal recognition, Government Regulation No 24/1997 are used by the state to determined adat communities right over land.

Beside BAL, the former 1967 Forestry Act[19], the first law issued by New Order regime, did not mention the existence of customary 'adat' rights. It regarded all forest as state's forest. [20] In addition, the community has only right to utilize forest harvest and only counted for areas

[19] *Undang Undang tentang Kehutanan tahun 1997* (the former 1967 Forestry Act).
[20] Above n 10, Article 1, ('Adat forest is state forest which located in the territory of 'adat' community). (Our translation).

that were not controlled by the holders of Forest Used rights. [21] It can be seen that this act did not placed the right properly. In 1999, Government replaced this act with a new legislation namely: the 1999 Forestry Act by recognizing 'adat' forest. The recognition of the 'adat communities' right over natural resources is limited to the right to use and manage the natural resources in limited scale. [22]

Despite these criticisms, there are some promising developments in Indonesian's constitution related to the recognition of 'adat community'. Firstly, the identity of culture and traditional right is recognized pursuant to the world civilization. [23] Secondly, the fall of Suharto[24] and the brief flare of reformation resulted in several important events over the year of 1997-2001. In 2001, a new stage in agrarian reform and natural resources was achieved with legislative Act No. IX. of 2001 of the People's Consultative Assembly. [25] It mandates the house of representative and executive to provide legal basis for fundamental and natural resources reform aimed at resolving land and natural resources conflicts with the full engagement of the communities.[26] In protecting the right of indigenous people, this decree also mandates them to restructure tenure rights and right of use and access to natural resources and to reform the legal, regulatory and institutional frameworks governing agrarian and natural resource relations. [27]

However, in May 2005, the government issued Presidential Regulation No. 36/2005 on land acquisition for development of public facilities.[28] This regulation contradicts Assembly's Decree No.IX/2001 in term of the right of communities over land. The regulation also met with protests from people who regarded the regulation strengthening the government's repressive and authoritarian efforts because the regulation allows the government to revoke people's property rights to land.

[21] Above n 11, Article 12.
[22] Above n 11, Article 67 (1).
[23] Above n 13, article 28 I, (3), 'the cultural identity and traditional society rights shall be respected in line with age progress and human civilization'. (The official translation).
[24] The 2nd President of Indonesian Republic (1966 – 1999).
[25] The Assembly Decree (TAP MPR) No. IX/MPR/2001 on 'Pembaharuan Agraria dan Sumber Daya Alam' (Land Reform and Natural Resources).
[26] Ibid.
[27] Ibid.
[28] Peraturan Pemerintah No. 36/2005, 'Pengambil alihan Lahan untuk Pembangunan Fasilitas Public' (Land Acquisition of Development on Public Facilities), (translated by WALHI, Indonesia)

Local Regulation on Indigenous People's right over land and Natural Resources

By 2002, Indonesia consists of 33 provinces and 370 districts (Kabupaten) which has more than 50.000 unit of the smallest local institution namely *Desa*. After the fall of the 'new order' era, the power in governing the state is changed from state-centered into decentralization which given some of central authorities to local government. As a consequence, there are many of local government regulations in various sector are issued which its objective, *inter alia*, to increase local revenue. A current research conducted by UNDP found a number of local regulations referring to indigenous peoples. In that research, beside national legislations, some of local regulations that were identified and analyzed are:

1. Local Regulation No 12/1999 regarding *Hak Tanah Ulayat* in Kampar District which regulate ulayat right and adat institution. The implementation of this regulation are mapping and inventorying the use of ulayat right. Furthermore, adat law is recognized by local election regulation to consider the existing role of local leader. Funds are allocated by local budget (APBD) to adat institution. However, the existence of adat communities is ignored in local regulation on forest concession license.
2. West Java Governor Decree No. 203/B.V/Pem./SK/68 declare that baduy forest became protected forest. In addition, Local Regulation No. 13/1999 concerning the empowerment of baduy's communities adat institution in Lebak. However, it is deemed only regulate immaterial issue such as adat institution but not material issues like land. As a result, local government issued Local Regulation No. 32/2001. one of the implementation of this regulation is that 5.136,58 area of land has been identified as ulayat land of baduy.
3. Local Regulation No. 3/2000 regarding Empowerment, Protection, and the Development of adat and adat institution in Pasir district. This regulation is implemented by the Minister of Internal Affairs No. 69/1999 regarding Desa. However, it is not introducing the territory and property of adat communities.
4. The Decree of Regent (Bupati) in Toraja which stated the recognition of 32 adat territory. This decree was issued to support the existing of Local Regulation No. 2/2001 concerning Toraja's local government and No. 5/2004 which both did not regulate adat territory and the right of adat communities over natural resources.

