

**LAW AT ITS MARGINS:
QUESTIONS OF IDENTITY, RIGHTS OF INDIGENOUS
PEOPLES, ANCESTRAL DOMAINS AND THE DIFFUSION OF
LAW***

*Marvic M.V.F. Leonen***

*“In the little world in which children have their existence,
there is nothing so finely perceived and finely felt as
injustice.”*

*- Pip in Charles Dickens' Great
Expectations*

*“Law, rather than a mere technical add-on to a morally (or
immorally) finished society, is, along of course with a whole
range of other cultural realities from the symbolics of faith to
the means of production, an active part of it.*

- Clifford Geertz, Local Knowledge

A STANDPOINT

Most law students encounter an epiphany during their second year in law school. At about this time, they start to realize that the study of law is not what they had expected it to be. Most of it is doctrinal rather than about justice. The rigors of legal education require them to rehearse arguments that are self-reflexive and often devoid of context. At least, that was how I felt in 1984 when I was a second year law student.

Those were difficult political times. Benigno Aquino had just been assassinated. People were on the streets. Human rights violations were being openly reported. Human rights organizations were in the thick of

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** Dean and Professor of Law, College of Law, University of the Philippines. Metrobank Professorial Chair Holder (PHILJA), 2009; Carlos P. Romulo Professorial Chair Holder (UP Law), Vice Chair, Constitutional Law Department, Philippine Judicial Academy.

their advocacies while we were inside the College of Law pondering on cases that seemed to have little relevance, then. I had a suspicion that the study of law was important--but there had to be a better way to do it. Fortunately, my rebellious streak found some venues. I helped in restructuring a student organization now known as the Paralegal Volunteer Organization. And then, I enrolled in Agrarian Reform Law and in Philippine Indigenous Law.

Philippine Indigenous Law¹ then was a strange subject. An American, Dr. Owen Lynch, taught it. Later on I learned that even its title was contradictory: Philippine law is certainly not indigenous law. To this day, my encounters with what we have officially called "indigenous peoples"² are framed by the introductory lecture in that class.

On the blackboard he wrote two sentences. One: Not everything that is foreign is bad. Two: Not everything that is indigenous is good. The statements were provocative. I immediately identified with their descriptive value. The origins of ideas do not by themselves provide the best basis for their evaluation. But, its normative suggestion was most disturbing. How then do we determine whether we should privilege the indigenous over the foreign or vice versa?

Then he went on to explain the scope of the subject. We were informed that we were not going to learn the customary laws of the various indigenous groups in the Philippines. He was not an expert in that subject. The College of Law was not the right place to study these laws. Furthermore, the concept of customary law³ had to be disrobed of its antique character. Even customary law is more dynamic than as would be implied by the stereotypical lessons in history or anthropology.

Rather, he said that the subject had a challenge for its problematique. How do we, as legal professionals crafting, creating, implementing and constituting official law accommodate / integrate/ deal with a plurality of norms in multicultural or multi-ethnic states like the Republic of the Philippines?

¹ Law 132 (3 units): "An introduction to legal anthropology with an emphasis on indigenous Philippine Custom Laws and their relevance to the national order. The course also examines national laws and policies affecting the national cultural communities", Law Bulletin, UP College of Law

² Throughout this article, "indigenous peoples" is always in the plural form to emphasize the existence of many communities, societies and identities represented by this label.

³ Other terms are perhaps more appropriate. The Journal of Legal Pluralism and Unofficial Law interchange folk law, customary law, received law.

That subject inspired me and perhaps framed my subsequent choices. Even while we were taking the bar examinations in 1988, my classmate Augusto Gatmaytan and I sat together to think about the formation of a public interest law group that would do nothing except to attend to the legal and policy challenges of peoples in the upland. Then we invited Antonio G. M. La Vina and Antoinette G. Royo to help us brainstorm. In December of 1987 we formed the Legal Rights and Natural Resources Center Inc., had it registered with the Securities and Exchange Commission and received a grant of \$ 30,000 from the Ford Foundation to operate for one year. It is still in operation today.

