

CHANGES IN INDIGENOUS COMMON PROPERTY REGIMES AND DEVELOPMENT POLICIES IN THE NORTHERN PHILIPPINES¹

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Introduction

This paper looks at how common property regimes changed in post-colonial Philippines in the context of development policies on natural resources, particularly in the management of common property regimes among the indigenous peoples of the northern Philippine highlands. What are the impacts of development policies on the Indigenous Peoples (IPs) who have retained their pre-colonial common property regime management practices? How are the Indigenous Peoples responding to the changes in development policies that affect traditional land tenure and resource management? What aspects of common property regime is changing, and under what conditions or pressures? What are some lessons learned in understanding the context where common property regime loses its reason for existence in Philippine upland agricultural communities?

The paper begins by giving a brief historical background of pre-conquest property regimes and the development of resource management practices associated with each property regime. It goes on to show the changes in the indigenous property system in lowland Philippines under the Spanish colonial period. Under American colonial administration more laws were introduced which required the registration and titling of land and the state management of other natural resources such as forests and minerals. After independence the colonial laws on resource management were adopted by the Philippine Republic such as the Regalian Doctrine, which was used to usurp the common lands of indigenous communities rendering them squatters on “public lands.” The indigenous communities common property became open access leading to unsustainable management with the breakdown of rules for managing natural resources.

I argue here that in the Cordillera there is an increasing tendency for common property regime to be converted into open access due largely to the confusion brought about by state policies on resource management with the concept of “public” land owned by the state, and at the same time the state is unable to manage these resources sustainably. Under this situation an opportunity structure emerges where individuals, mainly from the different surrounding communities, take the opportunity to clear the mossy forest and convert these into commercial farms. This has happened to the Mount Data National Park, and the same is threatening the Mt. Pulag and Mt. Polis mossy forests of Benguet and Ifugao.

HISTORICAL ANTECEDENTS OF PRE-CONQUEST PROPERTY REGIMES

The Establishment of Indigenous Land Rights

The general pattern of land rights in the Cordillera is *primus occupantis* (i.e., the first to occupy the land by clearing it and investing some improvements). Titles are embedded in rituals and are orally transmitted. This is further reinforced through continuous occupation. The various

¹ Paper presented at the RCSD International Conference *Politics of the Commons: Articulating Development and Strengthening Local Practices*, 11-14 July 2003, Lotus Pang Suan Kaew Hotel, Chiang Mai, Thailand.

groups have, over time, developed land use systems and accompanying rules and obligations that cover the relationships among the individuals who use the land. Different rights govern foraging, swidden farming, wet-rice agriculture, mining, cattle and water buffalo grazing. It is not uncommon for ethnic groups to have multiple land use systems, each governed by different rules of management (Prill-Brett 1994:689). Those whose livelihood depends on exploiting the products of the forest generally do not have strong attachments to the soil *per se*, for no labor has been invested in maintaining or improving it. Among swidden cultivators, access to productive land is acquired by clearing portions of the forest through the slash-and-burn method. Usufruct rights govern lands cultivated within the traditionally defined territory of the community. There is exclusive ownership to the crops planted and the use of the land until the soil is exhausted of its nutrients. The cultivator allows the land to lie fallow for several years, depending on the regeneration experience with the forest in the particular area. Very minor improvements are made on the land, for tenure is temporary, limited to some extent by ecological conditions. The right of usufruct is usually the rule among communities that practice swidden agriculture where land is still abundant and population is low. Swidden land may belong to a corporate descent group (see Prill-Brett 1987, 1991; Wiber and Prill-Brett 1988), or to individuals and managed by the family. Wet rice irrigation involves investment in permanent structures such as artificial pond fields, with its retaining stonewalls and irrigation canals. This type of land is generally not fallowed since it is continuously productive. Thus ownership rights are restricted to individuals who inherit the paddy field, and managed by the family as the productive unit. Inheritance rules for such property are more complex (see Prill-Brett 1986, 1991).

Forest stands that surround a community traditionally belongs to the community as common property. However, cognatic descent groups or clans may lay claim to certain forest stands as common property after investing minimal improvements such as swidden gardens followed by the performance of rituals. In some parts of the Cordillera such as Ifugao, forested areas called *muyong/pinuchu* are usually located in areas adjacent to paddy fields and are owned by individuals as private agroforests.

An important character of natural resources that fall under common property in the Cordillera is the rule of non-alienation of land to “outsiders” who do not belong to the community.

