

LEGISLATING COMMUNALITY: STATE LAW AND TENURE PRACTICE AMONG THE BANWA-ON*

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(To the memory of Mateo Morales, friend and martyr.)

1. INTRODUCTION

A. Theory and Practice

In a book reviewing Southeast Asian governments' policies for indigenous peoples, Eder and McKenna judged the Philippines "a relative bright spot", compared to the other countries in the region (2004: 56). This view is based mainly on the Philippine government's enactment of the Indigenous Peoples Rights Act (IPRA) in 1997, a law that allows indigenous peoples to secure titles over their territories. In their conclusion however, they spoke of "cloudy prospects" (2004: 78) for Philippine indigenous groups, because state practice allegedly lagged behind theory.

The article assumes that the theory – the IPRA itself – is, if not perfect, then sound; the focus instead is on the divergence between what the law promises and how well the state is implementing it. Externalities to the law such as the state's unwillingness to cede genuine control of resources to communities are thus cited as the obstacles to development (Eder and McKenna 2004: 79-80). Conversely, there is no attempt at a critical reading of the law's provisions.

This paper assays such a critical reading of the law. This is important because the IPRA is a pioneering attempt by a Southeast Asian government to address indigenous peoples' demands for legal recognition of their rights. Critical analysis

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may help other governments or advocates to avoid the statute's errors, and improve thereon.

However, the IPRA has a comprehensive approach to indigenous peoples' rights and welfare, making a critique of its entirety impracticable. The paper will therefore focus on the law's provisions on tenure, which have important consequences for the crucial issue of land and resource rights, and environmental management (Bromley and Cernea 1989). More particularly, the state's notion of indigenous tenure, as provided in the IPRA, will be discussed, and the assumptions underlying that notion explored.

The state's notion of indigenous tenure will also be juxtaposed with the actual tenure practices of one indigenous group (following Long 1996: 51-52), namely the Banwa-on of northeastern Mindanaw island. We thus gain a better sense of how well the IPRA's provisions on indigenous tenure reflect an understanding of the realities of life for a Philippine indigenous group of the 21st century. While the Banwa-on may not be representative of all Philippine indigenous peoples, any disjuncture between their tenure system and the law remains instructive. In any case, the exercise provides a measure by which to assess the validity of the assumptions underlying the law's provisions on tenure.

In sum, this paper will—to borrow the same trope employed by Eder and McKenna—examine the IPRA in terms of theory and practice. The difference is the “theory” will be critiqued by its contrast with the actual tenure “practice” of an indigenous people.

The paper hopes to prove useful in leading to a better understanding of state discourses on indigenous peoples and their rights and interests in land and resources, and in guiding future or further attempts at policy formulation, legislation and administrative regulation. Further, it provides a starting point not only for understanding the current situation of the indigenous peoples of the Philippines, but also for the necessary task of imagining a future beyond the IPRA.

B. History, Agency, and Tenure

This paper responds to the call to explore the interrelations between market processes, government and other forms of intervention and the organization of society (Long 1996). To that end, it will focus on the strategies that local actors devise so that they may appropriate particular interventions (Long 1996: 53).

Indigenous peoples and communities are not bounded, homogenous and timeless isolates; they and their culture are partly shaped by the historical development of market processes (following Wolf 1982). While I agree that there is more to indigenous peoples and their history than their relations with the market economy (Ortner 1994: 387), the fact is that we are all embedded in historical networks of global material relations (Thomas 1991: 8), that these relations have had a profound impact upon the development of local cultural practices, and therefore due attention has to be accorded to these issues. This is not to deny the agentive capacities of groups and individuals belonging to indigenous peoples. Agency, however, has generally been equated with resistance and defined in opposition to structure (Giddens 1984: 25); it is thus necessary to echo cautionary injunctions against romanticizing it (see Moore 1997: 89). Agency is as much about resistance as about attempts by individuals and groups to exploit the economic opportunities offered by the penetration of global capitalism into their life-worlds. As I hope to demonstrate, the Banwa-on engineered shifts in their tenure system to secure and maintain cash inflows through links with the timber industry.

Tenure is understood here as referring to that aspect of social relations that relates to access to and control over the resources of nature, and as such, is about “the ways in which a resource locale is worked ... into the developmental trajectory of ... groups” (Ingold 1987: 137) like the Banwa-on. A particular focus will be on the mode of ownership practiced by the Banwa-on; i.e., whether it is “communal” or “individual”.²

² Unless delegated, “communal” ownership is where a group as such is recognized as having relatively exclusive control of access and use of property, independent of actual occupation or possession. “Individual” ownership, on the other hand, is where an individual enjoys such control. “Open-access” goods are as defined by Bromley and Cernea (1989).

To describe the process of framing and constructing rules of tenure, I adapt Giddens' notion of structure (1984: 17; see also Long and van der Ploeg 1994) as a set of rules and resources creatively, reiteratively and strategically produced, invoked, reinterpreted or contested by variably situated actors as they pursue their respective interests. Tenure, in other words, is not seen as a static set of received rules and expectations (Ingold 1987: 137).

As Long (1996) urges, government intervention, in the form of legislation affecting indigenous tenure, will also be considered. Fortunately or unfortunately, the Banwa-on have only just begun to define their relations with such legislation (cf. Gatmaytan 2001a), so the full exploration of their strategies in appropriating, manipulating or subverting this intervention is very tentative, and may perhaps be properly addressed in another forum.

II. Outline

The paper will briefly introduce the Banwa-on and their culture, to provide a context for the succeeding discussion, which traces the development of Banwa-on land and resource tenure from the pre-War period to the present. Banwa-on land and resource tenure is then contrasted with the state's notions of indigenous tenure, as indicated by the Indigenous Peoples Rights Act. A brief discussion of the divergences between these two perspectives on indigenous tenure concludes the discussion.

III. THE BANWA-ON

A. The People of the Land: The Banwa-on

The Banwa-on—literally, “the People of the Land”—are an ethnic group whose language belongs to the Binokid family, which in turn is part of the great Manobo language family (Lebar 1975; PANAMIN undated; see also ESSC 1998). Apart from a mention in 19th century missionary accounts (Arcilla, trans. 2003), some passages in Garvan's pre-war ethnography of the Agusan Manobo (1929), and much later, a few scattered monographs and articles (SILDAP-SIDLAKAN 1993, 1996; Anon. 1998; Gatmaytan 2000, 2001a), very little has been written about them.

The 2000 government census—the latest available returns—does not enumerate the Banwa-on, perhaps including them under the categories “Manobo” or “others” (www.census.gov.ph). Neither does the website of the National Commission on Indigenous Peoples (NCIP), the state agency responsible for indigenous peoples' welfare, mention the Banwa-on among the country's indigenous peoples (www.ncip.gov.ph).

Be that as it may, the Banwa-on assert ethnic or cultural distinctiveness from the neighboring Manobo communities to their south and east and from the Higa-onon to the north. Local estimates of their population range between 8,000 to 10,000 individuals (SILDAP-SIDLAKAN 1996: 16), making them a small ethnic group.

Garvan (1929: 5) speculates that the Banwa-on were Higa-onon who migrated eastward from Bukidnon, across the Pantaron mountain range, and into the Ma-asam and adjacent river valleys.³ Today, Banwa-on communities are also found in the upper Adgawan river. This broad area now lies within the political jurisdiction of the Municipality of San Luis, Agusan del Sur province, in northeastern Mindanaw island, southern Philippines. Indigenous and *bisaya*⁴ residents of San Luis divide this area into two districts. The Ma-asam river area, and the adjacent Laminga and upper Kasilayan river areas form “Side 1”, as opposed to the upper Adgawan river area, or “Side 2”. These “sides” are formed around the two major roads built by logging companies in San Luis in the 1960s or 1970s, which are still in use today.

³Garvan says the “Banuaon” are “[a]lso called Higaunon or Higagagun” (1929: 5). Cole asserts that the “Higaonan” are the same people as the Bukidnon, or as Spanish called them, “Monteses” (1956: 5). Clotet says the “Monteses” or “Buquidnon” are also found in the Agusan valley (Lynch, trans. 1967: 465). Paredes says that while the “Higaunon” are referred to in general as “Bukidnon”, the latter term is properly applied to those in Bukidnon province (1997: 2). Also, “Higaunon” are “sometimes called the “Banuwaon” or “people who live in this or that place” (Paredes 1997: 33).

