**COUNTRY STUDY ON**
# CUSTOMARY WATER LAWS AND PRACTICES

## PHILIPPINES

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The Philippines is an archipelago composed of 7,107 islands located in Southeast Asia. It has a total land area of approximately 300,000 square kilometers, with the two principal islands of *Luzon* and *Mindanao* comprising 80% of the land. Only about 5% of the islands are over 1 square kilometer in size. In contrast, the extent of marine waters is about 2.2 million square kilometers, based on a 200-mile exclusive economic zone.[ii] The topography of the islands is generally classified as mountainous. The country is usually divided into three main clusters of islands: Luzon in the north, Mindanao in the south and the smaller central islands collectively called the *Visayas*.

In 2005, the population of the Philippines is estimated to be around 87 million; 13 million alone live in or around Metro Manila, the center of government and business. Recent data from UNDP show that per capita GDP is at $4,321; 46% of the population live below $2/day and 15% have no access to improved water supply.[iii]

### Water Resources of the Philippines

The country lies along the paths of tropical cyclones originating from the western Pacific Ocean and the South China Sea. Tropical cyclones contribute 38% of the annual rainfall in the country; monsoon rains from the southwest and northeast account for the remainder. Rainfall ranges from 1000 to 4000 mm per year, with significant variation from one area to another due to the direction of the moisture-bearing winds and the location of the mountain ranges.[iv]

Using the distribution of rainfall as basis, there are four climate types identified: Type I when there are two pronounced seasons (dry from November to April and wet throughout the rest of the year); Type II when there is no dry season but there is a very pronounced wet season from November to January; Type III when seasons are not very distinct (relatively dry from November to April and wet during the rest of the year); and, Type IV when rainfall is more or less evenly distributed throughout the year.

Surface freshwater resources are found in rivers and lakes. There are 421 principal river basins in 119 proclaimed watersheds, 19 of which are identified as major river basins. There are a total of 99 lakes, 16 of which have an area more than 400 hectares. The largest lakes in the principal islands are the Laguna de Bay in Luzon, with an area of 922 sq. km, and Lake Lanao in Mindanao, which is a major source of hydropower. On the whole, rivers and lakes cover 1,830 sq. km. or 0.61% of the total land area.[v] Groundwater is the other major source of freshwater, from reservoirs covering 50,000 sq. km. with a storage capacity of 251,100 million cubic meters (mcm).[vi]

The potential supply from surface water sources is estimated at 125,790 mcm per year, while that of groundwater is approximately 20,200 mcm/yr or about 14% of total water resources potential. Despite these figures, the Philippines ranks among the lowest in terms of freshwater availability per capita at 1,907 cubic meters, compared with the average of 7,045 cubic meters worldwide and 3,668 cubic meters in Asia.[vii]

Water use is generally classified as consumptive and non-consumptive; the former classification covers domestic, commercial, industrial water supply and irrigation, and the latter comprises hydropower generation, recreational, environment and flood control. According to World Bank data, groundwater use by sector is distributed as follows: 63% for domestic use, 17% for industry, 13% for agriculture, 1% for power generation and the remaining 6% is used by other sectors. Surface waters are largely used for agriculture at 85%, with industry and domestic sectors sharing 15%. Based on a study conducted by the Japan International Cooperation Agency (JICA), water demand in the Philippines was 29,944 mcm/yr in 1996 and is expected to dramatically increase up to 86,500 mcm/yr in 2025. In Luzon, which holds most of the large cities (and therefore a majority of the agricultural and industrial developments), demand will outstrip supply potential; however, in Mindanao, there will still be a huge surplus.[viii]

The country is divided into twelve (12) water resources regions (WRR) based on hydrological boundaries as defined by physiological features and homogeneity in climate. The water resources regions in the central Philippines may comprise several islands. The government monitors water resources with a total of 11,029 groundwater stations and 656 streamflow stations scattered throughout the different water resources regions and recorded in the National Water Information Network (NWIN), the database of all water-related information.[ix]

## Customary Water Rights

In this paper, the term "customary" rights and practices broadly includes those that are based on tradition or culture rather than written law, regardless of whether they are practiced by recognized indigenous peoples or not. Two general types of practices that define water rights are explored: one refers to ownership of the resource itself and the other is concerned with equity of access in a particular situation – the communal irrigation system. Both are relevant to any discussion on interface of customary water rights with statutory rights. The polar difference in perspectives on ownership of water resources could give rise to major conflicts between custom and statute. On the other hand, traditional irrigation practices were adopted as part of the widely successful 'Participatory Irrigation Management' policy in the late 1970s, which in turn greatly influenced policy development in community-based natural resources management from the 1980s to the present.

This paper is also limited in scope to a discussion on freshwater resources. There are several documented researches on customary fishing rights that involve access to marine waters (fishing grounds) such as that of the *Mataw* fishermen of Batanes.[x] The rules that apply in case of conflict of customary practices and statute under the

Indigenous People's Rights Act (IPRA) (discussed below) apply to all resources, including freshwater and marine resources.

Finally, this paper was not intended to be an exhaustive or detailed account of customary practices of any one, much less all, indigenous peoples. The three examples provided here only serve to lay the groundwork for a discussion on the interface between customary and statutory water rights.[xi]

### *Traditional Rules on Water Ownership and Use*

The rights to access and use of water are rooted in the concept of land. Indigenous peoples consider land as granted and entrusted by one Creator to be harnessed, cultivated, sustained, and lived on by everyone. This concept does not recognize the idea of private property but abides by the spirit of collectivism. In the Philippines, as implied from its origin myths, the land and everything connected to it were created by the Supreme Being (known by various names such as *Bathala, Kabunian, Magbabaya, Apo Sandawa*). Land was considered sacred owing to its divine origin and as such was not subject to ownership, sale, purchase or lease. Among Philippine indigenous peoples, there was the common belief that land was held in usufruct and the community could not be deprived of its use.[xii]

Life is linked to land because both come from the Creator. Land includes all resources, both above and below its surface, water being among these. It has often been said that the right to land includes the right to water. As in most traditional societies, ownership is communal. While use and access to resources are open to all, custom law disapproves of the abuse of these rights. Resources are used by the people based on their needs and they have the corresponding responsibility of regenerating the same.[xiii]

### *Traditional Rights Among the iBesao*[xiv]

The *iBesao* (people from Besao) is one of 110 ethnolinguistic groups of the Philippines. They live in the central western portion of the Mountain Province in the Cordillera Mountain Range in Northern Luzon. Every household is a member of a *dap-ay* of its choice, signifying its unity with the community. The *dap-ay* serves as the cultural, political and social center of the community where men gather to discuss matters affecting the community, where elders perform rituals, and where the *lallakay* settles conflicts and disputes among community members.

Customary leadership and authority is vested in community elders called the *lallakay* or *amam-a* by virtue of their vast experience, wisdom, personal integrity and willingness to serve others and the social organizations such as the *dap-ay*.

The customary laws of the *iBesaos* are contained in the *inayan* or *lawa* which forbids any act that inflicts harm on anybody or anything and prohibits the violation of norms. The *inayan* or *lawa* serves as a guide in determining whether one's act is right or wrong, and it warns of some form of "punishment" on the wrongdoer to be carried out by

Fate. *Inayan* translated in English would mean "Be careful!", a warning for one to consider the effects of his/her actions on others.

The *inayan* are culturally prescribed taboos which actually speak of values such as respect for other people and to nature, justice, morality, harmony, sharing resources, helping others, etc. In relation to natural resources, the *inayan* teaches self-restraint or discipline in its utilization and discourages wasteful and destructive practices. This is reinforced by the people's belief in nature spirits, which they call *nakinba-ey.*

The *nakinba-ey* inhabiting water sources are believed to be the primary forces in the production and supply of water. *Inayan* cautions people from doing anything that might displease these spirits, otherwise they will stop the flow or production of water. For instance, butchering or grazing of animals near water sources is prohibited. It is believed to be disrespectful to the water spirits since animal wastes appall them. Carrying of human or animal corpses along a path near a water source is likewise believed to displease these spirits.