Common Property Regimes and Management

Diversity of resource use and management is a central feature of the indigenous strategies whose foundation was to share scarce resources, where access to these common property resources by the poor or marginalized members of a community are covered by this rule.

The life cycle of Cordillera property regimes

The life cycle of Cordillera property regimes begins with *Communal rights regime*, to *Corporate rights regime*, and finally, *Individual private rights regime*, with very restricted rights of access and management together with permanent improvements that had created ownership rights (see Prill-Brett 1987, 1991).

- *Communal property regime*: where each community owns unrestricted rights to natural resources such as water from springs, rivers, and brooks, grazing land, forest products, timber and fuel, and the right to hunt wild animals within the communal domain. All members of the community have rights of access to these common property resources without having to ask permission from anyone. However, non-members of the community are excluded from exploiting such resources without the consent of the community.
- *Indigenous corporate property regime*: where ownership rights are restricted to members of a cognatic descent group. All the descendants of a founding ancestor or ancestress, who first put improvements on a portion of the communal land, have usufructory rights to this type of property, which is owned in common by the group. It is usually the members of a “clan” who did not inherit enough rice paddies that generally avail of the common-owned land for cultivation. Rights to corporate property ownership developed as a safety net and a strategy to ensure the members of a group who were unable to inherit rice paddies to avail of land for food production. This corporate property regime is also a legal entity that owns this common fund for the benefit of its members (see Prill-Brett 1987, 1993). Corporate property right is devolved to the group as undivided rights in common and cannot be claimed by individual members in severalty (see Wiber and Prill-Brett 1988). Thus an individual member who has been tilling the same plot may not transmit the land to his/her own children separately, since it belongs to the corporate group as common property. This kind of property (as a common fund) may only be alienated when the corporate group faces some crises, where the group has to raise the required penalty incurred by a member for the benefit or liability of the group. Should the property be up for sale it is first offered to any of its members who could furnish the required fine/penalty for violation of the provisions of customary law. Thus common property rights transfers to the individual who furnished the requirements, whereby the property ceases to operate as the common property of the group.
- *Private individual rights regime*: These are individual rights over rice paddies, residential lots, permanent gardens, and lands that have been invested with permanent material improvements. Such properties are inherited by individuals, usually following primogeniture rule and managed by the family of the inheritor. The sale or alienation of this type of property is with the decision of the owner who inherited the property. Custom dictates that it is offered first to the immediate family members, then to further relations before it is sold out of the kinship group.

The Colonial Period: Laws Affecting Native Titles

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 Portuguese explorer Ferdinand Magellan claimed the Philippine archipelago for the Spanish Crown, by virtue of erecting the Christian cross on one of the more than 7000 islands. The lowland Philippines was a Spanish colony for almost four centuries, where Catholicism and Hispanization were imposed on the lowland Filipinos. However, those who inhabited the northern Cordillera highlands and Mindanao, in southern Philippines resisted subjugation by the Spaniards (Scott, 1982). While the lowland Philippines fell under a feudal

system of government where community lands were assigned to Spanish *Conquistadores* as reward for their loyal services to the Spanish Crown, the mountain peoples were virtually in control of their lands and continued to practice their indigenous land tenure system throughout the Spanish and American colonial periods. In the Treaty of Paris in 1898, the Spanish Crown ceded the Philippines to the U.S. 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, and land registration, cadastral surveys, waters, and minerals (Keesing & Keesing 1934:163). The U.S. colonial administration, ignorant of native land tenure systems, considered lands not covered by land registration or paper titles to be public land. Although the American administration encouraged land registration among the indigenous groups, the diverse native land tenure system did not all fit the introduced private ownership concept of land. Only a few, mostly the elites and schooled individuals took advantage of the land registration system (Keesing & Keesing 1934).

The American colonial government adopted the *Regalian Doctrine* from colonial Spain. However, instead of the King as the owner of all natural resources, the state was substituted. Under American natural resource laws, land was classified into private, public, and land reservations. Thus, the common property resources such as communal lands and corporate lands owned in common by the natives were not recognized as such but were viewed as public lands under the control of the state. These common lands were now open for titling by any qualified applicant following the payment of land taxes. Under the American land tenure law, some natives who (especially the poor) could not avail of private lands under the customary law now had the opportunity (see Wiber 1996) to own land privately. Large tracts of land once associated with the upper class (*baknang*) landholdings had to be limited also due to the payment of taxes. The consequence is that common property resources became privatized, particularly in the Province of Benguet.