The key findings of the research are: (1) the recognition of existence are consists of the recognition of adat communities existence and the recognition of Ulayat right (2) there are

some condition to the recognition of the existence of adat communities that can be widely interpreted by the state, and (3) the regulations and the recognitions of adat communities were not based on holistic and integrative approaches.

Now, the main questions are whether the existing legislation fully recognizes the right of indigenous people over natural resources? Does the state have an intention to protect such right? The existing legislations do not fully recognize this right. 'Adat communities' is not explicitly mentioned. Furthermore, this recognition is also ambiguous. Even though article 28H clause 4 mention that communities has the right to own personal property, it does not mean that this right can be automatically obtained. It is because this right is limited by article 33 clause 2 and 3 which mention that sectors that give benefit to many people are subject under state's authority. The sovereignty of 'adat communities' over the land and natural resources are ignored by this article. This paradigm gives full authority and legitimacy to the state for claiming, managing, and using natural resources mainly as a source of income and political interest. [29] There are many others condition that will determined the existence of adat communities such as accordance with the world civilization and development, and community development. In some legislation the existence also required as long as such existence is not contravene with the national interest, accordance with the unitary of Indonesian Republic, and accordance with the higher and existing legislation.

Indigenous peoples argue that since they are the direct descendants of the original peoples who settled their lands before conquest by outsiders, they have an "inalienable" right to their territories and the natural resources contained therein. [30] Based on this argument, this article has abolished indigenous people's inherent right to use and manage their personal property as the have already live in that area for a long time.

The Development of Legal Recognition of Indigenous Peoples' Rights in the Philippines

The colonial legacy of the Dutch in Indonesia had left its imprint on current state laws and policies, much as that left by the Spanish and Americans in the Philippines. Unfortunately, while some of these colonial policies may have been written with the outward intention of recognizing native rights, they have in fact served to maintain the hold of colonists over the

[29] Rajendra Pradhan (2002) 102, as quoted by Rachmat Hidayat, 'Between two Confusions; A field Experience in an Effort for Strengthening the Folk Bargaining Position in Forest Fire, Legal Pluralism and Unofficial Law in Social, Economic, and political Development', (Paper presented at the XIII International Congress).
[30] Nagengast, Stavenhagen, and Kearney, (1992) 31.

management of natural resources. During the 350 years of Spanish rule, there were two types of property rights recognized – those held by the Crown and those granted by the Crown as customary rights based on usage and possession. Unfortunately, while there was some effort by the Spanish Crown to guarantee natives of their property rights, these in the end were given to the corporations of those days – including religious institutions that were treated as "individual" entities. In fact, "community-based tenurial rights to ancestral domains were seen as non-recognizable abstractions. Indigenous communities, thus, had no documentary existence and were unable to secure recognition of their rights."[31] The Royal Decree of February 13, 1984, known as the Maura Act, would supposedly insure land rights to the natives. Its main purpose, however, was to return undocumented property rights to the colonial state. Applicants were only given a year to prove their claim, making it almost impossible for the recognition of indigenous groups' property rights as the concept itself of documented land title was foreign. Those who were not able to have their claims documented had to leave their ancestral domain. When the U.S. acquired the Philippines in 1898 as a result of the American-Spanish War, they made use of a legal myth known as the *Regalian Doctrine* to justify their ownership of more than 90 per cent of the Philippines' total land mass. While the U.S. Supreme Court legally refuted the Regalian Doctrine in a 1909 decision, this decision was mostly ignored by U.S. colonial officials and their successors in the Philippine republic.[32]

> "The misbegotten nature of the Philippine state, including its twentieth century social contract, is rooted, at least symbolically, in the so-called Regalian Doctrine. Although the presence of people in the Philippine archipelago go back over twenty thousand years, the legal origins of the embryonic Philippine state are, by contrast, found in documents signed in 1493 by the Spanish Borgia pope, Alexander VI. The documents are cumulatively known as the Declaration of Alexander and, five hundred years after their promulgation, they still provide a legal basis for the grand theoretical usurpation known as the Regalian Doctrine. According to the doctrine, at some unspecified moment during the sixteenth century, the sovereign rights of the Philippine peoples' forebears were unilaterally usurped by, and simultaneously vested in, the Crowns of Castille and Aragón. At that same five-hundred-year-old moment, every native in the politically undefined and still largely unexplored (not to mention unconquered) archipelago became a squatter, bereft of any legal rights to land or other natural resources."[33]