The traditional water rights in Besao was described by E. Dictaan Bang-oa in a paper entitled "Traditional Water Management in Besao, Mt. Province," presented during the World Water Forum in Kyoto, Japan in March 2003 and cited in Molintas' paper as follows:

> "Water is a resource that cannot be owned by any private individual even if it is found in privately held property. The landowner can only be accorded the right to prior use. Rights to water according to customary law belong to those who first tapped the source for their use but does not include the right to divert water from its natural flow and depriving those who claim 'natural rights' by virtue of being located along the natural course of the water. In agricultural areas, the *dumapat* system is still being practiced today. The *dumapats* are groups of rice field owners sharing a common water source for their irrigation use. Aside from these, *dumapats*, today's equivalent of formal irrigators' association, claim their right to a water source based on prior claim and natural flow. Water sources found in privately held lands for example Kapusean in Suquib, Besao, cannot be privatized. The landowner may have prior right to use the water but not to stop or divert it from its natural flow.
>
> Maintaining water supply involves *dumapat* cooperation, labor and resources. Cleaning, weeding and rehabilitating canals and intakes to facilitate water flow are responsibilities of all members of a *dumapat.* Each member family sends a representative to offer labor in cases where major rehabilitation works are needed like annual cleaning during the dry season. When the water supply is depleted, especially during the dry season, the *dumapats* take turns especially during the dry season, the *dumapats* take turns directing the water flow to their fields as agreed among themselves and without prejudice to other fields. The process of taking turns is referred to as *banbanes* and ensures that each one get his or her turn. Field owners keep vigil at night to make sure that their fields are watered according to schedule. Local water disputes are taken to the

> *dumapat* level. If not resolved at this level, they are brought to the *dap-ay*. Besao residents, however, cannot recall any major water dispute among themselves. Community rebuke and taunting are seen as enough punishment for abusive *dumapat* members.
>
> An important aspect of the water management in Besao is sustaining the forestlands. Approximately 69% of Besao's land is classified as forestland. This is further sub-classified into two types based on use. One is the *batangan* or the pinewood forest and the other is the *kallasan* or mossy forests. The *batangan* is generally used for fuel and timber needs while the *kallasan* serves as the hunting and gathering grounds. To sustain these, local ordinances like banning logging for commercial use, have been imposed. People are also very conscious of preventing forest fires so that even in the cleaning of the *uma*, fire lines are established before any burning is done. In cases of fire, community members voluntarily mobilize themselves to put it out and secure valuable properties like houses, rice granaries and animal pens.
>
> Religious practices contribute to water management as well. Traditionally, the *legleg*, a sort of thanksgiving and propitiating ritual, is performed in water sources yearly in Besao. Performance of the *legleg* is believed to please the *nakinba-ey*, and prevent it from leaving. Such traditional rites reinforce the high value and regard for water, thus, maintaining its quantity and quality through culturally prescribed and environmentally sustainable use as well as reaffirming man's relationship with nature."

The nature of the rights to water as practiced by the *iBesao* may be said to be typical of the indigenous peoples of the Philippines, which is not to imply that traditions and customs among the more than a hundred identified indigenous groups are homogeneous. For purposes of this paper, it may be assumed that certain basic characteristics are common among the groups: that water and other natural resources are God-given; that ownership is communal and temporary; that one may use only what one needs and give others and other generations opportunity to enjoy the resources; and, that the resources have to be protected.

### *Traditional Water Rights in Irrigation Systems*

Water is an important element in growing rice which is the staple food crop in the country, particularly in the northern part of the Philippines. While rainfall alone is not enough to sustain its growth, excessive rainfall causes damage. As an insurance against these occurrences, irrigation systems were developed. Indigenous irrigation systems may possess some common characteristics but they are still distinct from each other. What follows is a description of two indigenous irrigation systems in the Philippines: the Tukukan village irrigation system in central Cordillera and the *zanjeras* in Ilocos Norte. These two examples show how rights to water among the members of the community are allocated and exercised.

*The Tukukan Irrigation System in Central Cordillera, Northern Luzon*[xv]

The Tukukan village (*ili*) is located in Mountain Province, in the central part of the Cordilleras. The *Bontok* people of Tukukan engage in rice farming as the major activity and water is their most valuable resource. A unique characteristic of the Tukukan irrigation system is the role that rituals play in regulating social relationships in relation to the management and distribution of water.

Tukukan society is composed of the *kakachangyan* (aristocrats) and the non-*kakachangyans* who comprise the majority. Despite this dichotomy, all the villagers are landed but the *kakachangyan* own the bulk of the land. Members of the community have long ago banded to develop an irrigation system to nourish their farms and collectively maintain the system.

Plots of land owned by individual *Bontok* farmers are not necessarily situated adjacent to each other. Water used to irrigate the rice fields come from small springs and brooks, which are channeled into major irrigation canals. Lands owned by a farmer may be scattered within the locality such that there are cases where rice fields owned by a single individual are situated at the head (*sunga-chan*), middle (*khawa-an*), or tail end (*ucho-na*) of an irrigation system. This pattern of fragmented ownership instills in the farmers a vested interest in ensuring that water is equitably distributed up to the lowest and farthest rice fields.

Citizenship in the village and being descendants of original field owners confer upon a farmer membership in the irrigation association. Ownership of a rice field automatically gives the person the rights to irrigation water. It is a rule, however, that owners of newly constructed rice fields must yield to the older rice field owners in terms of priority rights to receive irrigation water.

Communal irrigation activities, commencing with the *khaat si arak* ("cutting of the grass" along the irrigation canal), mark the start of the traditional agricultural cycle. The day is decided upon by the consensus of the elders subject to the occurrence of natural phenomena such as changes in climate, appearance of migratory birds, change in temperature and the water level in the river. On this day, the rite of *apey si khina* is performed. The purpose of the ritual, which is only one of the many rituals performed by the *Bontoks*, is to "warm up" the irrigation canal for water to flow continuously and ensure a bountiful harvest. The observance of certain omens dictates the scheduling of agricultural activities. It intends to maximize production and minimize risks by accurate timing of repairing canals, tilling the fields, planning rice seeds, weeding, diverting irrigation water and harvesting.

Members of the irrigation association are expected to send a family representative to contribute to labor to undertake the irrigation activities, which include cleaning and rip-rapping the irrigation canals. Failure to fulfill their obligation would subject the family to pay a fine (*ob-ob*), which may either be in the form of five bundles of unhusked

rice per day of absence, or its equivalent in cash. Those who did the work share this penalty.

Water distribution is supervised by the *chotoken* who is chosen by the irrigation association members; normally, each member takes his turn as *chotoken*. Rationing of water among the members becomes necessary when water becomes scarce, particularly during the dry season from January to April, and sometimes even during rainy season when the rain is insufficient. During this time, a system of water rotation called the *sogsog-li* is implemented. Water distribution is controlled by blocking the turnouts to other ricefields at the main canal or by blocking the points where water is diverted to individual rice fields. Water is distributed among the rice fields at intervals based on a set schedule. Water rights are allocated by farm lots, regardless of ownership; thus, a farmer with more farm lots will get a larger share of the total volume of water available. However, being a member of aristocracy does not entitle one to more water for a particular plot.

The commencement of the *sogsog-li* is announced by a "shout" (*ey-fukhaw*) addressed to members of the irrigation system. A system of guarding is instituted since some farmers tend to divert water into their own fields if the farmers entitled to the water do not personally watch the flow of water towards their respective fields. Spending nights in the rice fields becomes necessary to ensure that water is not diverted. The duty of standing guard is divided among family members. Vigilance and presence in the field during water distribution is viewed as the solution to avert water thefts and other possible conflicts that may arise.

Stealing water is considered "bad" (*lawa*) since it is tantamount to depriving another person of his rightful share of irrigation water that ensures their survival. Furthermore, monopolizing the use of water is frowned upon for the same reason. In the case of water theft, the offender is merely verbally reprimanded by the offended party with the theft reported to the other field owners. Retribution for such acts is believed to be in the hands of fate or misfortune in such forms as illness, death or crop failure for the offender or his family. The key to maintaining equality in water distribution among the *Bontoks* is their belief system founded on rituals and supernatural sanctions.