After independence in 1946, the Philippine Republic adopted the natural resource laws introduced by the colonial governments, primarily the Regalian Doctrine as basis for the State ownership and control of all natural resources in the Philippine archipelago. Also adopted was the western concept of resource management and conservation policy that perceives protected areas (national parks, ecological stations) as empty spaces with no human dwellers. Traditional dwellers of the forest, under the western view of conservation, should be expelled in order for conservation to take place or to be successful.

The Philippine Republic and Post-Colonial Policies on Natural Resources

Under the Philippine Republic the Regalian Doctrine remained the theoretical bedrock on which Philippine natural resource laws rest (Lynch 1986). 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 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 decades have been characterized by intensified commercial activities in the name of economic development. Agribusiness, logging, and infrastructure programs and projects have

intensified. These development activities have encroached into the ancestral domains of indigenous communities, displacing some, especially those practicing swidden agriculture, and threatening to dislocate others. Under the regime of President Ferdinand Marcos the laws were manipulated to justify state claims to indigenous peoples' ancestral lands. Such cases involved, in the 1970s the controversial Chico hydroelectric dam in the Cordillera and other such projects. Presidential Decrees number 410 (1974) and 705 were enacted. Presidential decree No. 410, for example, was an attempt to legitimize the government's claim that indigenous people were squatters on the land that they occupied since time immemorial, unless they apply for land occupancy certificates. This law excluded Abra and Benguet provinces from availing of this process since these were the sites where government projects were to be carried out. The Revised Forestry Code (P.D. 705) includes the 18% slope rule that stipulated that all lands with a slope of more than 18% was considered as part of the public domain and considered as non-alienable. This would render a large portion of the centuries-old rice terraces in the Cordillera as public land. The intent of these laws was apparently to prepare for the construction of a series of hydroelectric dams in the Cordillera region and to award Forest Reservation lands to the Cellophil Resources Corporation. This latter included the ancestral domains of the Tinguians of Abra (Dorral 1979:118).

Paradigm Shift in state policies on natural resource management as a consequence of the alarming rate of unsustainable natural resource management under state control

The Philippine government's recognition and the granting of ancestral land rights and ancestral domain rights (Prill-Brett 2002) to indigenous peoples through the passage of the *Indigenous Peoples Rights Act* (IPRA) has been the result of policy conflicts over land access, use, and control. The seeming inability of government to control and manage the natural resources led to a general perception that resources formerly under the rule of indigenous law were now open access resources in the public domain. The resulting intensification of forest degradation and unsustainable resource extraction has prompted the government to change its policies toward indigenous cultural communities that occupy the forest. Recognition of Indigenous peoples' rights to their ancestral lands and domain has been increasingly linked to a policy of ecological conservation and the protection of biodiversity. The IPRA Law also provides for the creation of the *National Commission on Indigenous Peoples* (NCIP) that "shall be the primary government agency responsible for the formulation and implementation of the policies" covered by the IPRA. Among the many responsibilities of the NCIP is the mandate to issue Certificates of Ancestral Land Titles (CALTs) and Certificates of Ancestral Domain Titles (CADTs) over areas that have been awarded CADCs and CALCs by the Department of Natural Resources (DENR). The IPRA further allows the titling of individually owned ancestral lands under the provisions of the Land Registration Act 496 of 1902. Another significant breakthrough is that this act further states that "individually-owned lands which are used for agriculture, residential, pasture, and tree farming purposes, including those with slopes of 18% or more, are hereby classified as alienable and disposable agricultural lands (A&D, Sec 12). This law will now allow the titling of agricultural lands such as the rice terraces with slopes of 60 to 80 degrees as alienable and disposable.

Community-based resource management and Sustainable Environmental Protection

In connection with the recognition and awarding of ancestral lands, government and non-government development agencies have increasingly considered community-based resource management, governed by customary law as essential in order to protect the environment and the economic interest of the indigenous peoples. Strengthening peoples' customary institutions is seen as important to empower people and give them a stronger bargaining position as they are increasingly interacting in the market economy. However, it is also important to consider that different state agencies pursuing different and often contradictory sectoral interests are involved in the making and implementation of state regulations. Thus, the Philippine government's support of the awarding of certificates of claims to ancestral lands and domains has, to a large extent, influenced the indigenous concepts of land ownership access and management of common property resources. Moreover, this situation has been complicated by the fact that the two government departments ---the Department of Environment and Natural Resources (DENR) and the Department of Agrarian Reform (DAR), both who are involved in the implementation of the state recognition of ancestral lands and ancestral domains, with the DENR as the lead agency, have inadvertently created problems with the awarding of overlapping claims (see Prill-Brett 2002; NIPAP General Management Plan, Vol.I, 2000).