⁴I follow Banwa-on usage and call non-indigenous migrants from the lowland, coast or beyond, or their descendants, as *bisaya*, irrespective of their actual ethnicity (e.g., Cebuano, Bol-anon, etc.).

B. Banwa-on Culture

This paper is based on data from Banwa-on communities of Side 1, considered by many as comprising a *talugan*, a bounded, autonomous region often conflated with a river system—in this case the Ma-asam—with its own laws or *gutlo*, collectively known as the *Kiyala ha Batasan*. Entry by *bisaya* into this *talugan* is supposed to be forbidden, as the spirits find the intermixture of people with different laws or customs offensive (Gatmaytan 2001a: 37). Importing products and practices from outside the *talugan*—such as schools, chainsaws, mapping, GI-sheets, tree planting and buffaloes—is traditionally considered to be *olagon*; i.e., resulting in grave illness visited by spirits on the Banwa-on of the area where these things were introduced.

The Banwa-on take their indigenous religious beliefs and practices very seriously. They practice both day-to-day rituals, such as farming and hunting rituals, as well as their *tulumanon*, or major ritual obligations. In the more accessible Side 1 villages, a few Banwa-on have converted to Catholicism, but continue to practice indigenous rituals.

The Banwa-on live in scattered, autonomous villages usually located along rivers or roads. Each village has one or more (male) *datu* or leaders, who settle conflicts, negotiate and formalize marriages, and provide guidance to the *sakup* or community members. Other traditional roles like the *panod* and *katangkawan* remain relevant.⁵ The Banwa-on participate in local government elections, which male non-*datu*s now tend to win. Elective officials and *datu*s coexist in many villages, though most day-to-day problems tend to be referred to the latter.

In each village are one or more extended families, built up from a nuclear family, and its female children's in-marrying husbands. The social structure is bilateral and patriarchal, with the male head of extended families having influence over his children and sons-in-law. Kinship bonds are strong, but exposure to *bisaya* culture has eroded practices like polygyny (*duway*) and arranged marriages (*boya*).

⁵The *panod* are widely recognized, mainly elderly authorities on indigenous custom laws (*gutlo*); the *katangkawan* resolves feuds (*lido*) and prosecutes sanctioned raids (*pangayaw*).

Swidden farming and hunting or trapping are highly valued, widely practiced and deeply ritualized. Rice and sweet potato harvests, and all game and fish are gifts of the spirits; it is taboo (*pamalihan*) to sell these products. To obtain trade items such as steel tools, salt, pots and clothing, they used to barter forest products like wild hemp fiber, beeswax, honey and *nawi* or rattan strips. As will be detailed below, the Banwa-on are now intensifying their engagement with the larger market economy.

IV. PRACTICING INDIGENOUS TENURE

A. Komunal Tenure

In contrast with the neighboring Adgawan Manobo, who explicitly represent their land tenure system as rooted in ownership based on pioneering first use by their ancestors (Gatmaytan 1999), most Banwa-on say that their land tenure system was originally “communal” (*komunal*).⁶

For the Banwa-on, the term *komunal* means no individual or group was recognized as owners of the land within the *talugan*, i.e., having the right to relatively exclusive control or use of the land independent of actual occupation (following Ingold 1987), and by implication, to restrict others' access and use of the same. Anyone could, in theory, make a swidden clearing in any part of the *talugan* or territory.

This does not mean that there was no link between lands and Banwa-on social formations. Families or groups of families were associated with particular tracts of land within which they resided and farmed over many generations, forming what may be referred as ‘home ranges’. No Banwa-on term for such tracts of lands could be elicited. One *datu* simply described such lands as the families' “*na-andan nga area*” (customary area).

⁶The term “*komunal*” is widespread, but is clearly of Spanish or English derivation. I suspect it may have been picked up from Communist organizers who used Engels' as a framework for approaching indigenous communities. Inquiries about a Banwa-on equivalent for the term have proved unavailing. The closest term offered by my informants was *tinibo*, derived from *tibo* or “all”; hence, “for all” or “for everyone”. Note that the term does not by itself offer a precise distinction between communal, community or corporate property on one hand, and open-access goods on the other.

Even as access to land was unrestricted, non-family members who wished to make clearings for subsistence cropping in a family's 'customary area' must first secure the permission of the head of the family concerned, by way of respect ("*isip pagrespeto*"). Elders agree that permission to use the land for cropping was never withheld.

This assertion of communal landownership is supported by studies of Banwa-on culture or land tenure (SILDAP-SIDLAKAN 1996: 57-58; see also SILDAP-SIDLAKAN 1993). Comparative data from the neighboring Tala-andig, locally considered as a more remote branch of the Banwa-on, also supports this view (Briones 1988: 79).

On the other hand, bodies of water like the rivers and creeks within the *talugan* were considered "*komun*" or open-access resources. These waters not only provided fish and other resources, but served as routes of travel. Categorizing them as *komun* ensured that anyone and everyone had access to these routes and resources.

Timber, game, fish and forage resources⁷ were likewise *komun*, open to appropriation by anyone, anywhere, at any time. Indeed, there are no traditional controls on hunting, trapping or fishing.⁸ Large-bodied game (principally wild pig and deer) captured through pursuit with hunting dogs (*pagpangaso*) or trapping (*pagpangla-is*), large fish, and fish caught in large weirs (*bisig*) were usually divided up (*handog*) among all the households in the village. Of the forage resources, rattan (*balagon*),⁹ beeswax (*tado*) and honey (*dugas*) were important as barter goods.

⁷These include wood and thatching materials for home-construction, firewood, bamboo, rattan, materials for the construction of ritual furniture or paraphernalia, weaving- or craft-materials, betel-chew ingredients, medicinal substances, honey, wild foods such as palm- and rattan-pith, fruits, edible ferns and mushrooms.

⁸If the Banwa-on were to regulate hunting, they would tend to ban the use of specific hunting or trapping technologies rather than limit access to the game animals themselves.

⁹In the past, rattan poles were never cut. The Banwa-on would only cut off a strip of the necessary length from the vine's stem for sale or use.

B. The Coming of the Companies

The post-war global construction boom spurred the growth of the timber industry in the Philippines. While logging had been practiced in Agusan del Sur province since the 1950s, informants date the entry of logging companies into the Ma-asam river area to the early years of the Macapagal presidency (1961-1965).

There is some confusion as to which logging company was first in the area. What is clear is that the owner of this first company visited the area to talk to the paramount leaders of the Banwa-on about his plan to conduct logging operations. These leaders were Datus Mansulsugan and Sabuluwan, and the *katangkawan* at that time, Datu Napongahan.

These three senior and widely respected *datus* quickly and unanimously agreed to allow logging operations in the *talugan*. More, they became agents of this and other logging firms.¹⁰ Their support of logging operations silenced any opposition, so that all through the years of the logging boom, logging companies met absolutely no resistance from the Banwaon.¹¹ Instead, most Banwa-on men found work with the various companies as guides, road-builders, tree-markers, sawyers, buffalo-drivers or -tenders, and guards, even as their wives and children carried on with traditional swidden farming.

These three leaders each initially received PhP 2.50 a day¹² as "time" from the logging firms.¹³ In return, the companies expected them to facilitate their logging operations by settling

¹⁰There were at least five logging firms in San Luis until the 1980s, aside from smaller operations, which paid "royalty" to licensed companies to operate in the latter's' concession areas.

¹¹There were reports of barricaded roads or even attacks on company employees, but they resulted from actual or perceived failures by a logging firm to keep its promises. These cases could not be interpreted as resistance to logging as such.

¹²In the 1960s, logging foremen received PhP 3.00 a day. A sack of rice sold for PhP 1.50.

¹³The term "time" probably comes from the company "time-papers", used to record numbers of hours worked as basis for computing daily wages. Slowly, "time-papers"—or simply, "time"—may have come to mean receiving money from a company, hence the usage.

disputes that might disrupt work, ensuring the safety of workers¹⁴ and equipment, and conducting the so-called "logging rituals" to circumvent the notion of *olag*.