The Philippines' transition from a colonial government to a republic had little changed the allocation of power and wealth. Most power remained with the elites and this status quo was

[31] Lynch, Owen and Kirk Talbott. 1995. Balancing Acts. World Resources Institute, 42.
[32] Ibid., Lynch and Talbott, 43-46.
[33] Lynch, Owen. 1991. Colonial Legacies in a Fragile Republic. Introduction.

kept by maintaining colonial laws and policies.[34] The Philippine government manages and allocates public forest through the Department of Environment and Natural Resources. Under the law on land classification that was established during the U.S. colonial period, classified "public" forest land cannot become privately owned. This system ignores those who have inhabited these areas for several generations and labels them as "squatters". The government claims ownership to more than 60 per cent of the nations total land area, and many would be hard pressed to believe that there are as few inhabitants of these areas as in the government's reported numbers.

The Comprehensive Agrarian Reform Law of 1988 definition of ancestral lands states that they "shall include, but not be limited to, lands in the actual, continuous and open possession and occupation of the community and its members."[35] It assures the protection of the rights of indigenous communities to their land in line with the principles of self-determination and autonomy. However, it is still the governments' prerogative to recognize or grant private ownership rights. This is also limited by the fact that these private ownership rights will only apply to "public agricultural land".[36]

By the mid-1990's, the 20 million people who live in classified forest zones had three options to secure land tenure and access to other resources: the Integrated Social Forestry Program (ISFP), the Community Forestry Management Agreement (CFMA) and the Forest Land Management Agreement (FLMA). The ISFP gave Certificates of Stewardship to mainly individual farmers for an average of 2.5 hectares of forest land over 25 years. CFMAs are usually given to contractors who hire other people to plant trees in designated areas. The FLMA addressed oversights of the CFMA by allowing for a contract with government not only to plant but to manage and protect an area and have the right to harvest its timber.

All these however, are still granted by government and could be cancelled by DENR. There is growing recognition of the inherent right of indigenous peoples to the land where they have lived their whole lives and rely on for their livelihood. In response to external pressure from grassroots activists and international donors, the DENR created Certificates of Ancestral Domain Claims. The National Integrated Protected Areas Act of 1991 safeguards the ancestral domains in biologically critical areas and highlights the importance of community

[34] Lynch, Owen. 1991. Colonial Legacies in a Fragile Republic. Introduction.
[35] Comprehensive Agrarian Reform Act of 1988 (Republic Act No. 6657, Section 9).
[36] Ibid., Lynch and Talbott, 59.

based management of natural resources.[37] Executive Order No. 263 formally adopted community-based forest management as a national strategy.

In December 2000 and October 2001, the Philippine Supreme Court narrowly upheld the Indigenous Peoples Rights Act of 1997 (IPRA). Under the IPRA, indigenous community-based property rights were legally recognized by the State as private and community-owned through the issuance of Certificate of Ancestral Domain Titles (CADT). The State also recognized the inherent right of indigenous peoples to self-governance and self-determination. Proof of ancestral domain claims included testimony of elders under oath and at least one kind of documented proof. Members are allowed to transfer land to other members within the same indigenous community. While considered, in many respects, to be a tremendous victory for the Philippines, the IPRA was a result of a process of compromise, and still faces challenges with implementation. The National Commission on Indigenous Peoples is mandated as the primary government agency that will, among other roles, provide assistance to IP groups, develop policies and programs for economic, social and cultural development, and issue CADTs. The NCIP though faces several challenges, such as being given the appropriate power, authority and funding to assist IP communities.

Extracting Lessons and Principles from the Philippine Experience

While there are certainly differences between the Indonesian and Philippine contexts, these two countries face common challenges to the recognition of the inherent rights of indigenous peoples.