In the interaction of indigenous communities with the different sectoral groups, indigenous people find themselves in a situation where the different agencies present them with different and often conflicting perspectives, objectives, and agendas from their respective institutions. This has opened up new opportunities that have been taken advantage of by some community members. The DENR, for instance, is mandated to protect and conserve the forest and other natural resources. This department has its own management plan in order to attain its objectives. The Department of Agriculture's primary objective is to increase agricultural production, while the Department of Agrarian Reform's main thrust is to distribute land to the landless. In addition, the NGOs that usually work with the indigenous people are not exempt from carrying with them their own agendas with regards to resource management. Often, the objectives of these different agencies come in conflict with the indigenous communities' resource management practices, especially on common property resources. Under such conditions some indigenous claimants have invoked the customary and national laws to allow them new access to natural resources that may not result in equity amongst indigenous community members, nor attain the sustainable objectives (see Prill-Brett 2002). Furthermore, these conflicting and often contradictory perspectives open up competition among stakeholders asserting their rights by invoking both customary and state laws to support their access to resources.

The problem that confronts implementors of community-based development programmes/projects is usually the lack of ethnographic information on indigenous land tenure systems and existing property regimes. Included here is the issue of communal rights: what are the common property resources of a particular community? What kinds of rights to what kinds of resources do community members have access to? Who are the responsible resource managers to what kinds of resources? What are the social arrangements (rules) pertaining to these resources? Confusion arises, especially among development implementors as to the locus of rights and responsibilities in resource management pertaining to communal resources, indigenous corporate resources owned by clans, cognatic descent groups, and individual private-owned resources. In such cases new structures are introduced that often ignore the existing social arrangements. In some instances, where there are no existing rules in the management of communal resources, or

where the rules have broken down, an “opportunity structure” emerges (see Appell 1980 quoted in Prill-Brett 2002) which is used by individuals and interest groups. As suggested by F. von Benda-Beckmann (1983): “plurality provides the necessary leeway for individual actors or interest groups to lift the behavior out of the opportunity structure and reify it in the social structure” since emergent structure in legal pluralism situations is contingent on purposive political and economic actions.

Sometimes indigenous people invoke indigenous tenure rights in order to gain access to land and create permanent rights through state granted title (see Wiber and Prill-Brett 1988). Such situations are being employed in the adoption of state laws and sometimes the use of customary law to justify their actions.

Among indigenous communities that still practice collective land ownership by the corporate descent group, there is the current tendency for corporate land to become privatized by individuals who belong to the corporate group. This is facilitated through the planting of non-traditional crops such as temperate vegetables, citrus and other fruit tree varieties, coffee, and other cash crops. These cash crops have been largely introduced by development agencies such as the Department of Agriculture as part of their poverty alleviation project to uplift the socio-economic conditions of indigenous cultural communities. However, when permanent crops and improvements (e.g., barbwire fences) are invested on the land there is a tendency for the enterprising person to keep increasing his/her landholding and then try to have the land tax-declared at the Bureau of Lands. If the corporate group members do not protest and enforce their equal rights of ownership these co-owners will eventually be excluded in the future from enjoying their rights. There are some cases where this has happened to corporate property that became privatized by one of its corporate members. The rights of the other corporate members have been extinguished by the act of using national tenurial instruments through tax-declaration of the land under the individual’s name. The tenurial instrument shows that the “legal” owner is recognized by the national legal system, since the individual had performed the legal requirements and paid the taxes.

In the Cordillera experience, it appears that when indigenous communities shift from the production of subsistence crops to cash crops, especially if there is a heavy input of capital, there is the tendency for common property regime to become privatized by enterprising persons of the communities. These persons who invested permanent improvements on common land make use of the state tenurial instruments to perfect their ownership right over the land.