Those expecting these revered elders to embody ecological sensitivity and wisdom might find these events perplexing. Life in a tropical rainforest, however, is hard and hardly idyllic. While harvests and resources were reportedly plentiful in the past, traditional subsistence technologies required the use of steel axes, machetes and spears, which were imported from outside the area, relatively expensive and/or in short supply. The Banwa-on also needed salt, metal pots, clothing, and even "traditional" items such as gongs, beads and brass wire. Comparative data from the pre-war Subanun (Christie 1909: 42) and Higa-onon (Cole 1956: 84), and the post-war Subanun (Frake 1955: 62) and Tiruray (Schlegel 1979: 106, 108, 110) all affirm indigenous communities' need for lowland goods for their survival.¹⁵

In other words, the coming of the logging industry was probably seen as an opportunity to earn cash for purchasing needed or desired lowland products. In contrast to popular opinion (Vitug 1995), most Banwa-on elders remember the logging boom as a time of relative prosperity generated by employment¹⁶ in the timber industry, and more access to more goods.¹⁷

Some of the other *datus* or heads of families—perhaps not content with the wages they and/or their *sakup* received—soon

¹⁴The use of indigenous trapping techniques such as the *la-is* (spring-driven spear-trap) and *salungag* (sharp stakes planted on game trails) were discouraged during the 1960s and 1970s because they could injure or kill unwary logging workers.

¹⁵This perhaps explains why 19th century Jesuit missionaries were so confident that Agusan Manobo renegades or outlaws who fled into the forests to escape the crown or Church would starve and eventually return to surrender themselves (cf. Arcilla 2003).

¹⁶In the 1970s, wages for logging workers were at around PhP 4.00 per day. By then, a sack of rice sold for PhP 6.00, and a buffalo for PhP 18.00.

¹⁷Hunting and trapping technologies were enriched by interaction with the *bisaya*. They learned how to manufacture homemade shotguns (*surit*), which could also be used in booby-traps (*tang-ul*) to catch game. Nylon rope allowed them to modify snare-traps (*lit-ag*) for small game to catch wild pigs. A few also learned to use *ping-pong*, small explosive charges inserted into pieces of sweet potato left in the bush, which explode when bitten by a wild pig.

learned to occasionally barricade logging roads that passed by or through their respective 'customary areas', citing real or imagined grievances. One of the three senior *datus* would then have to negotiate with them, a process often framed as a request not to embarrass the senior *datu* before company officials, and facilitated by liberal allocations of wine, tinned fish, or other goods supplied by the company. All such incidents were reportedly resolved amicably.

C. Sektoral Tenure

By the late 1960s, other *datus* and heads of families were seeking ways of earning "time" as well. This began a process whereby the *talugan*—until then still communally held—was subdivided into landholdings.

At first, extended families asserted group claims of ownership over tracts of land, mainly on the basis of their respective 'customary areas'. A descriptive association between a family and a tract of land was thus turned into a claim of ownership. The 'customary areas' easily lent themselves to this transformation because they contained the families' homes, farms, tree-plantings, fallow areas, and worship and burial sites, all of which could be invoked as evidence of prior use or occupation, and by extension, of ownership.

Later, even siblings would subdivide such tracts of land into individual landholdings.¹⁸ Gradually, the whole of the Banwa-on *talugan* was subdivided into such landholdings, ranging in size from a few hectares to thousands of hectares. These landholdings were called "sektor".

To bolster claims of ownership of *sektor*, many Banwa-on heads of families represented themselves as *datus* to company operators and officials. They may initially have been exploiting the apparent link between *datu*ship and receiving money from loggers, following the example of *Datus Sabuluwan* and *Mansulsugan*. Almost all loggers accepted such representations,

¹⁸I hypothesize that Banwa-on inheritance rules began to be elaborated at this point. Previously, inheritance was generalized (see Garvan 1929). The notion of descent and inheritance may have been used to argue for subdivision into individual landholdings. Today, there is an explicit rule that all children, regardless of sex or order of birth, inherit land equally.

so the practice spread, eventually resulting in a proliferation of "datus" in the area in the 1970s and 1980s.¹⁹ Even today, many people in the area conflate landownership with *datu*ship.

The express purpose of these processes of negotiating identities and subdivision of landholdings was to make money from logging operations. If an operator wanted to cut timber in a given area, he must first secure the permission of the owner of the *sektor* in which the timber stood. It may have been more pragmatic for loggers to 'recruit' *sektor*-owners and/or "datu" as allies and negotiators through payments of "time"; rather than risk their anger and the resulting loss of equipment or workers in a remote, densely-forested frontier area that in many respects is still very poorly policed by the government.²⁰ For most Banwa-on heads of families, this provided the opportunity to negotiate the payment of "time" by the logging operators, the period they were allotted to work, and the specific areas where they may log. In the 1970s, *sektor*-owners received from PhP 7.00 to PhP12.00 for each day of logging operations within their landholdings.

One informant explained that the right to payments from the companies stemmed from the necessity of intruding into a *sektor* to conduct cutting operations, rather than from ownership of the timber itself. He said *sektor*-owners at that time would tell loggers, "my land extends to that creek" (i.e., if they want to enter his land [to cut timber] they have to pay for the intrusion or disturbance), rather than "these are my trees".

This indicates the tenacity of the idea that timber was an open-access resource that could not be claimed as property, particularly since the Banwa-on made no investments in 'producing' timber stands. By contrast, they could justify ownership of land because they did expend time and labor in clearing it, making it productive or otherwise converting it from

¹⁹In the late 1980s, this practice formed one root of what activist-organizers referred to as the "fake", "company" or "*datu-de-papeles*" (paper *datu*) phenomenon.

²⁰In fact, the one company in the general area that clearly refused to recognize local claims of landownership was Provident Tree Farms, Inc. (PTFI), which began logging operations sometime during Martial Law (1972-1986). It could afford to do so because its owner was then Minister of National Defense Juan Ponce-Enrile, who had a well-armed security force, as well as control of the military command.

wilderness or undifferentiated space, into a human domain or meaningful place (following Appadurai 1995). To make money off the loggers in such a situation, the Banwa-on solution was to invoke disturbance of their land-ownership rather than ownership of the timber itself. Still, it is clear that tree tenure (Fortmann and Bruce 1988) was becoming linked to land tenure.

Commercially valuable varieties of rattan, such as *palasan*, *kalapi* and *tomalin*, followed the same pattern. By the late 1970s, rattan poles—not just rattan strips—were becoming an important source of cash for the Banwa-on. *Sektor*-owners also began demanding payments from anyone wishing to cut rattan poles from their *sektors*, a practice that continues today. Rights to rattan were thus similarly being linked to landownership.

The proliferation of landholdings and the occasional disputes over relative rights or boundaries were probably confusing for the logging operators in San Luis. Worse, the number of *datus* in the area increased, as some Banwa-on (and a few enterprising *bisaya*) claimed to be *datus* to strengthen their claims of ownership. The now-defunct Commission on National Integration (CNI), and the Presidential Assistant on National Minorities (PANAMIN) that succeeded it—state agencies responsible for indigenous peoples' welfare—were consequently busy helping clarify who owned which *sektor*.²¹ Today, even Banwa-on activist-organizers occasionally have to get involved in resolving disputes over land/timber ownership.

Not all Banwa-on were equally interested in profiting from logging, though everyone needed a source of cash for needs or wants. A few *datus* or heads of families considered themselves obligated to provide their descendants a means of livelihood—i.e., land for cultivation, hunting, or trapping (and logging?)—and to that end also claimed their own *sektors*. Indeed, remote and rugged areas where timber extraction would be extremely difficult were also subdivided, if mainly on speculative grounds.

²¹The CNI also tried to establish a number of civil reservations in the larger Banwa-on *sektors*. This further spurred processes of boundary-negotiations between putative landowners.

In any case, the entire *talugan* was subdivided into individual *sektors* by the late 1980s.²² By then, an apparent dependence on timber and rattan as sources of money had developed. No other goods could be sold for cash because deforestation itself destroyed the supply of beeswax, honey and wild abaca; and the taboo against selling crops and game remained strong, even as other taboos have lost hold.