It was through that organization that we reached quite a number of indigenous peoples groups in the Philippines. We sat in various indigenous councils, dealt with various issues relating to identity even within heterogenous communities, debated on gender identities in tribal settings, encountered various armies on field, survived many near death experiences and reached the Supreme Court in various cases.

Those experiences earned me an invitation to teach Philippine Indigenous Law in this College. Later, I was brought in to the regular faculty to also teach remedial law and constitutional law. Dean Merlin M. Magallona appointed me to my first administrative job and then to the Office of Legal Aid of this College. After twenty one years I find myself in the office which I now inhabit, speaking before the academic arm the most important of all legal institutions on a topic which a few decades ago was not even at the margins of legal consciousness in the Philippines.

I open with this personal statement not merely to acknowledge how times have changed but also to clarify my standpoint. I am not a member of any of the ethno-linguistic groups which the National Commission on Indigenous Peoples (NCIP) regard as “indigenous”. To be counted as one by some of the communities that I have served and grown to respect is definitely an honor. I am rather an Ilocano, a lawyer, a law professor, an advocate. I do not speak with their voice. I do not represent them. But, I wish to use this privilege generously created by the Metrobank Foundation and the Philippine Judicial Academy to sketch the basic contours of an issue which I think should lead us to rethink our collective narrative as a nation and as one people. It is also an invitation to theorize on the role of the judiciary in the context of law forced into its margins: as it is challenged by questions of our own indigenous identities and voices whose narratives do not find shelter in much of our jurisprudence or in the jurisprudence which we copy.

I will not rehearse the argument that our statutes are not enough.⁴ It is the judiciary and the judicial academy in attendance today and I would think that what we should be talking about is the extent of the concept we now know as judicial discretion. I am a firm believer of the idea that a judicial decision which concludes with inaction simply because there is no statute is a betrayal of the court's institutional functions. In every case where the controversy is real, it is the duty of judges and justices to make a decision.

But decisions do more than simply interpret the constitution or the law. Judicial decisions have a powerful constitutive function and nowhere is this more apparent than in the history of the legal concept of "indigenous peoples" and "ancestral domains".

This article should be an invitation to discuss in more detail the interplay of law and our social realities. Specifically, within this short period of time we should inhabit relationships between law and culture. Consciously, I will not positivist. There will be no effort to make Langdellian⁵ sense of a string of doctrines relating to the subject of today's discussion.

I adopt for purposes of my arguments, Naomi Mezey's provisional way of defining culture: that is, "as a set of shared signifying practices that are always in the making and always up for grabs."⁶ In this way we can clearly see how law integrates with culture. Law "partly generates the signs and symbols--the signifying forms--with which difference is constituted among meanings."⁷ Law is, in Clifford Geertz account, one "distinctive manner of imagining the real."⁸ Courts clarify these signs and symbols mainly through the texts of its jurisprudence.

It is through this process that I have been told that while I, male, non-speaking Ilocano lawyer, born and raised in Baguio City and resident now of Diliman, am not part of the indigenous peoples of this republic. Why that is so is part of the subject of my discourse. Why that should be

⁴ See Marvic M.V.F. Leonen, "Indigenous Peoples Rights Act: Will the Legal Reality Bring Us to a More Progressive Level of Political Discourse?" 9 *Philippine Natural Resources Law Journal*, No. 1, 7-45 (1998).

⁵ Christopher Columbus Langdell, *Treatise on the Law on Contracts* (1853) has been credited with the idea that law should be approached as a science. I do not follow this tradition.

⁶ Naomi Mezey, *Law as Culture* in Austin Sarat and Jonathan Simon, eds., *Cultural Analysis, Cultural Studies, and the Law*, 37, 39 (2003).

⁷ Naomi Mezey, at 43 citing Rosemary J. Coombe, "Contingent Articulations: A Critical Cultural Studies of Law," in Austin Sarat and Thomas Kearns, eds., *Law in the Domains of Culture* (1998)

⁸ Clifford Geertz, *Local Knowledge: Further Essays in Interpretative Anthropology* 184 (1983).

good for those who have been considered as non-christian/ national minority/ tribal or indigenous peoples is also the gist of today's discussion.