Consequences of Inconsistent and Inappropriate Policies: Resource Degradation and mismanagement of Common Property

In the traditional land management, the development of institutional arrangements in the access, use, and transfer of resources, particularly agriculture land and forest, are strategies used by indigenous communities for sustainable management under the traditional system. This has been carried out through the practice of multiple land use and management. The nature of these institutional arrangements defines the extent of property regime over land and related resources.

State policies governing access, control, and management of Philippine natural resources have resulted in unintended consequences, which have contributed to the non-sustainable resource management resulting to the loss of biodiversity. This has also indirectly led to the commencement of the demise of common property regimes. With nationalization, common property resources claimed by indigenous communities were gradually converted to open access (see Prill-Brett 1993, 2002).

Some unintended consequences have also been observed in the implementation of the IPRA. This law was intended to improve the quality of life and to promote unity among the indigenous communities. However, it has been observed that issues involving conflict over boundaries between adjacent community-stakeholders, between individuals and groups within the same community have been increasing. This has been brought about largely as a consequence of the introduction of new technologies, commercial crops that have replaced subsistence crops, infrastructures such as roads, and different rules or/and policies of conservation introduced by national and international conservation agencies.

Furthermore, the superimposition of nationalization policies interacting with population increase and the increasing commercialization of agriculture and forest resources, are contributing to the breakdown of traditional institutional arrangements. Several implications may result from the inconsistent and inappropriate policies on land under common property regime, as I have argued elsewhere (Prill-Brett 1994). *First*, the intervention of government by superimposing national law over customary law on resource management results in the breakdown of internal juralty. For the period in which these resources devolve into open access, major depletion and destruction occurs before any internal juralty has a chance to develop (Bromley and Cerna 1989; Berkes 1986; Runge 1986). This is clearly demonstrated in the Cordillera where the government virtually declared all forested areas as public land. The forest in question, which may have originally been managed as the common property of a certain community is now perceived to be an “open access” resource. In such case, an opportunity structure emerges, where the rule of exclusion is challenged by certain individuals or groups who invoke the national law (Malayang 1991). An example is the accelerating conversion of the mossy forests into commercial vegetable farms within the past twenty years. The government’s declaration that the forest is public property, and therefore owned by the state has encouraged some members of neighboring villages to encroach into the traditional territory or domain of another to exploit their resources. This has resulted in an increase in cases of conflict over resources and boundary disputes. *Second*, is the depletion of resources due to the breakdown of the internal juralty of the community in the management of common property regime. Under such condition individuals take advantage of the uncertainty of the current land tenure situation to expand their landholding and use state legal instruments to privatize common property. *Third*, is the increasing degradation of the environment and the loss of biodiversity. When communities are deprived of the right to manage the common property resources within their ancestral domain such as forestlands, the perception of open access to public land arises. There is now open competition for resources between the community and government-favored individuals or corporations, and as a result the resource is not allowed to regenerate since there is no incentive to prevent its depletion. In some cases, the community may even compete to deplete these resources. Some individuals have taken advantage of this opportunity to convert common property resources into capital. Such a situation has happened to the mossy forest of the northern

central Cordillera such as Mt. Data (see Delson, 1989), and the increasing encroachment of Mt. Pulag (Benguet) and Mt. Polis (Ifugao), where portions of mossy forest are being converted into commercial farms threatening the biodiversity of probably the last mossy forests in the central Cordillera.

Conclusions

Implementors of sustainable environmental management programs are often faced with a poor understanding of indigenous land resource management and the indigenous social arrangements governing property rights. Furthermore, it appears that the several agencies involved in development work within a particular area rarely coordinate with each other. This problem has given rise to issues in the implementation of well-meaning development projects. In one report of findings and recommendations for Protected Areas planning, resulting from a rapid rural appraisal (RRA) in 1998,² reported the following issues:

- Poor definition of community that resulted in the difficulty of identifying community responsible groups to carry out development planning activities.
- Land rights issues were ignored because the implementors did not have enough knowledge about the diversity in resource management of common property resources resulting to conflict.
- Implementors did not have adequate skills, thus, ill prepared for carrying out the tasks required in community development.
- Community (inter-community/inter-ethnic) conflicts were ignored, especially in resource competition issues.
- Political will was largely absent and unrealistic promises were made.

New development projects being introduced to indigenous communities without first understanding the traditional resource management practices may encourage the creation of new rights that would eventually lead to the demise of common property regimes.

² This RRA was conducted within the communities of the Mount Pulag National Park (also declared as a Protected Area in Benguet Province).

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