But even as individualization of tenure proceeded through the 1970s and 1980s, *sektor*-owners continued to allow others to borrow land for subsistence cropping, free of any obligation to pay rents or shares in the harvest. In other words, the individualization of *ownership* of land has not affected the communal *use* of land cognized as property of others. While prior permission must first be secured, informants agree that, as before, permission was never withheld. The one proviso was that those who borrowed land must not plant trees. Planting trees implied the intention of staying in the borrowed area beyond one cropping and until the trees became productive, and thus connoted to stealing land.

Aside from the land, only marketable timber and rattan varieties were becoming individualized. Other varieties of trees or rattan, and all other forage-resources remained open-access goods. Also, cutting commercially valuable rattan for immediate use, or for its edible pith (*ubod*), need not be paid. Game and fish also remained open access goods, and could be pursued or caught in any *sektor*, without need for permission from or obligation to share the catch with the owner.

V. CASE STUDIES: TRENDS AND PATTERNS

A. Timber as Commodity: Policarpo

By the mid-1980s, the logging boom had passed its peak, and logging firms began closing down as stocks of marketable hardwoods ran out. With the departure of the logging companies, many Banwa-on men began to conduct their own small-scale logging operations, called *panoroso* or *laging-laging*, which many

²²A nun who still runs an NGO assisting indigenous peoples today said that when their order arrived in San Luis in 1978, *sektoral* landownership was already in place.

now consider their principal source of income (SILDAP-SIDLAKAN 1996: 33).

In the more prevalent type of logging operation, small groups of Banwa-on men conduct operations on their own.²³ Such is the case of one *datu* and ritualist in Policarpo, a small village on the Side 1 road, near the junction of the lower and upper Ma-asam River valley. During the logging boom, he received "time" from a logging firm based in Policarpo and operating in the surrounding area. Today, even as he continues traditional swidden and ritual activities, he periodically fells *lawa-an*²⁴ trees in his *sektor*. The logs are usually hauled by hired teams of men, boys and buffaloes to one of several cliff-top sites above the Ma-asam River, where they are stockpiled. When sufficient logs have been collected, the logs are rolled down the cliff to the river below, and from there floated downriver to buyers.²⁵

Many other Banwa-on are less fortunate, having little or no timber of their own to fell and sell. To earn money, they have to approach owners of *sektors* with standing timber, and ask their permission to cut the timber. The *datu* himself has been so approached by Banwa-on and *bisaya* loggers. The *sektor*-owner, of course, is compensated.

The basis for compensation, however, has changed. By the 1990s, payments to *sektor*-owners were no longer on "time" basis, but were based on the volume of timber cut. This reflects the change in the nature of logging operations. In the past, the loggers—or more precisely, the owners of the logging firms—were outsiders; now, they were Banwa-on, perhaps even kinsmen. *Sektor*-owners could not demand "time"—understood as

²³In another type of operation, a financier contracts Banwa-on cutters to cut trees (or rattan), advancing them money for supplies, to be deducted from the payment for the logs. The financier shoulders transport costs and the payment to the *sektor*-owner. Returns from this type of operation are lower for loggers, and sometimes results in indebtedness to the financier.

²⁴*Pentacme contorta*, a hardwood of the dipterocarp family.

²⁵The logs are usually sold at Kalilid, the commercial center of San Luis town; Sta. Fe in Esperanza, a neighboring down-river town; or Butuan City, at least three days down the Ma-asam and Agusan rivers. The preference is for the two nearer locations, because even if prices there are lower, transport time and costs are also lower, and they do not have to pay bribes (from PhP 500.00 to 2,000.00) at the military, police and DENR checkpoints along the route.

payments from a logging company to compensate for intrusion— from Banwa-on loggers; they were not outsiders, and if they were kin, were not intruding into the land, the original basis for claims of payment of “time”. At the same time, *sektor*-owners wanted to go on making money from logging operations. The solution was to assert full ownership of the timber itself, which loggers in effect had to buy from the *sektor*-owner. This signaled the full individualization of tenure rights to commercially valuable trees. Today, a *sektor*-owner demands and receives from PhP 100.00 to 150.00 for every “*kubiko*” (cubic foot?) of wood taken from her/his *sektor*.²⁶

It is thus not surprising that despite the passing of the corporate logging that gave rise to individual landownership, land tenure did not revert to communal property, but continued to be subdivided into individual *sektors*, as landowners’ economic interests remained linked to the exploitation of commercially valuable timber or rattan stands within those *sektors*.

Of course, changes did not proceed evenly through society and over space and time. There are variations in the rate at which the individualization of tenure and/or commoditization of trees proceed. In Balit, a more accessible village than Policarpo, not only commercially valuable trees have become individual property of *sektor*-owners; even “miscellaneous” wood or trees— non-premium species like *uwayan*, *anangilan*, *kulipapa*, *sajapow* and *agusip*—that would be considered open-access goods in more remote villages must now be purchased by loggers or woodcutters from the landowners as well.²⁷

²⁶ In a variant form of payment, the *sektor*-owners are instead offered an allocation of one or more truckloads of timber for every week or month of logging operation in her/his *sektor*, which s/he then sells on the market.

²⁷ The owner of the land on which these “miscellaneous” trees stand receives PhP 100.00 to PhP150.00 per tree. This practice has intensified in the later 2000s, as bakeries in Bayugan town in need of fuel for their ovens opened a market for firewood. Today, woodcutting, called *raha* or *pagraha*, is a major livelihood in Balit, earning the woodcutter PhP 10.00 per bundle. If the woodcutter has no suitable trees of his/her own, s/he will have to ‘buy’ these from those who do, paying the latter PhP 50.00 per tree felled. Some residents also explain local involvement in woodcutting as a result of fears of attack by the local military death-squad, which discourage people from spreading out and cultivating farms in scattered, distant plots in the bush, far from assistance or support.

Clearly, the Banwa-on of Policarpo are intensifying their engagement with the market system. The men divide their time and labor between logging—and latterly, tree planting—on one hand, and subsistence activities, on the other. Local rates for labor or other services are becoming standardized.²⁸ Interestingly, despite their quest for cash, almost all loggers continue to practice the “logging ritual” before beginning work.²⁹

B. Tree Cropping: Balit

The Banwa-on village of Balit is only seven kilometers up the Side 1 road from the town-center of San Luis. It has the largest population among the villages of the Side 1 area because of a school and other services offered by a non-government organization (NGO), which attract migrant Banwa-on and *bisaya*, many of whom have no lands in Balit, or have lands in other villages.

Being so accessible, Balit lost almost all its hardwoods by the 1980s. Many residents rely on logging in *sektors* of other villages for money; some cut “miscellaneous” woods for sale to band saw operators; others cut firewood for sale to outsiders. Men, women and children also hire themselves out as laborers (*inadlaw*) in farms and tree farms.

While almost everyone is linked to the timber market, a few families fare better. Those with salaries (e.g., local government officials, NGO workers) or have assets such as chainsaws and buffaloes that can be leased to others enjoy comparative security. Also, some *sektor* owners simply have more

²⁸ The rate for daily labor is PhP100.00 a day. Rafting logs to Esperanza pays PhP500.00. Chainsaw operators may be paid on a daily or per *bulpit* (board foot?) basis. In the former case, the rate is PhP 500.00 per day, plus the gasoline used. In the latter, the rate is PhP 5.00 per *bulpit*, plus gasoline. Chainsaw “assistants” or *katabang* have lower rates. Peeling bark off softwoods pays PhP1.00 per tree. Buffalo hauling of logs may also be paid on a daily or per “*bulpit*” basis. In the former, the rate ranges from PhP 250.00 to 350.00 per day. In the latter, the rate is PhP1.00 per *bulpit*, or PhP 1.50 if the distance over which the logs are hauled is great.

²⁹ The *sektor*-owner determines if a “logging ritual” must be performed. The rituals costs—the sacrificial animal and other offerings to the spirits—are borne by the loggers. In Policarpo and most other villages, such a ritual is considered necessary.

lands and/or timber than others. On the other hand, some families are less fortunate. Cases of timber poaching in others' landholdings in Balit are attributed to hardship (Gatmaytan 2001b).