Of course, these meanings of who I am as defined by constitution, law and jurisprudence will still be contested in the various localities of my social realities. This is what I would mean when we point to the diffusion of law.⁹ The Supreme Court pronounces, society adapts and in the fog of this relationship people find meanings and go about their individual and collective lives. This causes some dissonance between the collective intentions of the courts and life as truly lived by our peoples.

Implicitly, I argue that courts should develop sensitivities to the effect of its choices of law, its interpretations and the language it uses to justify those interpretations. I am aware that the court's legitimacy is dependent on assuring its various publics some level of neutrality and objectivity. Neutrality can be assured by procedure. Objectivity on the other hand, is not necessarily exogenous, but its assurances come with adherence to legal text, experience and the reasonable expectations of the bench, bar and the public as to what the law should be and how it is interpreted. Reasonable expectations include a modicum of expertise in relation to law as our language.

OUR PROBLEM

The depth of our answer as to who are indigenous peoples and why we should recognize their identity and the rights associated with them will be come relevant in three types of problems.

First, there are questions that relate to decisions on resource rights. Specifically it will take the following legal form: do indigenous peoples own not only the rights to the surface of the land but also to the resources above and more importantly under it?

Second, there are questions that relate to governance. Do indigenous peoples within ancestral domains have the constitutional prerogative to exercise all aspects of governance including the prescription and enforcement of crimes based on their customary law?

⁹ See Westbrook and Twinning's article See David A. Westbrook, "Theorizing the Diffusion of Law: Conceptual Difficulties, Unstable Imaginations and the Effort to Think Gracefully Nonetheless," 47 *Harvard International L. J.* No. 2, 489 (2006) and William Twinning, "The Diffusion of Law: A Global Perspective,"

Third, there are questions that relate to the manner in which we organize our personal and family relations. This will take various legal forms such as: Are our personal laws especially those that govern marriage and family unconstitutionally restrictive of the individual and collective rights of indigenous peoples?

Allow me elaborate on these three problems.

The Court was evenly split in the case of *Cruz versus National Commission on Indigenous Peoples*. There, a fundamental issue raised was whether the Indigenous Peoples Rights Act (Rep. Act No. 8371) was unconstitutional because it violated the provisions of article XII, section 2 of the Constitution. To recall, that provision states that “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.”¹⁰ It prescribes the various ways that the state can enter into contracts with private entities. It also authorizes the state to directly utilize these natural resources.

On the other hand, the same Constitution provides in article XII, section 5 for the concept of ancestral domains. Hence, in the second paragraph it mentions that “The Congress may provide for the applicability of customary laws governing property rights and relations in determining the ownership and extent of ancestral domain.”¹¹ We note textually, that there is a distinction between ancestral land mentioned in the first paragraph of section 5. Also, that the earlier constitution referred to ancestral land solely—not ancestral domain. The question is whether there is judicial significance to the concept of ancestral domains as opposed to ancestral land. It can also be framed as whether ancestral domains demand a treatment of “resources”

¹⁰ Article XII, Sec. 2. 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. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

¹¹ Article XII, Sec. 5. The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being.

different from the traditional way we signify natural resources as consisting of land, timber, minerals, waters and even potential sources of energy.

This becomes more interesting if we take into consideration the meanings of article II, section 22 together with article XIII, section 16 and even of article III section 1 of the Constitution.

At this point, I am not referring to the precedent created in *Carino v Insular Government*, but rather another case similar to that of *Cruz v NCIP*¹² and perhaps occasioned by a mining claim within an area recognized as ancestral domain.

*Carino v Insular Government*¹³ should be taken in its context.¹⁴ It consists of two significant ratio decidendi which, to my mind, have become close to being canonical.¹⁵ The first is summed up with this phrase:

“...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 from before the Spanish conquest, and never to have been public land.”¹⁶

From my perspective, the case was unique not because it involved an *Ibaloi*¹⁷ but because the case is definitive for all peoples who have perfected their ownership rights through what civil law now refers to as “extraordinary acquisitive prescription.”¹⁸ Parenthetically, it also clarifies that the myth of the regalian doctrine was of Spanish origins and did not carry on to the next sovereign.