*The Zanjeras of Ilocos Norte*[xvi]

The *zanjera* irrigation systems in Ilocos Norte in northern Luzon were developed during the Spanish period and have been in operation for more than two centuries. *Zanjera* comes from the Spanish word *zanja* which means ditch or conduit. Anecdotal accounts by villagers tell of farmers asking the Spanish priests for help in designing irrigation systems. The priests may have adopted Mexican irrigation practices through exchanges of knowledge facilitated by the Galleon trade. The number of existing *zanjeras* in Ilocos Norte range from 1,000 to 1,200.

Similar to the Tukukan irrigation system, the activities of the *zanjeras* cover the construction of dams, and maintaining and managing the irrigation system in order to

ensure that irrigation water is adequately and regularly delivered to its members. Mobilizing the entire *zanjera* members to perform major dam repairs or cleaning canals before the rainy season refers to *dagup* labor. Routine maintenance and repair works, which is undertaken by smaller work groups constitute *sarungkar* labor.

There are two types of *zanjeras*: one type aims to assist each other in irrigating lands they are already cultivating; the second type is composed of landless farmers who build and maintain irrigation systems in exchange for the rights to till portions of irrigated land.The relationship between the landless farmers and the owner of the un-irrigated lands is governed by what is called *biang ti daga* which means "sharing of land". The landowner retains ownership of the land and the *zanjera* farmers hold the land in usufruct. A sharing of the produce or its cash equivalent is specified, 25% goes to the landowner, while the remaining 75% is the *zanjera*'s share. The right to use the land reverts back to the landowner in the event that the *zanjera* farmers fail to fulfill their obligation to irrigate the land for a period of 12 years.

The organizational structure of the *zanjeras* depends upon its size. Each *zanjera* is composed of smaller units of five to fifteen members called the *gunglo*. A small *zanjera* would be headed by a *panglakayen* and supported by a secretary/treasurer. Larger *zanjeras* may have as many as two sets of officers, one to govern daily water management activities and the other representing the landowners. Officers in the first set are chosen from among the members who may either be tenants, lessees or owner-operators. This set of officers cover the three levels of collective control for using water corresponding to the layout of the irrigation system. At the first level is the *panglakayen* or board of directors which exercises collective control over water distribution across municipal and administrative boundaries. The next level, which is the canal level, is where the *maestro* or supervisor controls the activities of working groups composed of four to ten farmers sharing the canal. The maestro is selected on the basis of the location of his land, usually positioned at the farthest end of the system, which serves as an extra incentive to efficiently regulate the amount of water to be used by the members for their crops. At the lowest level is the cluster of farm parcels or the canal segment where the *lakay* or family elders resolve problems related to water use below the canal turn-out. Other *zanjeras* may have a different designation for the heads of each level such as *mayor cabecilla*, *segundo cabecilla* and the *gunglo* officer, respectively.

Several *zanjeras* may also form a federation to manage a dam and a common canal to serve the individual *zanjeras*. This arrangement, however, does not diminish the authority of each *zanjera* but it recognizes the interdependence among them. Procedures and schedules for operating and maintaining the irrigation facilities are exercised by a council composed of the heads of each individual *zanjera*. *Zanjeras*, through the council, communicate and coordinate their activities and each *zanjera* contributes its share in the needed labor and materials.

The allocation of water to the members of a *zanjera* is determined on the basis of the *atar* or membership share. *Atar* refers to the measure of the land area cultivated and to a system of rights and responsibilities. Labor duties and material resources to be

contributed to construction and maintenance works in the irrigation system are also distributed in proportion to the number of *atars* held.

Water-sharing arrangements within the *zanjera* as well as with other *zanjeras* are governed by certain rules which involve specific schedules for water delivery, labor assignments and a penalty structure for violation of *zanjera* rules. Most of the *zanjeras* observe rotational (*squadra* or *cuadra*) irrigation during dry season when water is scarce. Other *zanjeras* do not see any need to allocate water on a rotation basis because of perennial supply of water from springs or drainage.

In cases of conflict within or between *zanjeras*, mediation facilitated by the officers is employed, and recourse to litigation is avoided as much as possible. Penalties imposed for violation of a *zanjera* rule comes in the form of fines (*multa*), and are enforced for offenses such as absence from required *zanjera* activities and water stealing. The latter offense carries a relatively heavy fine, reflecting the high value accorded to irrigation water.

## Statutory Water Rights in the Philippines

Statutory water rights in the Philippines were founded upon two major water laws enacted during the Spanish regime: the Spanish Law of Waters (August 3, 1866) and the Spanish Civil Code. These laws were promulgated in Spain but their application was extended to the Philippines, which was then a Spanish colony. These two laws recognized the duality of water ownership – that waters are owned publicly and privately. All resources were owned by the Crown (Regalian doctrine); however, it recognized the principle of acquisitive prescription in the use of public waters. The dominant tenet underlying the Spanish water legal system was the riparian doctrine, which attached water rights to ownership of riparian land. Upstream landowners where the water rises are given a superior right over those in the lower stream. In the allocation of water among riparian owners, the law assumes the principle of natural flow. This again reinforced the superiority of the water rights of riparian owners where the water rises.

On December 10 1898, the Philippines was ceded to the United States by virtue of the Treaty of Paris, following the end of the Spanish-American War. The Spanish Civil Code remained in effect, but in addition, under the American regime, the Irrigation Act of 1912 (Act No. 2152) was passed. The dual nature of water ownership continued to be recognized but it defined the basis of water rights on public waters, thus introducing the concepts of priority of appropriation and beneficial use. Priority of application defines who can claim the right to use public waters, that is, the one who appropriated it earlier has a prior and better right. Beneficial use, on the other hand, stipulates that the appropriation of public waters must be for actual application for beneficial use. This law formally recognized irrigation associations duly registered under the existing corporation law at the time as authorized to manage communal irrigation systems.[xvii]

In 1949, after the Philippines became an independent state, congress passed the Civil Code of the Philippines, which included a chapter on waters. Most of the

provisions were modifications of the Spanish Civil Code provisions on water rights and use. It continued to recognize the use public waters and the use of water of private ownership. The Code affirms the right of riparian owners to the flow of water passing through its natural channels for private ownership, subject however, to the qualification that upstream owners should not exercise their water rights to the prejudice of the rights legally acquired by those of the lower estates.

The Civil Code was the single dominant law dealing with water rights and use until December 31, 1976 when the Water Code of the Philippines was issued by the President.[xviii] The Water Code expressly repealed the provisions of the Civil Code, the Spanish laws and other earlier laws regarding water rights. From 1977 onwards, the Water Code consolidated all statutory rules on water rights and uses, applicable everywhere in the country and applying to everyone.

## The Water Code of the Philippines

The Water Code of the Philippines sought to revise and consolidate the laws governing ownership, appropriation, utilization, exploitation, development, conservation and protection of water resources. Its objectives (Article 2) include, among others, to define the extent of the rights and obligations of water users and owners including the protection and regulation of such rights; to adopt a basic law governing the ownership, appropriation, utilization, exploitation, development, conservation and protection of water resources and rights to land; and to identify the administrative agencies which will enforce this Code.

The nature of water rights may be drawn from the five "underlying principles" enumerated in Article 3:

a) all waters belong to the State;
b) all waters that belong to the State cannot be the subject of acquisitive prescription;
c) the State may allow the use or development of waters by administrative concession;
d) the utilization, exploitation, development, conservation and protection of water resources shall be subject to the control and regulation of the government through the National Water Resources Council (NWRC);
e) preference in the use and development of waters shall consider current usage and be responsive to the changing needs of the country.