Logging firms introduced fast-growing softwoods in the 1960s or 1970s to meet their reforestation obligations. Softwoods did not generate much interest until the government introduced reforestation programs in the late 1980s and early 1990s, after which cultivation of softwoods like *falcatta* and *mangium* spread among *bisaya* smallholders and some Manobo villages. In the Banwa-on *talugan* however tree planting did not catch on quickly, as it was deemed *olagon* or unsanctioned by the practice of ancestors.³⁰

An old *bisaya* who used to work for the logging company at Policarpo pioneered softwood cultivation in Balit. He planted *mangium* trees in a vacant lot in the 1980s. His Banwa-on neighbors were initially dismissive, until he made a profit from selling the wood in the early 1990s. Thereafter, softwood cultivation spread in Balit. About 70% of the households there now have their own tree stands, mostly planted in their respective landholdings. Softwood seedlings are often inter-planted with sweet potato or banana crops in swidden clearings; and clearings may be made purposely for softwoods. Most people explain that the trees serve as a ready source of money or supplement the usually inadequate output of their farms (Gatmaytan and Dagondon, 2004).

With timber growing scarce, interest in tree-planting growing, and limited lands available, a new practice has emerged: borrowing land not for subsistence cropping, but for planting trees. This reflects a shift in how the Banwa-on think about trees. As noted, those who borrow land must not plant trees. However, softwoods—which are harvestable in five to ten years—are now viewed as crops, rather than trees. Their status as 'crops' is underscored by the borrower's lack of obligation to pay or give anything to the landowner upon harvest of the wood, precisely as

³⁰In connection with *olagon*, the belief that one may do only as one's ancestors have done, a number of Banwa-on report the belief that if one plants a tree—something their ancestors are not believed to have ever done—that tree will grow to be the source of one's coffin-wood.; i.e., one will be punished with death.

if they were a crop of rice or sweet potatoes. This suggests an expansion of the notion of subsistence from direct consumption, to generating cash for buying consumption needs. Still, the Banwa-on of Balit usually lend their land for 'tree cropping' only to relatives, and never to *bisaya*.

Land borrowing for 'tree cropping' has as yet unclear consequences. Economically, it may affect land borrowing for subsistence cropping, as softwood cultivation reduces the amount of land available for borrowing while lengthening the crop rotation-time. At least one Banwa-on felt it was a waste to plant softwoods in good farmlands. Also, the spread of softwood cultivation arguably reduces biodiversity, which translates to the loss of open-access resources. There may be other effects on local culture.³¹

Softwood stands or trees can be bought or sold, independently of the land where they are planted. Such transactions have been noted in Balit and Policarpo. Unfortunately, there are cases where a buyer believed or was made to believe s/he was buying land (and the 'tree crops' thereon), when the seller actually owned only the trees, not the land.³² In fact, the man who introduced tree cropping in Balit was twice caught trying to sell lands he borrowed for tree planting.

As indicated, land can now be sold and bought by Banwa-on and *bisaya* in Balit, Policarpo and perhaps other villages in the lower Ma-asam river valley. Some elders are disturbed by such sales,³³ suggesting that even as land tenure has become individualized in the whole of the *talugan*, it has become fully commoditized only in the more accessible villages. Still, land sales are no longer unusual in Policarpo or Balit, especially since the

³¹The Banwa-on of Balit hold no rituals before planting or harvesting tree-crops. Informants explain that unlike other villages, where parts of the original forest cover remain, Balit's land has been logged over and repeatedly cleared so much that the spirits have abandoned it.

³²This is a cunning play on the relationship between landownership and the right to plant trees: The deceitful seller asserts good faith in the transaction by stressing that s/he planted the softwoods, implying ownership of the land, since the general practice is that borrowers cannot plant trees.

³³One elder asked, "If it is taboo to sell meat from wild pigs, how much more the land?" Another said selling land was "*makagaba*"; i.e., punishable by an illness inflicted by a spirit.

individualization of landownership in the latter was reinforced by government cadastral surveys that subdivided the land into titled parcels in 1996 (Gatmaytan 2000) and 2005.

C. Patterns

Banwa-on land tenure shifted from communal to family-owned tenure. This was made possible by transforming the notion of 'customary areas' from an expression of a family's historical link to a certain locality, to a basis for ownership (Barnard and Woodburn 1999: 23). By the 1980s, these areas were further subdivided into individual *sektors*. With individualization of tenure is a parallel process of commoditization of resources, which—as seen from the elders' adverse reaction to land sales in some villages, and the varying attitudes towards "miscellaneous" trees—apparently proceeds more gradually in the area.

What drives such changes is a strong interest in making money. This drive seems to be rooted in the need for goods that the Banwa-on themselves cannot or do not produce. Over time, however, money came to be necessary to supplement subsistence activities whose productivity has been reduced by ecological changes resulting from the logging the Banwa-on themselves allowed; and to purchase an expanded range of goods and services, such as education. It is also possible that, as global or mainstream popular or consumerist culture infiltrates Banwa-on communities, individuals have sought to emulate the lifestyle of the (comparatively) powerful; i.e., the non-Banwa-on *bisaya* majority.³⁴

The pursuit of money originally took the form of "time" payments. The companies' payments to the three paramount leaders were only intended to secure their negotiating skills vis-à-vis their fellow Banwa-on in the *talugan*. Their arrangement, however, linked money with territory. Later, "time" became compensation for intrusion into a territory, with *sektor*-owners emphasizing ownership of land rather than timber itself. I would conjecture that the payments for intrusion or disturbance may

³⁴It is as yet unclear to me if this emulation of the lifestyle of the powerful represents an attempt to protect themselves, in the manner suggested by Taussig (1993), or if it simply reflects envy or social insecurity across lines of ethnicity, class and power.

have even been justified by *sektor*-owners' claim that they shouldered the risk of punishment—with its consequent ritual expenses—from the spirits offended by logging operations. This again changed in the 1990s, when "time" could not be demanded from Banwa-on loggers. Instead, *sektor*-owners demanded payment on the basis of the volume of wood taken, signaling the individualization of timber tenure.

Tree tenure as regards premium timber species changed from open-access resources, to quasi-property,³⁵ to individual property of *sektor*-owners. Rattan poles apparently followed the same pattern. The degree of individualization of tree tenure varies across space however; non-premium trees deemed open-access goods in most villages are now *sektor*-owners' property in more accessible ones.

At the same time, *sektor*-owners continue to lend land rent-free for subsistence cropping, though with a ban against planting trees. Individualization of landownership thus did not affect communal use of land. In the 1990s, softwood cultivation spread in the more accessible villages. With limited land available there, people began to borrow land for tree cropping. The prohibition against planting trees was met by reinterpreting the notion of 'crops' so as to include softwoods.

The Banwa-on have thus been adapting their tenure system to their interests—dominated by the need for a source of cash—in ongoing attempts to exploit the timber industry's penetration of their territory (following Long 1996). Those who have more lands and/or timber, or have other sources of income with which to supplement timber or rattan transactions, however, benefit more from these tenure changes. Interestingly, marketable timber did not revert to being open-access goods when the logging companies pulled out, but were appropriated by *sektor*-owners. The lack of opposition by mostly Banwa-on loggers suggests that by the 1990s, the link between land and tree tenure was well established.

³⁵ I apply this term to timber at this intermediate state where access to, and benefits from an open access resource like timber was controlled indirectly, by claiming ownership of the land on which they stood.

There is still the general belief that land and resources are meant for everyone's survival. This is seen in the status of game, fish and forage resources; and in the continued practice of rent-free land lending, as modified. On the other hand, sources of cash—timber, rattan, and in some villages, land itself—are becoming commoditized, such that they can no longer be taken or used without prior permission from the landowner, whose financial interests would be affected.³⁶ As one man put it: "*Mag-uban ta sa la mesa, nunca sa bulsa*" (very roughly: "We come together at the table [i.e., to share meals], but never in our pockets"). This saying reflects the continued cultural emphasis on sharing resources needed for subsistence or survival; as well as the newer emphasis on respecting each other's *financial* interests, rooted principally in timber.

In the process, the Banwa-on family is valorized; the changes reflect progressive attempts to claim and protect its sources of cash. This comes however at the cost of weakening inter-family and inter-village levels of organization.

Through all these, rituals for logging, rattan cutting, and in some villages, tree planting, circumvented religious notions of taboo. The notion of *olag* was implicit in the elders' criticism of land sales, but had little effect. However, and somewhat inexplicably, the taboo against selling harvests and game remains strong, keeping the Banwa-on from intensifying and commoditizing agriculture as an alternative source of cash.