The other doctrine in *Carino*, more often cited, was that the paper title does not create ownership but rather only evidences it.

¹² *Cruz et al. v NCIP*, G.R. No. 135385, December 6, 2000.

¹³ 41 Phil. 935 (1909).

¹⁴ Leonen, *Legal Myths and Engaging the Rhetoric*, supra note 6 where the argument relating to *Carino* had been rehearsed.

¹⁵ See for instance J. M. Balkin and Sanford Levinson, “Canons of Constitutional Law,” 111 *Harv.L. Rev.* 963, 970 (1998) [they discuss on the concept of canonicity and argue that that depends on how the concept is used].

¹⁶ *Carino v Insular Government*, at 941

¹⁷ Although the case was titled in the name of Mateo Carino, the descendants of his family argue that the land actually belonged to his wife Bayona.

¹⁸ See II Tolentino, *Civil Code of the Philippines*

Of course, there is the ambiguous provision in the Indigenous Peoples rights act that states that indigenous peoples have the “right to claim natural resources.”¹⁹ This can imply, as it did for a few of the justices in *Cruz v NCIP*, that the right of indigenous peoples is still ripe for perfection and is not per se that of ownership.²⁰

This approach however might beg the question we just asked. Are ancestral domain rights of indigenous peoples constitutionally protected? Should it have that level of importance?

The next problem relates to governance. Does the recognition of ancestral domains and customary law constitutionally entail acknowledgement of the necessity of a level of governance over these domains? Put in more precise terms so the judicial handle can be clearer, is section 72 of Republic Act No. 8371 valid?²¹

This section provides that any “unauthorized and/or unlawful intrusion upon any ancestral lands or domains” or a violation of the prohibited acts of discrimination shall “be punished in accordance with the customary laws of the ICCs/IPs concerned.” There is a proviso however that “no such penalty shall be cruel, degrading or inhuman”. Indigenous peoples may however choose to avail of national law in which case a penalty is prescribed.

This provision does not clarify what the penalties should be but rather refers back to customary law. Customary law in turn is defined by the Indigenous Peoples Rights Act as referring “to a body of written and/or

¹⁹ See Republic Act No. 8371 or the Indigenous Peoples Rights Act, Section 7 (a) “Right of Ownership. — The right to claim ownership over lands, bodies of water traditionally and actually occupied by ICCs/IPs, sacred places, traditional hunting and fishing grounds, and all improvements made by them at any time within the domains” see Leonen [paper on IPRA in Philippine Natural Resources L. J. (1998).

²⁰ See per Puno J. *Cruz v NCIP* (2000) supra note 12.

²¹ SECTION 72. Punishable Acts and Applicable Penalties. — Any person who commits violation of any of the provisions of this Act, such as, but not limited to, unauthorized and/or unlawful intrusion upon any ancestral lands or domains as stated in Sec. 10, Chapter III, or shall commit any of the prohibited acts mentioned in Sections 21 and 24, Chapter V, Section 33, Chapter VI hereof, shall be punished in accordance with the customary laws of the ICCs/IPs concerned: Provided, That no such penalty shall be cruel, degrading or inhuman punishment: Provided, further, That neither shall the death penalty or excessive fines be imposed. This provision shall be without prejudice to the right of any ICCs/IPs to avail of the protection of existing laws. In which case, any person who violates any provision of this Act shall, upon conviction, be punished by imprisonment of not less than nine (9) months but not more than twelve (12) years or a fine of not less than One hundred thousand pesos (P100,000) nor more than Five hundred thousand pesos (P500,000) or both such fine and imprisonment upon the discretion of the court. In addition, he shall be obliged to pay to the ICCs/IPs concerned whatever damage may have been suffered by the latter as a consequence of the unlawful act.

unwritten rules, usages, customs and practices traditionally and continually recognized, accepted and observed by respective ICCs/IPs.”²² How far in terms of creating exceptions to the fundamental tenets of governance as traditionally understood, can we go to recognize the identities of Indigenous Peoples?