At present, there are numerous government agencies involved in water governance in the Philippines regulating aspects such as watershed protection, water quality management, water utilities, etc. However, it is the National Water Resources Board (NWRB), formerly known as the National Water Resources Council (NWRC), which is the primary government agency tasked with the overall management of the water resources in the Philippines. Its functions and responsibilities are three-fold: policy formulation and coordination of programs and standards relating to the water sector; management and regulation of all water-related activities; and finally, regulation

and monitoring of water utilities. As the regulator of water resources, the NWRB performs the following functions:

- Issue/suspend/revoke/approve transfer of water permits for the appropriation and use of waters;
- Declare waters not previously appropriated exempt from appropriation;
- Promulgate rules and declare the existence of control areas for the coordinated development, protection, and utilization of ground and surface waters;
- Establish minimum stream flows for rivers and streams and minimum water levels for lakes as may be necessary for the protection of the environment, control of pollution, navigation, prevention of salt damage, and general public use;
- Issue permits for development of streams, lakes or springs for recreational purposes;
- Issue permits for drilling of wells;
- Issue rules and regulations for reservoir operations;
- Approve transfer of water from one river basin to another;
- Coordinate data collection, research and manpower development;
- Impose penalties for administrative violations;
- Impose and collect reasonable fees or charges for water resource development;
- Approve rules and regulations prescribed by other government agencies pertaining to the utilization, exploitation, development, control, conservation or protection of water resources;
- Adjudicate all disputes relating to appropriation, utilization, exploitation, development, control, conservation and protection of waters

In carrying out its functions, the NWRB has deputized agents which perform tasks related to hydraulic and meteorologic data; flooding areas and inland waterways; lakes and marshes; watersheds; water supply and sewerage; and, water accounting within watersheds. Among the deputized agents are the district engineering offices of the Department of Public Works and Highways; the Provincial Engineering Offices of the National Irrigation Administration; the regional managers of the National Power Corporation; and general managers of water districts.

***Nature of water rights***

The first and fourth principles of the Water Code state the essence of the Regalian doctrine which was embodied in the Constitution of 1935 and in 1973 and reiterated in Article XII, Section 2 of the Philippine Constitution of 1987 which states in part as follows:

> "All lands of the public domain, *waters*, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development and

> utilization of natural resources shall be under the full control and supervision of the State. x x x." (emphasis supplied).

Consistent herewith, the Water Code provides that "no person, including government instrumentalities or government-owned or controlled corporations, shall appropriate water without a water right." *Appropriation of water* is defined in the Code as the acquisition of rights over the use of water or the taking or diverting of water from a natural source in the manner and for any purpose allowed by law. *Water right*, on the other hand is defined as "the privilege granted by the government to appropriate and use water."

The acquisition of rights to the use or development of waters may be obtained through administrative concession. The acquisition of water rights in the use of waters by prescription, recognized in the pre-1977 water rights system, was abrogated under the Water Code as expressly stated in its fundamental principles and repealing clause.

A water right is evidenced by a document known as a water permit and acquired through the water permit system being administered by the National Water Resources Board (NWRB). The application and approval process to be observed prior to the issuance of the water permit is set forth in detail in the Implementing Rules and Regulations (IRR) of the Water Code.[xix] The permit contains such conditions imposed by the Board, including information such as the maximum amount of water which may be diverted or withdrawn, the maximum rate of diversion or withdrawal, the time or times of the year when the water may be diverted or withdrawn, the point or points of diversion or location of well, the place of use and the purposes for which the water may be used. The Code specifies that the exercise of a water right should not prejudice the rights of third persons or of other appropriators.

Water permits may be applied for by citizens of the Philippines of legal age, juridical persons with Filipinos owning at least sixty (60) percent of their capital, and government entities and instrumentalities, including government owned and controlled corporations. The Water Code, however, explicitly favors collective management of water over individual control of water by encouraging the merger of irrigation associations and the appropriation of waters by associations. The Board shall not grant a permit to an individual when his need for water can be supplied through an irrigation association.

The Water Code provides for exemptions to the permit requirement. For instance, the owner of the land where water is found may use the water for single family without securing a permit, provided, its use shall be registered when required by the Board, which may regulate such use when there is wastage or in times of emergency. Another exemption would be when the person appropriates or uses natural bodies of water with the use of hand-carried receptacles or when appropriation is for bathing or washing, watering or dipping of domestic or farm animals, and navigation of watercrafts or transportation of logs and other objects by flotation.

The rights to the use of water are deemed acquired as of the date of the filing of the application for a water permit in cases where it is required. In cases where no water permit is required, the right to the use of water is deemed acquired as of the date of actual use.

The Water Code recognizes the use of water for the following purposes: domestic use (utilization of water for drinking washing, bathing, cooking or other household needs, home gardens and watering of lawns or domestic animals); municipal purposes (utilization of water for supplying the water requirements of the community); irrigation (utilization of water for producing agricultural crops); power generation (utilization of water for producing electrical or mechanical power); fisheries (utilization of water for propagation and culture of fish as a commercial enterprise); livestock raising (utilization of water for large herds or flocks of animals raised as a commercial enterprise); industrial purpose (utilization of water in factories, industrial plants and mines, including the use of water as ingredient for a finished product); and, recreational purposes (utilization of water for swimming pools, bath houses, water skiing, golf course and other similar facilities and other places of recreation). Different documents are required to be filed with the Board upon application for a water permit depending on the purpose for which water will be used.

A filing fee is imposed and collected from every applicant for a water permit. In addition to this, the Board is authorized to impose and collect reasonable fee and charges for water resources development from water appropriators, except when it is purely for single family domestic purposes or when the quantity of water appropriated for agricultural use is not more than five liters per second. The Water Code provides a schedule of annual water charges based on the rate of withdrawal and the type of water source. The Board may revise the rate of the charges depending on certain considerations such as intended use of water, the environmental effects, the extent to which water withdrawal will affect the source; and, the development cost of bringing water from the source.

Water permits continue to be valid as long as water is beneficially used. Beneficial use is defined as the utilization of water in the right amount during the period that the water is needed for producing the benefits for which the water is appropriated. It serves as the measure and limit of appropriation of water.

Temporary water permits are also issued by the Board for the appropriation and use of water for short periods under special circumstances. These are granted by the Board on a case-to-case basis specifying the conditions and period under which the permit is valid. These permits do not exceed six months; and the quantity of water, which may be appropriated shall not be more than 200 liters per second.

Water permits may be revoked, suspended, modified or cancelled only after due notice and hearing on the following grounds: non-beneficial use; gross violation of the conditions imposed in the permit; unauthorized sale of water; willful failure or refusal to comply with rules and regulations or any lawful order; pollution, public nuisance or acts

detrimental to public health and safety; when the appropriator is found to be disqualified under the law to exploit and develop natural resources of the Philippines; when in case of irrigation, the land is converted to non-agricultural purposes; and other similar grounds.

The Code allows transfer of water rights in whole or in part, with prior approval of the Board after due notice and hearing. Transfers, however, arise only in cases of a change in the occupant or the owner of the property where water is used. It does not contemplate "trading of water rights" in the sense where water resources are reallocated from lower to higher priority uses for a price.[xx]

Conflicts arising from the privileges in the use of water shall be adjudicated by the Board in the exercise of its quasi-judicial functions. The implementing rules and regulations of the Water Code requires that complaints or protests on the ground of adverse effects on the privileges to use water from any source shall be filed by a water permittee, otherwise the complaint shall not be entertained. An amicable settlement of the controversy is encouraged at the preliminary hearing stage. Should the parties fail to come to an agreement, an investigator shall hear the case at the local government unit where the controversy is located or at any other place agreed upon by the contesting parties. The investigator prepares his report and makes a recommendation to the Board which, in turn, issues the decision or resolution.

The Water Code also penalizes specific prohibited acts which include violation or non-compliance with any order, rule or regulation of the Board; non-compliance with the obligations and terms and conditions of a water permit; and commission of acts which adversely affects the quality and quantity of water.