1) Definition of indigenous peoples' rights

The Indonesian Constitution is ambiguous in recognizing indigenous peoples' rights. As stated above, even though article 28H clause 4 mention that communities has the right to own personal property, it does not mean that this right can be automatically obtained. It is because this right is limited by article 33 clause 2 and 3 which mention that sectors that give benefit to many people are subject under state's authority. There are some conditions that will determine the existence of adat communities.

Indigenous peoples, like any ordinary people have their basic human right that must be recognized and protected by the state. As a consequence, such recognition and protection

[37] Ibid., 90.

should be made to guarantee substantial justice and create fairness. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.[38] For this reason justice denied that the loss of freedom for some is made right by a greater good shared by others.[39] It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many.[40]

Some of the national and local regulations that recognize adat communities in Indonesia did not involve their main stakeholders, the indigenous people, when they were developed. The involvement of relevant stakeholders is essential to the development of the law. It leads to the conclusion that there is a need to reform The Indonesian Constitution regarding to the recognition of indigenous people. The reforms must guarantee substantial justice by not only acknowledging in the regulation, but also recognize the important elements of indigenous people such as territory, law, and institution. Furthermore, to create fairness, the reform must be firstly started by identifying indigenous people and its territory so that they can be involved in the decision making process.

2) Ambiguity over rights

The importance of the clear recognition can also be seen at the situation in Philippine. Indigenous Peoples Rights Act (IPRA) where it provides for the registration of ancestral lands & domain titles over land and resources.[41] It mentioned that "property rights within the ancestral domains already existing and/or vested upon effectively of this Act shall be recognized and respected". [42] The passage of the IPRA has shown the progress of the struggle for self determination of the indigenous peoples.

3) Judicial Activism in Making Discretion and Interpretation

The existing ambiguity and inconsistency of legislations on the recognition of indigenous peoples that in effect results in unfair decisions can be avoided by judicial discretion and interpretation. In Philippines, it can be seen from the recognition of indigenous people in the first case brought by Justice Isagani Cruz. In common law, judges relied on this clause by making several levels of generality on the rule of indigenous people over natural resources.

[38] Rawls, John, *A Theory of Justice*, revised Edition, The Belknap Press of Harvard University Press, Cambridge, Massachusetts (2003) 3.
[39] Ibid,3.
[40] Ibid,3.
[41] the Philipine Indigenous People Rights Act (IPRA).
[42] Ibid, Article 56.

One of the 'landmark case' in Australia regarding to the recognition of indigenous people is *Mabo v Queensland*.[43] The action which brought about the decision had been led by Eddie Mabo, David Passi and James Rice, all of the Meriam people (from the Murray Islands in the Torres Strait). They commenced proceedings in the High Court in 1982, in response to the Queensland Amendment Act 1982 establishing a system of making land grants on trust for Aboriginals and Torres Strait Islanders, which the Murray Islanders refused to accept. In that case, six members of the Court (Dawson J. dissenting) were in agreement that the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland.[44]

This approach might be considered by Indonesian judges in interpreting this right by giving a wider interpretation of '…the right to own personal property' and '….traditional rights along with their customary rights' so that can cover the right of indigenous people over natural resources. This interpretation shall be refined by exercising the characteristic of indigenous people which have sovereignty over land and natural resources as part of their property while another characteristic, the existence of their adat law and institutions represent traditional rights. The reform in to Indonesian legislation as have suggested above will transform the way judges make discretionary interpretations from the basis of an old legal assumption on natural resources management in Indonesia as laid down the Indonesian constitution that presumes state has the ultimate authority over the natural resources to new legal assumption that guarantee the right of each individual over land and natural resources.

4) Inconsistency among existing laws

There is inconsistency between legislations concerning the right of indigenous people over natural resources in Indonesia. While it is important to harmonize the natural resources legislation, some of legislations are contradictive to one another. The spirit of BAL which gives foundation to this recognition, based on the recognition on the Indonesian Constitution, does not followed by the 1999 Forestry Act. Indeed, this act categories forest area by state forest and 'adat' forest. It slightly heard that indigenous people has the right to control and

[43] http://en.wikipedia.org/wiki/Mabo#The_decision
[44] Mabo and Others V. Queensland (No. 2) (1992) 175 CLR

use the forest. But, this act states that 'adat' forest is a part of the state forest which is managed by '*adat* community'. It means that in any circum stances this right might be revoke by state for the reason of public interest. As it can be seen in Constitution, this act also does not consider about 'adat communities' sovereignty over land and natural resources. Furthermore, the recognition of 'adat communities' by local regulation has ignored the existence of 'adat communities' law and institutions. In fact, the 1960 Basic Agrarian Law and the 1999 Forestry Act do not clearly recognize 'adat communities. As in the case of the Philippines, there should be measures to protect and defend the institutions and laws (such as the NCIP and IPRA) from being further pulled down or made useless by policies or other government agencies.