VI. IMAGINING INDIGENOUS TENURE

A. Indigenous Peoples and the Philippine State

Tracing the evolution of the Philippine state's legal framework as regards indigenous peoples' rights goes beyond the limited intentions of this paper. Suffice to say, activism and advocacy by indigenous peoples and their allies in the church, NGOs, revolutionary movements, media and the government contributed to building public consensus on the legitimacy of their

³⁶The general rule is that commercially valuable timber or rattan cut for immediate use or consumption are not 'taxable' by landowners, only those cut for sale. Either way, however, a request for permission is still expected, though in the former case, it is never denied.

rights (Gatmaytan 2001b: 21), so that when the Philippine Constitution was drafted in 1986, it included an explicit commitment to "protect the rights of indigenous cultural communities to their ancestral lands".³⁷

Until then, the question of indigenous peoples' rights was debatable (cf. Lynch 1983; Gatmaytan 1992). Today, there is no legal doubt that indigenous peoples have rights to "ancestral lands"; the question is how those rights were to be defined in law. Legally, this meant that the cited Constitutional provision could not be implemented without enabling legislation defining those rights.

While some advocates and activists pushed for enabling legislation, others—with the help of allies in the Department of Environment and Natural Resources (DENR)—developed procedures for certifying specified areas as being claimed by indigenous communities (Leonen 2000: 78-79; McDermott 2001: 36-37; Eder and McKenna 2004: 65-66). The resulting administrative regulation³⁸ introduced certain concepts later carried over into the enabling legislation finally promulgated in 1997 (Gatmaytan 2001b: 25).

This enabling legislation is the IPRA. The process of formulating this law's provisions was marked by an unprecedented level and intensity of involvement by NGOs (cf. Pavia, ed. 1998); and by fierce, sometimes counterproductive intramural debates (Leonen 2000: 80). Today, the IPRA dominates discussions of indigenous peoples' rights and development to such an extent that critical analysis of this statute, its assumptions and impact has become muted (Gatmaytan 2001a: 27-28; see also Gatmaytan 1999).

B. Lands and Domains

At the core of the IPRA are its provisions on the titling of indigenous peoples' lands. This titling mechanism however maintained a legal distinction between "ancestral lands" and

³⁷ Art. 12, Sec. 5, Philippine Constitution (1987).

³⁸ DENR Administrative Order no. 2 (1993).

"ancestral domains" that was first articulated in law by the DENR.³⁹

"Ancestral lands" are defined as "land occupied possessed and utilized by individuals, families and clans who are members of ICCs/IPs".⁴⁰ On the other hand, "ancestral domains" are defined as

[A]ll areas generally belonging to ICCs/IPs comprising lands, inland waters, coastal areas, and natural resources therein *It shall include ancestral lands, forests, pasture, residential, agricultural, and other lands individually owned whether alienable and disposable or otherwise, hunting grounds, burial grounds, worship areas, bodies of water, mineral and other natural resources, and ... the home ranges of groups who are still nomadic and/or shifting cultivators.*⁴¹

Ancestral lands thus refer strictly to lands, which form but one element of the larger, more inclusive notion of ancestral domains. In other words, ancestral domains are made up of an indigenous community's ancestral lands (as defined by the IPRA),⁴² the natural resources therein (the waters, forests, mineral resources, etc.), and culturally significant sites or areas (burial and worship areas).

The indigenous peoples' rights in ancestral domains are correspondingly larger in scope. Whereas the owners of ancestral lands enjoy only the rights to transfer property (and only to members of the same indigenous group) and to redeem the same under certain circumstances,⁴³ owners of ancestral domains have the right to manage natural resources within their territory, to benefit therefrom, and to regulate the entry of migrants, among others.⁴⁴

³⁹ Sec. 3 (b) and (c), DENR Administrative Order no. 2 (1993).

⁴⁰ Sec. 3 (b), IPRA. "ICCs" are "Indigenous Cultural Communities", and "IPs" are "Indigenous Peoples".

⁴¹ Sec. 3 (a), IPRA. Italics mine.

⁴² Sec. 53, which provides the procedure for titling "ancestral lands", notes that the "ICCs/IPs" should first decide whether or not to allow titling of "ancestral lands" within the "domain".

⁴³ Sec. 8, IPRA.

⁴⁴ Secs. 7 and 57, IPRA.

With regard to the indigenous peoples' tenure rights to ancestral domains, the salient provision of the IPRA states that

The indigenous concept of ownership generally holds that ancestral domains are the ICC's/IP's private but community property which belongs to all generations and therefore cannot be sold, disposed or destroyed.⁴⁵

This imputation of community or communal ownership is reinforced in still another provision, which states that "areas within the ancestral domains, whether delineated or not, shall be presumed to be communally held".⁴⁶ Likewise, in defining rights to natural resources within ancestral domains, the statute consistently refers to "ICCs/IPs", rather than to members thereof.

On the other hand, we have seen that the very definition of ancestral lands is linked to "individuals, families and clans". Indeed, the law defines "individual claims", as claims and rights of—again—"individuals, families and clans" to "residential lots, rice terraces or paddies and tree lots".⁴⁷ In the same spirit, sec. 12 of the IPRA, which provides an alternative mode of titling "individually-owned ancestral lands", defines the latter as "agricultural in character" and "actually used for agricultural, residential, pasture and tree farming purposes".

In sum, ancestral lands are (presumably small) tracts of land owned by individuals, families or clans for residential and essentially agricultural purposes. Ancestral domains cover the (presumably large) areas encompassing lands (individually claimed or otherwise), natural resources and culturally significant areas, communally owned by an indigenous people or a community or communities belonging to such a people. Interested individuals, families and clans may apply for and secure a Certificate of Ancestral Land Title (CALT) over ancestral lands, which might be within an ancestral domain area. Interested indigenous communities or groups of communities may likewise secure a Certificate of Ancestral Domains Title (CADT) over their ancestral domains.

⁴⁵ Sec. 5, IPRA.

⁴⁶ Sec. 55, IPRA.

⁴⁷ Sec. 3 (j), IPRA.

C. Indigenous People and Communal Tenure

Eder and McKenna assert that the titling of lands on the basis of communal ownership is a measure designed to "impede the unilateral sale of land by tribal leaders or others" (2004: 67). If that were the sole intention however, it would have been infinitely easier to have simply prohibited the sale of ancestral lands or domains, for which there is ample legal precedent in Philippine law. In any case, it is one thing for the law to institute a policy preference for communal ownership, and it is quite another to insist that *the* indigenous concept of land ownership is communal, establishing a legal expectation that indigenous communities must conform to, or otherwise exhibit this valorized form of ownership if they are to be seen as indigenous.

My sense is that the IPRA simply assumes that indigenous tenure is communal in nature. This assumption grows from the state's notion of who or what indigenous peoples are, which is provided in the IPRA itself, as follows

[A] group of people or homogenous societies identified by self-ascription or ascription by others, who have continuously lived as organized community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have, through resistance to political, social and cultural inroads of colonization, non-indigenous religions and cultures, become historically differentiated from the majority of Filipinos.⁴⁸

This provision imagines indigenous peoples or communities as "homogenous societies" with "distinctive cultural traits", who have "owned" their "communally bounded" territories "since time immemorial". This notion is located within a discourse of resistance to colonization, by which they became "historically differentiated" from "the majority of Filipinos". In short, the IPRA sees indigenous peoples as homogenous, isolated groups outside of history (McDermott 2001, 2000), a notion that is "anthropologically naïve".

⁴⁸ Sec. 3 (h), IPRA.

While I agree that cultural survival represents an assertion of political and cultural autonomy in the face of foreign and domestic colonialism, it also allows the state to posit fundamental differences between indigenous and non-indigenous peoples. The varying colonial experiences of indigenous and non-indigenous groups reinforced the perception that indigenous peoples were isolated in space and time, hence the resulting cultural differences between them. Isolation in space is seen in how indigenous peoples are implicitly located in areas too distant to have been reached by colonization, or in their retreat away from its reach and into distant spaces.⁴⁹ Isolation in time is seen in the emphasis on indigenous peoples' retention of (pre-colonial) cultural traits that non-indigenous peoples have lost or abandoned in the course of their march to modernity.