***Status of Implementation of the Water Code***[xxi]

Although the Water Code has been in effect for almost three decades, compliance with the permit requirements is low. According to the NWRB, extraction rates are understated by as much as 30% and approximately only 40% of users have the requisite water permits and pay the annual fees and charges. Since its promulgation in 1976 up to the present, there are a total of only 24,362 water permittees throughout the country. This figure includes cancelled and inactive permits as well as permits which are pending approval. These are attributed to causes that are systemic and institutional in nature, including:

- The permit process is too cumbersome, costly and time-consuming.
- The NWRB lacks financial and manpower resources to effectively enforce the water permit system.
- The deputation scheme is ineffective due to limited resources and conflicts of interest.
- The awareness level on the need for and the requirements for a water permit is low.

The NWRB does not have field offices or personnel in the provinces or municipalities which means there is no monitoring or enforcement of the permit requirement. Further, an ordinary citizen would not know where to go to get a permit, or that a permit is required, or that NWRB even exists. In one of our researches, we interviewed the operations manager of a major sugar mill in the Visaya, who informed us that they do not have a water permit and are in fact extracting groundwater for free.

## Legal Status of Customary Water Rights and Interface with Statutory Rights

Customary water laws equate the right to access and use of waters with land ownership, which is communal in nature. Land, including those above and below its surface, is considered as owned by the gods and the spirits and is merely held by people in stewardship. Insofar as indigenous peoples are concerned, land and the resources found therein constitute one integrated ecosystem.

In contrast, statutes, particularly laws that pertain to land and natural resources, are grounded on the Regalian doctrine, which provides that ownership and control over natural resources belong to the State. On the basis of this principle, the State enacted laws regulating the extraction and utilization of the different resources such as timber, minerals, fisheries and water. Rights to these resources can only be acquired through a grant given by the State.

The Water Code is silent insofar as customary water rights is concerned. The provision of the Code that more or less approximates recognition of customary water rights is Section 95, which recognizes claims to the right to use of water existing on or before December 3, 1974. However, these holders of prior use rights were required to secure a new water permit within two years from the promulgation of the Code, otherwise, they shall be excluded from the utilization of the water resource and the same shall be available for disposition as unappropriated waters. There is sufficient reason to believe that this provision of the Code was hardly implemented at all. Judging from the low probability of effectively enforcing the Code and the low rate of compliance with its requisites during the past thirty years, holders of prior use rights would not have bothered to secure their water permits considering the lack of information available regarding the necessity to do so. Moreover , there would not seem to be any urgent need to secure their rights unless an adverse claim exists.

### *Prior rights of indigenous peoples*

An exception to the Regalian Doctrine was established through jurisprudence in the case *Cariño v. Insular Government* decided by the Supreme Court in 1909 where it ruled that: "when, as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way before the Spanish conquest, and never to have been public land." In effect, the decision recognized the property rights of an individual who has occupied it since time immemorial.[xxii]

Indigenous cultural communities/indigenous peoples (ICCs/IPs) have been in possession of their lands even prior to the colonial era. While the decision in the *Cariño* case may be invoked to assert their rights over their land and natural resources, legislation somehow overlooked, if not totally disregarded this settled rule. The case was only resurrected from the dustbins in the late 1980s.

For quite some time, Philippine indigenous peoples were referred to as a "cultural minority", differentiating them from the majority of the Filipinos who have assimilated lowland cultures because of its colonial past. The government sought to "integrate" the indigenous peoples into the "mainstream" Philippine society by enacting a law, the Charter of the Commission on National Integration (1957), which subsequently evolved to the Charter of the Presidential Assistant on National Minorities (PANAMIN) in 1978.[xxiii]

The position of the Philippine government towards the indigenous peoples changed from one of "integration" to "recognition" with the ratification of the 1987 Constitution. The 1987 Constitution recognizes the existence of ICCs/IPs as peoples and of their rights as gleaned from the following provisions, to wit:

> Article II, Section 22 – "The State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development."
>
> Article XII, Section 5 – "The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the right of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural well-being.
>
> The Congress may provide for the applicability of customary laws governing property rights and relations in determining the ownership and extent of ancestral domain."
>
> Article XIV, Section 17 – "The State shall recognize, respect and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies."
>
> and
>
> Article XVI, Section 12 – "The Congress may create a consultative body to advise the President on policies affecting indigenous cultural communities, the majority of the members of which shall come from such communities."

On the basis of the foregoing Constitutional mandates, Republic Act No. 8371, otherwise known as the "Indigenous Peoples' Rights Act (IPRA)", was passed on October 29, 1997 and took effect on November 22, 1997. This law is a comprehensive statute which addresses the rights of indigenous peoples to social justice and human

rights, self-governance and empowerment, and cultural integrity as closely anchored on their rights and values attached to their ancestral domains/land.[xxiv]

The IPRA contains provisions that recognise the primacy of customary water rights over statutory water rights. For instance, "ancestral domains" include water. It is defined under the law as referring to "all areas generally belonging to ICCs/IPs comprising lands, *inland waters, coastal areas* and natural resources therein, held under a claim of ownership, occupied or possessed by ICCs/IPs, by themselves or through their ancestors, communally or individually since time immemorial, continuously to the present x x x. 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 lands which may no longer be exclusively occupied by ICCs/IPs but from which they traditionally had access to for their subsistence and traditional activities, x x x." (emphasis supplied.)

The right of ownership of ICCs/IPs over their ancestral domains cover rights to claim all lands and natural resources within the domains, including *bodies of water which they have traditionally and actually occupied*. (emphasis supplied.) The Act further introduces the "indigenous concept of ownership" which sustains the view that ancestral domains and all resources therein shall serve as the material bases of their cultural integrity. It generally holds that ancestral domains belong to the ICCs/IPs', but is community property belonging to all generations and therefore cannot be sold, disposed or destroyed. It covers sustainable traditional resource rights which in turn is defined as "the rights of ICCs/IPs to sustainably use, manage, protect and conserve a) land, air, *water*, and minerals, b) plants, animals and other organisms; c) collecting, fishing and hunting grounds; d) sacred sites; and e) other areas of economic, ceremonial and aesthetic value in accordance with their indigenous knowledge, beliefs, systems and practices." (emphasis supplied).

The rights of the ICCs/IPs to claim ownership and develop natural resources are not absolute. It is qualified by specific situations such as when there are existing property rights within the ancestral domains or when such rights were vested prior to the effectivity of the IPRA. Property rights as used herein refers to "title" while "vested rights" would refer to those who do not necessarily possess title but have been granted the privilege to use, exploit or develop the resources. The latter would cover licenses, leases, grants or permits which may continue to be in force until they expire unless earlier revoked for cause. Renewal of these privileges shall then be subject to the free and prior informed consent of the ICCs/IPs.[xxv]

ICCs/IPs are given priority rights to harvest, extract, develop or exploit natural resources within the ancestral domains. Non-ICCs/IPs, however, are not excluded from undertaking these activities, provided that there is a formal and written agreement with the ICCs/IPs concerned.

Environmental considerations also qualify the ICCs/IPs' rights over their ancestral domains. Ancestral domains shall be maintained, managed and developed, whenever necessary, for use as critical watersheds, mangroves, wildlife sanctuaries, wilderness, protected areas, forest cover, or reforestation.

***Conflicts between customary and statutory rules***

The key to resolution of conflicts between customary and statutory rights is not the Water Code but IPRA, which states that whenever disputes involve ICCs/IPs, customary laws and practices shall be used to resolve the dispute. Furthermore, it advocates the "primacy of customary laws and practices" of the ICCs/IPs, which means that conflicting parties shall amicably settle their disputes by exhausting first all remedies available in customary laws before resorting to regular courts. Any doubt or ambiguity in the application and interpretation of laws shall be resolved in favor of the indigenous peoples.

An example of a water rights conflict between a water grantee and a water user whose rights are based on a claim of "prior right" involved *zanjeras* as documented by Ma. Concepcion Cruz.[xxvi] However, in this case, while *Ilocanos* are a people with a distinct culture and tradition, they are not recognized as an ICC/IP under IPRA.This water rights conflict involved the Bacarra-Vintar river in Ilocos Norte. The competing water users in this conflict were the Integrated Communal Irrigation System (ICIS), composed of two federated *zanjeras*, encompassing two municipalities and thirteen barrios, which holds a legal water permit from the then NWRC, and three unfederated *zanjeras* of Curaig, Dibua and Camongao which were unregistered users who drew water directly from the river but whose claim to the water was based on a long-standing or "prior right" established by documented evidence.