5) The Territory of Indigenous People

Indigenous people rights Act (IPRA) in Philippine provided for the registration of ancestral lands & domain titles over land and resources. The passage of the IPRA has shown the progress of the struggle for self determination of the indigenous peoples. In Indonesia, self determination still has to be recognized, such as in the Natural Resources Management Bill. Legal documentation (title) of indigenous property rights is important in order to make certain foundation for the protection.

Legal recognition of indigenous people right is desirable and necessary. But it need not always entail formal codification of the issuance of any formal documents. The recognition of appropriate existing form of evidence such as farm fallows, orchards, gravesites, and so forth should be as consequences of the recognition of community-based property rights. This recognition seems would be difficult to be achieved considering the number of land and indigenous communities. In order to support this initiative, the power by the state is needed to empowered communities right and guarantee rights. The most important is the government's fulfillment of its responsibility to help resource dependant communities defend and benefit from sustainable managed natural resources, whether public or private.[45] In this point, to make sure that such evident can be applied, the identification of such evidence is important.

The Philippine experience provides a starting Clause towards the recognition of community-based property rights, an essential part of natural resource management. In 1998, over a thousand rural communities in the Philippines participated in Community-Based Natural

[45] Ibid, page. 7

Resources Management (CBNRM) projects and initiatives sponsored by the Department of Environmental & Natural Resources (DENR). Hundreds more communities had received Certificate of Ancestral Domain Claims (CADCs) from the DENR that cumulatively cover over 2.7 million hectares, or over eight percent of the nation's total land mass.[46]

6) The need for a mechanism to fund implementation costs

The CADC process in the Philippines faces obstacles to registering indigenous peoples' organizations, such as having to maintain an office and even just a telephone number to be recognized by the Securities and Exchange Commission. More importantly, the cost for a geodetic survey to delineate the land area for the title is a burden that some communities are not able to afford.

7) Varying levels of identity

In a study done by Albert E. Alejo, SJ, he mapped the various identities of lumads (indigenous peoples) in Mindanao, the southern region of the Philippines. After mapping these various strategic identities and "symbols of verification", he presented corresponding *forms of struggle* and *forms of solidarity* which the peoples could themselves demand or supporters can offer. This kind of analysis does not only dwell in theories but provides areas for action for indigenous peoples given the varying levels of identity that they have.[47]

8) The need for the popular recognition of indigenous peoples' rights.

A famous Philippine documentary and a movie on the conflict in Southern Philippines did not even mention the presence of *lumads* (indigenous peoples) in the area who are extremely affected by the conflict between government and Muslim fighters. The *lumads* are not even represented in official talks between the government and both Muslim and Communist groups.

[46] Lynch, Luna, Mercado, Rural Communities and Philippine Forest; Cases and Insights on Law and Natural Resources, 2004

[47] Alejo, Albert E. 2006. Globalization and Self-Determination. Mindanawon Initiatives for Cultural Dialogue. Ateneo de Davao University, Philippines.

9) The need for conflict management mechanisms

Much conflict and confusion is also inevitable given the vagueness of laws and the communities' lack of access to information, resources and skills that would promote the recognition of their rights and help manage their ancestral domain. Thus, building mechanisms for conflict management and decision-making within a community and indigenous peoples' organizations are important.

Conclusion

The Indonesian Constitution does not clearly recognize the right of indigenous people over natural resources. The term indigenous people as well as their right over natural resources are ambiguous and result in many interpretations. This condition is not sufficient to protect the inherent rights of indigenous peoples and has strengthened the perceived ultimate right of the state to control natural resources. Furthermore, there is also an inconsistency among legislations on natural resources and the Constitution. As a result, communities, particularly indigenous people do not have a strong legal basis for refuting decisions made by the state in all its full authority over what is deemed "public lands" and their natural resources. Admittedly, if there should be amendments to the Indonesian Constitution, this process will take a long time to debate. During this time, judges should be more active in making judicial interpretation, expansion, and modification on the right of indigenous people over natural resources.

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