This notion of isolation and resulting cultural differences reflects how indigenous peoples as a group are defined through contrasts with non-indigenous peoples. If "the majority of Filipinos" represent modernity, which is associated with individualism, then the minority indigenous peoples represent the pre-colonial past (Duncan 2004: 5), which in turn is associated with communalism (Dove 1988: 12-14). Following this logic, if indigenous people were to own land, then they would have to do so 'differently'; i.e., through a tenure system that is "culturally distinct". In short, indigenous peoples own their lands communally, rather than individually, which is the 'ordinary', 'norm-al' way to own land. Difference—and the notion of isolation in space and time on which it is predicated—is embodied in indigenous peoples' ancestral domains, which are also imagined as remote and distant, and as being constituted on a logic that is culturally distinct.

This equation of indigenous culture and identity with communal tenure is in fact a major theme that runs through much of the literature on pre-colonial (Vidal 2004: 54; Scott 1982: 140; May 2004) and indigenous tenure (Rodil 2004; Sajor 2000; Royandoyan and Atillo 2000; Gaspar 2000; TRICOM 1998). Indeed, so tenacious and pervasive is this association of indigenous culture and communal tenure that many social

⁴⁹This somewhat contradicts the notion of time-immemorial possession, and suggests that time-immemorial possession may, in some Philippine contexts, be an "invented tradition" (Hobsbawm and Ranger 1983).

scientists working in the Philippines have simply assumed that indigenous tenure is communal, despite the fact that their own data indicated otherwise (see Gatmaytan 2001b).

I believe that this complex of projections, distinctions and assumptions also informs the IPRA's notion of indigenous tenure, hence its assertion of communal or community property as *the* indigenous concept of tenure. So hegemonic is the idea that indigenous tenure is necessarily communal that the law adopts a lecturing, authoritative tone in the essential way it speaks of indigenous tenure. This authoritative tone is all the more misleading and paradoxical since it is not based on a comprehensive, critical and in-depth study of Philippine indigenous peoples' tenure systems, but on a mere assumption.

If individual members of indigenous peoples are to have any titles to land at all, then these must be restricted to (small) residential or agricultural sites; these can be sold only to members of the same group. Individualism in tenure is thus literally contained within the communally owned domain, and the imagined boundary between the indigenous community and the rest of the Filipino people is upheld.

On the other hand, ancestral lands outside ancestral domains are treated like any other parcel of non-ancestral lands. This underscores how their owners are more individualistic, and thus more similar to the majority of Filipinos rather than to 'true'—i.e., communalistic—indigenous peoples.

As to why an essential dichotomy between indigenous and non-indigenous Filipinos found its way into the IPRA, we can only speculate on the combined effect of the state's colonial political heritage and outlook (Sajor and Resurreccion 1998: 20-21), the bureaucratizing imperative of administration (Giddens 1985), nostalgia rooted in a critique of modernity (Delanty 2003: 186-187), and the representations of culture and ethnicity made by indigenous peoples and their NGO allies during their historic struggles. All of these have to be seen as the articulation by the Philippine state of a widespread ideological framework by which the ethnic, political and cultural majority defines itself in relation to the minority.

V11. EXPLORING THE DISJUNCTION

A. The IPRA and the Banwa-on

The Philippine state imagines that indigenous peoples' tenure rights to ancestral domains are "private but community property". Individuals or families might own parcels of residential or agricultural land, but resources such as timber, game, rattan, minerals and waters are communally owned.

However, the Banwa-on—like all other peoples—are much more complex and dynamic than the state imagines them to be. Land is owned by individuals, or at most, by families; and as generations succeed each other, landownership will probably fragment into progressively smaller individual *sektors*. The *sektor*-owners also own the commercially valuable trees and rattan within their landholdings, though some of these may be freely extracted if for domestic or immediate consumption or use. All other resources are open-access—not communal—goods. It is possible however that as the commercial value of other resources is discovered, landowners will also claim them as their property.⁵⁰

In a sense, the Side 1 Banwa-on as a group do not have an ancestral domain, as there is no longer any sense of collective ownership of land or territory. The notion of *talugan* remains relevant, but this has no direct connection to the question of tenure, anymore than the Philippines' territorial jurisdiction directly reflects actual ownership, control or use of the lands within it. Or perhaps it would be more precise to say that the Banwa-on have individually owned ancestral domains, in as much as owners of lands are also the owners of the commercially important resources.

Either way, it is clear that the IPRA's construction of indigenous tenure varies significantly from the actual, lived reality of Banwa-on tenure practice. Whereas the state is focused on communal boundaries (McDermott 2000) of groups deemed remote in space and from history, the reality is that among the

⁵⁰ Among the neighboring Adgawan Manobo, wild *duryan* fruits were open-access goods, but greater accessibility has made marketing the fruits feasible. As of 1999, the status of *duryan* fruits was being negotiated (see Gatmaytan 1999): Will they remain open-access goods, or will they become the property of the owners of the land where these wild trees grow?

Banwa-on, the individually defined boundaries, constituted by their intense engagement with the global market for forest products, have become far more important.

Neither does the statute anticipate their need for money, which fuels the evident fluidity or dynamism of Banwa-on tenure. Unfortunately, the drive to make money also has negative consequences for the environment. This refusal to acknowledge indigenous peoples' participation in global economic and cultural relationships has consequences for the survival of indigenous communities, and for the relevance and utility of the IPRA and its provisions.

Many Banwa-on express a philosophical acceptance that they have committed a *sala* or sin in having allowed logging—as a metaphor for *bisaya* culture—into the *talugan*. However, almost everyone feels they are powerless to break away from logging as a source of cash. Where else, they ask, can we run to for money? Thus, even as there is a sense of moral transgression and an awareness of ecological decline, they feel compelled to continue exploiting their forests. One *datu* was pessimistic about regulating the exploitation of the forest; people, he said, “now have different dreams”.

B. Legislating Communalty

Systems of tenure can vary widely in terms of how communal and individual rights are allocated among lands and resources. Indeed, among the communities of a single indigenous people, or even within a single community or clan, there may be significant differences in the construction of tenure. More, these differing systems of tenure are continuously being assessed, and invoked, modified or rejected, as actors struggle to pursue their interests.

The state however ignores this diversity and mutability, and through the IPRA is (mis)representing a single construction of indigenous tenure as true for all indigenous peoples or communities. While there may be Philippine indigenous peoples whose tenure systems conform to that described by the IPRA, there is no doubt that others—like the Banwa-on, the Agusan Manobo (Gatmaytan 1999), and the Bugkalot/Ilongot and Alangan Mangyan (Aquino and Gatmaytan 2005)—have tenure

systems that do not. More, tenure systems that are initially similar to that imagined by the IPRA may eventually evolve into other forms. The result, in either case, is a disjunction between the legal notion of tenure and the practice thereof in specific areas.

In other words, the IPRA valorizes one particular construction of tenure and imposes it on all indigenous peoples and communities in the country, regardless of their actual practices. If an indigenous community wants to secure a title over its territory, it will have to conform to the tenure system described and sanctioned by the law. Indeed, the statute may even be seen as re/introducing communal tenure among those that do not actually have communal tenure (anymore).

Worse, there is little room in the statute for the adaptive dynamism displayed by the Banwa-on. Not only are indigenous peoples expected to have communal tenure as defined by the state, but they are expected to maintain this essential form of tenure permanently, particularly as it forms the legal basis of their right to lands and resources. There is thus a failure to grasp that tenure systems need to be adaptable and necessarily mutable, if they are to enable the survival of communities and individuals.

The effect is to legislatively homogenize indigenous tenure in space and time, and to prohibit its further evolution. This has the advantage, for the state, of expanding its administrative or bureaucratic control, facilitating surveillance, simplifying tenure and commoditizing lands and resources. The IPRA thus represents an ideological victory of the Philippine state, in that it has thus secured the power to define who the indigenous peoples are, and what their rights are over which lands and resources.

This is not to deny that the IPRA is, in the context of Philippine elite-democracy, a progressive piece of legislation. But as Giddens points out, rights such as those extended by the IPRA are inextricably linked to the exercise of power by the state (1985: 205). There is, in this sense, a give and take to legislation (following Giddens 1985: 10-11), though scholarly attention has thus far been on what the IPRA is perceived to be giving, rather than on what it has taken from the indigenous peoples.