The water rights conflict stemmed from the proposed construction by the ICIS of a 400 meter canal from the point of diversion at the source to the farthest affiliated *zanjera* to enable this *zanjera* to plant crops during the dry season. The three unfederated *zanjeras* opposed the project claiming that the canal would reduce the water supply reaching their fields. They sought assistance from the National Irrigation Administration (NIA) which later came up with a proposition to construct an 80 meter canal to cut across the main canal to service the unfederated *zanjeras*.

The ICIS found this alternative unacceptable, arguing that their proposal of constructing the 400 meter canal was within the water allotment of 2,800 liters per second granted to them by the NWRC. They further argued that the opposing *zanjeras* did not possess water permits from NWRC, and as such, the construction of the 400 meter canal was justified since it was within the discharge rate prescribed by NWRC.

The NWRC did not rule outright in favor of the ICIS despite the fact that it was the holder of a legal water right, neither did it decide against the unfederated *zanjeras*. Several meetings were held among the contending parties, NIA engineers, and NWRC lawyers to arrive at an equitable solution to the problem. A proposed solution was for the

reallocation of the water right granted by NWRC by reducing the ICIS allotment from 2,800 liters per second to 980 liters per second. At the same time, the unfederated *zanjeras* would be required to secure a common water permit before the 80 meter canal could be constructed.

Cruz presented a technical solution where an assessment of water availability would be conducted to determine water rights allotment. She also recommended an institutional solution to settle the conflict. In the latter solution, she noted the significance of the organizational structure of the *zanjeras*, particularly the role of the *panlakayen* who can negotiate with the other *zanjeras* and arrive at agreements on a water allocation scheme. The *zanjeras*, however, would be required to obtain the requisite water permits pursuant to the Water Code.

There is no information on how the conflict was eventually resolved. According to sources at the National Water Resrouces Board (NWRB) and the National Irrigation Administration (NIA), the records are no longer available since the conflict happened twenty years ago. They added that they are not aware of any current conflict among the zanjeras in Ilocos Norte and believe that the conflict was settled amicably.

***Zanjeras as model for government policy***

Even before the passage of the IPRA, the State already realized the importance of building on the strength of traditional water systems instead of changing or imposing a system recommended by the state. One particular government experience which illustrates this fact concerned the Ilocos Norte Irrigation Project (INIP) where the conflict involved the *zanjeras* and a government agency, the National Irrigation Administration (NIA).[xxvii]

In 1978, the NIA commenced with the design of an irrigation facility to improve water supply and to introduce hydropower in the Ilocos Region. The extent of the project covered a number of *zanjeras* in the area. Despite being aware of the existence of these communal irrigation systems, the original project planners disregarded the *zanjeras*. The *zanjeras* did not have any participation in the formulation of the project design.

The *zanjeras* resisted the project for a number of reasons, namely: NIA's intervention would not matter since there was enough water; some were not willing to pay fees for water which they had been using for free; others were afraid that the canals to be built would reduce the size of their farmlands; they wanted to preserve the existing *zanjera* irrigation system; they did not want to give up their rights; and, the landowners stood to be compensated and not the tenants. As a result of this open resistance, the project encountered delays in implementation.

In light of these protests, the NIA reviewed the project and decided to redesign it by adopting a more participatory approach. The *zanjeras* were given the opportunity to take part in the planning process. The review team recommended four principles to guide the redesign of the project: (1) preserve the identity of the *zanjera* groups; (2) follow

existing canal lines as much as possible; (3) conceive the project as rehabilitation of existing communal irrigation systems, not as construction of a new, large-scale system; and, (4) involve farmers in planning and implementing the project.

The project was finally completed in December 1995. The post-evaluation report commended the fact that the NIA implemented the project while coordinating with the *zanjeras*. This coordination continued on through the operations and maintenance work, including the collection of water charges. Likewise commended by the report is the project's use of the system for operation and maintenance of traditional irrigation cooperatives to perform adequate maintenance. The success of the project was reflected in the increase in rice crop yield in the area as well as in the average farming income of the farmer beneficiaries. The post-evaluation report further noted that "This project was unusual for its time in that it reflected the needs and opinions of the farmers who were the beneficiaries, and it was an early example of successful participatory development. Now that the project has been completed, Zanjeras is active as an irrigation cooperative and its strong organizational ability contributes to the realization of the project's effects."[xxviii]

From the onset, the INIP should have been conceptualized as a collection of communal irrigation systems. It should not have initially subsumed the existing water rights of the *zanjeras*. As a result of this experience, NIA developed a policy on Participatory Irrigation Management, which would revolutionize the way government viewed communities in natural resources management.[xxix]

The foregoing shows that customary water rights and practices can be kept intact and accommodated in the state regime. When customary water rights and practices are recognized and respected by the State, as in the cases cited, greater efficiency of water allocation is achieved.

## Issues

### *1. Who owns the waters?*

The Water Code still operates under the Regalian doctrine but IPRA is still instrumental for recognition of customary rights. However, IPRA has been challenged because it is perceived to give too much power to indigenous peoples which can be used to block major natural resource exploitation such as mining, industrial forest plantations and water diversion for agricultural, domestic or power-generation uses. The pressure will increase as demand for water exceeds supply, prompting government to take greater control over water resources especially in the highlands (mostly under claim by IPs) to ensure supply for the rapidly growing cities and industries in the lowlands, at the expense of community rights.

The constitutionality of the IPRA was questioned in a petition filed before the Supreme Court by former Supreme Court Justice Isagani A. Cruz and Cesar Europa on September 1998. On December 6, 2000, the Supreme Court dismissed the petition on a divided vote.[xxx] With seven (7) votes to dismiss the petition and the other seven (7) votes

to grant the petition, there was no clear majority to declare the questioned provisions unconstitutional, and the law was presumed to be valid. The decision itself did not make any declaration nor provide any discussion on the questioned provisions of the IPRA. Some of the contentious provisions under question refer to the recognition of ancestral lands and domains and to the right of ownership of ICCs/IPs over natural resources as part of the ancestral domains. One separate opinion captures the apprehension of opponents of IPRA:[xxxi]

> "Indigenous peoples may have long been marginalized in Philippine politics and society. This does not, however, give Congress any license to accord them rights that the Constitution withholds from the rest of the Filipino people. I would concede giving them priority in the use, the enjoyment and the preservation of their ancestral lands and domains. But to grant perpetual ownership and control of the nation's substantial wealth to them, to the exclusion of other Filipino citizens who have chosen to live and abide by our previous and present Constitutions, would be not only unjust but also subversive of the rule of law.
>
> In giving ICCs/IPs rights in derogation of our fundamental law, Congress is effectively mandating "reverse discrimination." In seeking to improve their lot, it would be doing so at the expense of the majority of the Filipino people. Such short-sighted and misplaced generosity will spread the roots of discontent and, in the long term, fan the fires of turmoil to a conflagration of national proportions."

A future case where there is specific conflict between indigenous rights and a government grant would revive the debate once more. IPRA is still vulnerable to legal attack but it remains a valid law unless the Court declares it otherwise.

To date, a number of ICCs/IPs have filed claims over millions of hectares of ancestral domains and ancestral lands, which constitute a large percentage of land in the country. In view of this, there is growing fear that ICCs/IPs would eventually own the bulk of the country's land. This would mean that the ICCs/IPs would receive a majority of the water rights resulting in inequitable allocation of water resources. Should this become inevitable, the constitutional principle of "more equitable distribution of opportunities, income, and wealth" among Filipinos would be violated and the objectives of the Water Code would be defeated.[xxxii]

### *2. How would customary rights to water be recognized?*

Customary water rights and practices were kept intact notwithstanding the enactment of the Water Code in 1976. The only obvious "intrusion" would be the imposition upon these traditional societies of the obligation of securing a water permit from the State as evidence of their water rights. This may appear to be a simple mechanical procedure but the truth is that traditional societies may not appreciate the need to do so. The process is costly and taxing. Even more complicated is the fact that

by complying with the requisites of the state for exclusive rights under IPRA, the indigenous peoples betray their customary belief about the concept of land – that it is owned by the gods and spirits and merely held by men who act as stewards.

The problem of recognition of customary rights would be trivial if the only issue is compliance with bureaucratic requirements for permits. However, it becomes a substantial issue when there are conflicts among different claimants over the resource. Holders of customary water rights could not avail of the conflict resolution process under the Water Code. Section 62 of the Implementing Rules and Regulations of the Water Code provides that the complainant or protestant should be a water permittee; otherwise, his complaint will not be acted upon. It is a given that holders of customary water rights do not have water permits. Because of this customary water right holders, in effect, do not have a "personality to sue" before the Board. Therefore, they would not be able to assert their rights over the use of waters before the NWRB in the event of an adverse claim. This rule has been revised in the new draft Implementing Rules and Regulations of the Water Code (IRR).[xxxiii] Paragraph 2 of Section 65 of the draft IRR now states that "complaints/protests filed solely on the ground of adverse effects on the privileges to use water from any source shall not be entertained *unless the complainant/protestant has a legal right over the water source as recognized under existing laws.*" (Proposed amendment is emphasized).[xxxiv] It can be argued that "legal right over the water source as recognized under existing laws" should include customary rights recognized under IPRA, but the draft IRR does not explicitly recognize this.

An accurate and transparent accounting of all water uses and a thorough inventory of water rights is a requisite for an organized water rights system. Currently, NWRB does not account for customary water rights that are unregistered. The absence of data or information on existing customary water rights creates the risk of potential conflicts between holders of customary water rights and holders of statutory water rights. Consequently, a mechanism to recognize and legitimize customary water rights, should be set in place.

### *3. Can customary rights be the basis for trade or compensation?*

Reasonable fees and charges for water resources development are imposed and collected from water appropriators (excluding those who use water for domestic purposes) by the NWRB. This, however, does not represent the value of raw water but the cost of administering the transfer of water rights from the government to the water appropriators.[xxxv]

The Philippines is currently facing a crisis in managing watersheds for lack of capacity and resources to control destructive land uses. In the last three decades, the country has developed policies on community-based natural resource management, which is premised on the assumption that communities in the highlands perform (or should perform) a function of protecting the watersheds for which they should be compensated by those in the lowlands who benefit from the water supply.

The Philippines is currently developing mechanisms for lowland users to pay for the cost of protecting the upland sources of water and to pay for water itself. These schemes involve the development of markets for environmental services to bridge the people who provide the service of environmental protection of the upland sources of water and those who benefit from the service.[xxxvi] Traditionally, upland water source protection was not linked to the market system and thus was unpaid for, but scarcity of resources influenced the development of payment systems.[xxxvii] It is also hoped that developing this payment scheme will enable marginalized upland peoples to make a decent living without depleting the resources of the watershed.

Economic theory of markets is anchored on the production and trade of private goods. The nature of water source protection, particularly in the context of rights in the Philippines, gives it the character of a public good. As such, it is difficult to apply market instruments to the service of water source protection. Payments for environmental services are predicated on the premise that the service of water source protection can be given a semblance of a private good, meaning, it can be made marketable or commodified. This involves recognizing some rights (e.g., customary rights) of the stewards of the good (water/watershed) and allowing them to market the preservation of the good as a "service."

However, the issues of property and tenurial rights over water and water sources are complex, given the nature of land and watersheds as property. There are inherent differences in opinion whether the highlands can be "privatized." Despite IPRA, the primary environment agency, the Department of Environment and Natural Resources, still insist that ancestral domains are public lands. The uncertainty of ownership of lands and water rights can doom any economic or incentives-based scheme to failure.

The enormous power of having control over water resources in the coming times of scarcity is not something that will be handed to customary rights claimants without contest.

***4. How should conflicts between IPs and non-IP resource users be addressed?***

With the growing population and the increasing demand for food, electricity and water, development projects to address these demands are given priority. It is noted that the present trend is towards an agro-industrial economy such that a policy shift is being considered. To attract investments in projects, such as those requiring water, investors have to be guaranteed of their water rights. This guarantee is an assurance to these investors that their rights would prevail over those of other users. Conflicts between existing water rights holders and industrial projects which apply for new water rights will be inevitable if the a shift towards an industrial economy is adopted. Conflicts are likewise bound to escalate in the future because significant portions of the watersheds are under IP claims. Despite IPRA, there is no practical procedure in place to address conflicts between IPs and non-IP resource users.

The power to settle disputes involving the appropriation, utilization, exploitation, development, control, conservation and protection of waters is vested in the National Water Resources Board. As noted above, the Water Code and its Implementing Rules and Regulations do not provide the venue to resolve disputes between customary water rights and statutory water rights. The holder of a customary right would not be recognized before the Board should it have a grievance relating to his water use.

One may point out Section 53 of the Implementing Rules and Regulations of the Water Code which provides that conflicts involving the use of water that may arise from any project proposal shall be resolved on the basis of national (or regional) priority and needs. This means that the need for power generation for a multipurpose project shall be determined by the quantity and time of such need on a grid basis rather than on a single project basis alone. It further provides that any conflict, which adversely affects a particular segment of society, group of individuals or small community, may be resolved after the Board or its proper deputies have conducted a public hearing. A determination of who has better rights over the use of water is not the goal in a public hearing; the most that can be achieved at these is a compromise agreement or an acceptance by the affected community of the project.

The National Commission on Indigenous Peoples (NCIP), which is the primary government agency responsible for protecting the rights and well-being of the ICCs/IPs and the recognition of their ancestral domains and rights to resources, has not participated nor was it consulted in the process of reviewing the Water Code and its implementing rules and regulations which NWRB conducted in 2004, referred to earlier.

## Agenda for Future Action

The operationalization and institutionalization of the Integrated Water Resources Management (IWRM) is said to be the key in realizing harmonized water use and allocation. Numerous recommendations along the lines of IWRM include *inter alia*, the strengthening and regionalization of the NWRB; the decentralization of governance through the development of river basin organizations (RBOs); and the adoption of tradable water rights.[xxxviii]

The information system for basic water data needed for decision-making should be improved. The National Water Information Network (NWIN) would have to enhance the existing information system by regularly updating its data, strengthen the linkages among all the agencies and instrumentalities involved in water resources development and management, and expand the scope of their data. One step towards minimizing conflicts over water resources is the creation of a realistic and accurate water database which accounts for customary water rights. In order to realize this objective, financial assistance is necessary to support data collection, management efforts and capacity building for all institutions concerned.

In order to account for customary water rights, a documentation of customary rights and practices is necessary. Unfortunately, there is resistance to this among some IP

groups. Moreover, there is the difficulty of ascertaining the authenticity of some customary rights and practices while some are no longer in their 'pure' or unmodified state. An awareness program targeting the ICCs/IPs should be made for the latter to better understand the significance and necessity of the documentation process as a means of establishing their rights. The NCIP would play a significant role in reviewing related laws, rules and regulations affecting the rights of indigenous peoples. Particularly ensuring their customary water rights are recognized and safeguarded. At the same time, the NCIP shall ensure the genuineness of information, which shall form part of the government data.

Conflict resolution mechanisms would have to be developed further under the framework of IPRA. Currently, the new revised rules of the Water Code do not explicitly recognize customary rights holders as legitimate parties in complaints against other claimants.

History and experience have shown that customary laws can work within a statutory regime. It is suggested that with the coordination of the NCIP, clear and express provisions espousing customary water rights should be included where necessary in the relevant laws and regulations. As long as the policies are indirect and ambiguous, the rights of legitimate water users derived from either customary law or statutory law cannot be guaranteed or protected.