C. Addressing the Disjunction

Owen Lynch, a pioneering scholar in the field of indigenous peoples' rights in the Philippines, spoke of "second generation problems" in the wake of the IPRA. For him, the "first generation problem" was the struggle for state recognition of indigenous peoples' rights to their territories, which was 'solved' by the promulgation of the IPRA. "Second generation problems" arise from the necessary task of reconciling the IPRA's relatively radical provisions with the rest of the legal system. One of the first of these problems was the legal challenge to the constitutionality of the IPRA itself, which the Supreme Court eventually dismissed (*Cruz and Europa vs. Secretary*, 2000).

What has not been realized until now is that the "second generation problems" actually include the task of reconciling the IPRA with the cultures and practices of indigenous peoples or communities. How will indigenous peoples and communities address any disjunction between the law and their practice of tenure? Will they willingly discard their own tenure system, and adopt that enshrined in the law? Will they outwardly conform to the law, but among themselves continue practicing their actual tenure systems? Will they develop a synthesis of the two? Or will they reject the IPRA and its notion of indigenous tenure?

At present, there are ongoing discussions and confrontations among the Banwa-on as to whether or not they should apply for a CADT, and at what level (Gatmaytan 2001a). Shortly after the promulgation of the IPRA, a group of *panod*—Banwa-on legal experts—pronounced the statute contrary to the *Kiyala ha Batasan* or Banwa-on customary law. On the other hand, one leader with links to the military has applied for a 9,000 hectare CADT area. Many *sektor*-owners have opposed this application. Some of the oppositors are considering applying for a CADT of their own.

The indigenous peoples' attempts to address any disjuncture between their tenure practices and the law's provisions thereon may well be an emerging arena where state-community relations will be negotiated, particularly as more and more communities secure CADTs.

D. Tenure and the Environment

Moreover, how the disjunction is addressed bears upon the issue of sustainable resource management. The interface between the environment and indigenous rights, of course, has long been a concern of Southeast Asian states (Duncan 2004; see also Poffenberger 1990).

The IPRA seems to assume that indigenous peoples practice sustainable forms of resource utilization;⁵¹ sustainability is in fact seen as an inherent aspect of the indigenous concept of ownership.⁵²

As we have seen however, the quest for cash dominates Banwa-on discourses on tenure. Their tenure practices foreground the economic role and impact of landowning individuals, who ultimately determine the rate of exploitation of resources in their holdings. The readily apparent results of this practice strongly suggest that the Banwa-on, in general, are not particularly concerned with ecological considerations; even though having witnessed—and even collaborated in—the destruction of their own forests, they are aware of the environmental impact of unregulated resource-extraction. Indeed, their experience suggests a Banwa-on critique of the "Tragedy of the Commons" thesis; i.e., individual ownership of land and timber results in ecological crisis.

If the Banwa-on reject the IPRA, or if they apply for a CADT but merely pay lip service to its provisions on tenure, it means that their actual relations with their lands and resources will be driven underground, where the state can neither monitor nor regulate it. And it seems to me unlikely that they will discard their financially productive (though marginally so) but ecologically unsustainable practices, and adopt those imposed by the state, at least without some assurance that the latter will assure them their continued survival.

If the state wants to structure indigenous communities' participation in environmental management—as the IPRA suggests it does⁵³—it ought not to begin by ignoring these realities

⁵¹ Secs. 3 (o) and 7 (b), IPRA.

⁵² Sec. 5, IPRA.

⁵³ Secs. 7 (b), 9 and 58, IPRA.

and risks, and premising its approach on an empirically debatable, if politically correct, assumption of sustainable management. Rather, the state must proceed from recognition of the diversity and complexity of indigenous peoples' and communities' relations with their environments. This puts it in a better position to appreciate that some indigenous tenure and resource-management systems are in fact ecologically unsustainable. This is not intended to revive the image of the indigenous farmer as a destructive agent, but merely a necessary warning against making and relying upon unwarranted assumptions. Sustainability—like communality—is something that cannot or can no longer be assumed, but must be verified on a case-to-case basis.

By failing to acknowledge the situation, we disable ourselves from transcending it. More particularly, assumptions of sustainability make it difficult to understand the current situation, and thus hinder provision of support to tenure systems that are sustainable but are also threatened, or to address those that are simply unsustainable (Gatmaytan and Dagondon 2004).

Perhaps most importantly, unrealistic expectations of sustainable management can lead to widespread disappointment with community-centered management models, particularly within the government and its agencies. Already, the Philippine government's ongoing erosion of environmental impact assessment procedures, local government autonomy, and free and prior informed consent provisions to encourage foreign investments—particularly in mining—as well as the increasing bureaucratization of state-community interfaces, together suggest a pendulum-swing back to the state-centered management models that dominated from the 1950s to the 1970s. Disappointment in the community-centered strategies that developed through the 1980s and 1990s could intensify this state-ward trend, and lead to the reversal of gains made in relation to indigenous peoples' tenure rights.

This suggests the complexity of the relationship between tenure, environment and the role of the state. Some communities have sustainable resource use patterns; others do not. State involvement is necessary in the latter case, but not in the former. The problem is that the resulting tensions are played out in an arena where indigenous tenure has been linked to sustainable

management. Perhaps, during the course of the struggle for state-recognition of indigenous peoples' rights, it was tactically necessary or convenient to simplify the relationship between indigenous communities and the environment, and so win wider support from the public and within the administration. In hindsight however this approach has unintended consequences that now threaten the strategic position of indigenous peoples vis-à-vis the state. The lesson, it seems, is that if the Philippines as a polity is to recognize indigenous peoples' rights as mandated by its Constitution, it must do so on the basis of their rights, and not because of any expectations in terms of sustainable management.

This is not to say that the state should have no interest in the sustainable management of indigenous peoples' territories, but rights to land and resources are a separate issue from sustainability. Whether their tenure and resource use practices are sustainable or not, indigenous peoples or communities own their respective territories; state concern for sustainable management must start from that premise.

VIII. Conclusion

We have explored the link between market processes—particularly the demand for timber, rattan and softwoods—and the way the Banwa-on organize their society in terms of their relationship with their environment, in order to appropriate benefits or make money by exploiting those market processes. When juxtaposed with the IPRA's 'theory' of indigenous tenure, it is difficult to resist the conclusion that there is a significant disjunction between the two. True, the situation of the Banwa-on is not necessarily representative of all other Philippine indigenous groups. Neither, however, is their situation fully unique.

The disjunction between state law and Banwa-on practice highlights the problem in dealing with the demand for recognition of indigenous peoples' rights the way the IPRA does. Laws are intended to apply to everyone and in all places with equal force. Almost by definition then, the law ignores the diversity and dynamism of local or indigenous tenure systems. Hence, the stricter the implementation of the IPRA, the greater is the possibility of indigenous communities' resistance against it.

The IPRA, as state intervention through legislation, is imposing a communal framework for indigenous peoples' relationship with their environment; one that, despite its rhetoric of self-delineation and -determination, ignores their links with market processes critical for their survival and development. Rather than deploying a homogenizing tenorial ideology of communality, it may be more productive to acknowledge the diversity of land and resource tenure arrangements and their varying ecological impacts. The latter is important because the environmental consequences of tenure are rightly of profound concern to states and their polities.

More, it may be necessary to attempt an archaeology of the statute, and inquire further into the assumptions that underlie the legislative valorization of communal tenure. Here, we have seen that Banwa-on land and tree tenure, while it retains certain communal aspects, has been significantly individualized in the course of their pursuit of money. This not only demands that we problematize the uncritical assumption of a link between indigenous culture, ascribed communality and sustainable resource use; but also the patterns of indigenous peoples' consumption, and its meanings (following Douglas and Isherwood 1996).

Finally, there is a need for a more sociologically grounded approach to policy-making, legislation, and regulation. These have to be anchored on a sound post-romantic understanding of the realities of indigenous peoples' lives in the 21st century, rather than a political fantasy of the ethnic and cultural other. This is not to say that communal tenure has no basis in reality. Rather, what is communal has to be ascertained and evaluated on a case-to-case basis rather than assumed; it is something to work on or towards, rather than forcibly imposed through the power of the state.

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