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[ii] The official government portal of the Republic of the Philippines, www.gov.ph. According to the National Mapping and Resource Information Authority (NAMRIA) at www.namria.gov.ph/geog_fac.asp, Philippine waters only comprise 1,830 sq. km., obviously referring only to inland waters and not counting the 200-mile extent of the exclusive economic zone provided under the UN Convention on the Law of the Sea where the Philippines is a party.

[iii] UNDP, Human Development Report, Country Sheet – Philippines. http://hdr.undp.org/statistics/data/countries.cfm?c=PHL data is from 1990-2003.

[iv] Philippine Atmospheric Geophysical and Astronomical Services (PAGASA) www.pagasa.dost.gov.ph

[v] World Bank. The Philippines Environment Monitor 2003: Water Quality. www.worldbank.org.ph; National Water Information Network www.nwin.nwrb.gov.ph; NAMRIA, supra note 2.

[vi] World Bank (2003), see note 5; Rogelio Concepcion, "Philippine Country Report", in Gateway to Land and Water Information (2004) www.fao.org/ag/agl/swlwpnr/reports/y_ta/z_ph/ph.htm; National Water Resources Board, Integrated Water Resources Management, Thematic paper presented during the National Water Forum, March 22, 2004, Manila. www.nwin.nwrb.gov.ph/uploads

[vii] The latest data were compiled from several sources by the World Bank in its 2003 Environment Monitor.

[viii] JICA, Master Plan Study on Water Resources Management in the Philippines (1998), in World Bank Philippine Environment Monitor 2003.

[ix] NWIN www.nwin.nwrb.gov.ph is designed to host all water-related information from various government agencies that regulate or monitor the supply and quality of water resources. At present the framework for the database is there, but only a sampling of data is available.

[x] Maria F. Mangahas, Mataw-amung nu rayon, Anito. Man, the Fish of summer, and the spirits: an ethnography of mataw fishing in Batanes. Unpublished masteral thesis. University of the Philippines, Diliman, Quezon City. (1993)

[xi] There are at least 110 ethnolinguistic groups found throughout the Philippines based on the records of the National Commission of Indigenous Peoples (NCIP); this paper presents the traditional rules on water use systems of only three groups: water rights among the Besao people living in the Mountain Province in the Cordilleras, the traditional irrigation practices of the Tukuran village in Bontok and the zanjeras of Ilocos Province, all in Northern Luzon.

[xii] Jose M. Molintas, "The Philippine Indigenous Peoples' Struggle for Land and Life: Challenging Legal Texts", Arizona Journal of International and Comparative Law, Vol. 21, No. 1, pp. 269 – 306 (2004).

[xiii] Id.

[xiv] The descriptions of the culture and practices of the iBesao is based on the following: Molintas (2004) in note 11, citing E. Dictaan Bang-oa in paper entitled "Traditional Water Management in Besao, Mt. Province," presented during the World Water Forum in Kyoto, Japan in March 2003; Asian Development Bank, Proceedings of the Final Consultative Workshop Philippine Country Case Study on Forest Policy and Institutional Reforms, Development Academy of the Philippines, Tagaytay City, October 15 –16, 2001.
[xv] This account of the Tuktukan irrigation system is based on June Prill-Brett, Stone Walls and Waterfalls: Irrigation and Ritual regulation in the Central Cordillera, Northern Philippines, in Karl Hutterer, Terry Rambo and George Lovelace (eds), Cultural Values and Human Ecology in Southeast Asia. Center for Southeast Asian Studies: The University of Michigan (1985).
[xvi] The account of the zanjeras is based on the following papers: Robert Y. Siy, Jr., Egalitarian models in water management organization: the zanjeras of Ilocos Norte. (Typescript. 1980); Robert Y. Siy Jr., Rural organizations for community resource management: indigenous irrigation systems in the Philippines. Ph.D. dissertation, Cornell University, Ithaca, New York (1982); Ruth A. Yabes, "The Zanjeras and the Ilocos Norte Irrigation Project: Lessons of Environmental Sustainability from Philippine Traditional Resource Management Systems", in Ghai, D. and Vivian, J.M. (eds.) Grassroots Environmental Action: People's Participation in Sustainable Development, Routledge, London, England (1992); Benjamin Bagadion, Sr., "The Evolution of the Policy Context: An Historical Overview", in Korten F. and R. Siy, Jr. (eds.), Transforming a Bureaucracy: The Experience of the Philippine National Irrigation Administration. Ateneo de Manila University Press (1989); Ma. Concepcion J. Cruz "Water as Common Property: The Case of Irrigation Water Rights in the Philippines", in Berkes, F. (ed.) Common Property Resources: Ecology and Community-Based Sutainable Development. Bellhaven Press, London (1989); Ma. Concepcion J. Cruz, L.B. Cornista, and D.C. Dayan, Legal and Institutional Issues on Irrigation Water Rights in the Philippines, Agrarian Reform Institute, University of the Philippines at Los Baños, College, Laguna, Philippines (1987).
[xvii] Bagadion (1989), see note 16.
[xviii] Presidential Decree No. 1067. This was issued at a time when the President exercised legislative powers. Presidential decrees have the same status as statutes passed by Congress and may be repealed or modified only by an act of Congress.
[xix] The present rules and regulations were adopted by the NWRC on June 11, 1979. The NWRB is now in the process of finalizing a revised implementing rules and regulations for the Water Code.
[xx] NWRB 2004, supra note 6.
[xxi] Id.; data from www.nwin.nwrb.gov.ph
[xxii] 41 Phil. 935
[xxiii] First Peoples Worldwide, Philippines Summary of Land Rights, First Nations Development Institute, http://www.firstpeoples.org/land_rights/Philippines/ summary.htm (2005)
[xxiv] CIPRAD, Guide to R.A. 8371: Indigenous Peoples' Rights Act of 1997 (IPRA), Coalition for Indigenous Peoples' Rights and Ancestral Domains, Manila (1999).
[xxv] Id.
[xxvi] Cruz (1987, 1989) presented this as one of her case studies on water rights conflicts. Supra note 16.
[xxvii] Yabes (1992), supra note 16; JBIC, "Philippines: Ilocos Norte Irrigation Project" in 1999 Ex-Post Evaluation Report on ODA Loan Projects, Japan Bank for International Cooperation, 755-758. http://www.jbic.go.jp/english/oec/post/1999/pdf/30.pdf. (1998).
[xxviii] JBIC, id.
[xxix] Korten and Siy (1989), supra note 16.
[xxx]G.R. No. 135385. December 6, 2000
[xxxi] separate opinion of Justice Artemio Panganiban.
[xxxii] First Peoples (2005), supra, note 23.
[xxxiii]On September 12, 2002, the Office of the President issued Executive Order No. 123, "Reconstituting the National Water Resources Board (NWRB)". It is aimed at strengthening the NWRB to enable it to effectively implement and enforce the Water Code and to address the problems cited above. One of its provisions called for the review and amendment of the Implementing Rules and Regulations (IRR) of the Water Code. Due to lack of financial resources, it was only in 2004 that the NWRB was able to formally commence the review and amendment process of the IRR. After a series of public consultations, the draft IRR was finalized In March 2005, the final draft was approved and signed by the NWRB Executive Director. Despite this approval, the IRR cannot take effect since it has not yet been published. The NWRB claims it does not have the money to publish the approved IRR. Legally, the old rules and regulations remain in effect.
[xxxiv]Draft revised IRR of the Water Code is posted on http://www.neda.gov.ph/
[xxxv] NWRB (2004), supra note 6.
[xxxvi] N. Landell-Mills and I.T. Porras, *Silver Bullet or Fool's Gold: A Global Review of Markets for Forest Environmental Services and their Impacts on the Poor*. Instruments for Sustainable Private Sector Forestry Series. International Institute for Environment and Development, London, (2002).
[xxxvii]Resources, Environment and Economics Center for Studies, Inc. (REECS), *Developing Pro-Poor Markets for Environmental Services in the Philippines.* Report to the International Institute for Environment and Development. London, (2003).
[xxxviii] NWRB, see note 6.