The third type of problem relates to the definition of our personal and family rights. They invite scrutiny as to the relationship of cultural concepts of family and genealogy with those that we currently see in our laws. Perhaps to sharpen the controversy, a legal question might be whether article 36 of the civil code, which limits the declaration of nullity of marriage only on the basis of psychological incapacity when applied to specific indigenous communities, would be unconstitutional.

The *B'laan*, an ethnic group that are usually found in Southern Mindanao, practice a form of polygamy that is regulated by their customary norms. Only a very small minority embraced Islam.

This court has been felicitous with respect to the exercise of religious freedoms. Thus in *Estrada v Escritor*,²³ the court did not find that a court employee who remarried without availing of the judicial process of annulment or declaration of nullity was not considered to have committed immorality within the meaning of our civil service rules. This is notwithstanding provisions of the civil code. The court took note of an approach which it called “benevolent neutrality”, i.e. the desire to protect religious exercise from the state’s intrusive behavior. The Court also created an exception in *Ebranilag v Division Superintendent*²⁴ against the seeming universal requirement to salute the flag and stand at attention while singing the national anthem for Jehova’s witnesses.

Should the approach of creating exceptions on the ground of basic constitutional rights also apply to indigenous groups *qua* indigenous groups? If it does not, what would be the basic difference between the right to one’s exercise of one’s faith and one’s right to participate in a specific culture?

²² Act No. 8371, section 3 (f). The provision requires that the normative practice be both (a) traditionally and (b) continuously practiced. For an explanation of its effects, see Leonen (PHILNAJUR article)

²³ A.M. No. P-02-1651. June 22, 2006 and August 4, 2003

²⁴ 219 SCRA 256, G.R. Nos. 95770 and 95887 (1993)

**THE APPROACH: ADDRESSING THE CONSEQUENCE OF
ESSENTIALIZED IDENTITIES**

His name was Cayat. He had only one name and he was languishing in the Baguio City jail.²⁵ His crime was to drink A-1-1-1 gin after an hour proscribed by Act No. 1639.²⁶ Had he not been *Ibaloi*, he would not have been convicted of violating this provision.

Fortunately for him, an enterprising young lawyer eager to earn his reputation discovered him. The lawyer was also *Ibaloi* and his name was Sinai Carino Hamada.²⁷ He filed a Petition was Habeas Corpus and his argument was simple. The law was null and void because it unconstitutionally infringed on the fundamental right of the accused to equal protection of the law.

People v Cayat is considered today as a landmark case. It ruled:

It is an established principle of constitutional law that the guaranty of the equal protection of the laws is not violated by a legislation based on reasonable classification. And the classification, to be reasonable, (1) must rest on substantial distinctions; (2) must be germane to the purposes of the law; (3) must not be limited to existing conditions only; and (4) must apply equally to all members of the same class.²⁸

Then proceeding further to explain that the act was valid:

²⁵ The penalty according to section 3 of Act No. 1639 was a fine of two hundred pesos or imprisonment of not more than six months at the discretion of the court.

²⁶ Sections 2 of Act No. 1639 read: "It shall be unlawful for any native of the Philippine Islands who is a member of a non-Christian tribe within the meaning of Act Numbered Thirteen hundred and ninety-seven, to buy, receive, have in his possession, or drink any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind, other than the so-called native wines and liquors which the members of such tribes have been accustomed themselves to make prior to the passage of this Act, except as provided in section one hereof; and it shall be the duty of any police officer or other duly authorized agent of the Insular or any provincial, municipal or township government to seize and forthwith destroy any such liquors found unlawfully in the possession of any member of a non-Christian tribe."

²⁷ UP Law Class of 1937. Sinai Hamada later on founded the Baguio Midland Courier. He also wrote Tanabata's wife, a short story which National Artist Francisco Arcellana would later refer to as the finest love story ever written.

²⁸ *Borgnis vs. Falk Co.*, 133 N. W., 209; *Lindsley vs. Natural Carbonic Gas Co.*, 220 U. S., 61; 55 Law. ed., 369; *Rubi vs. Provincial Board of Mindoro*, 39 Phil., 660; *People and Hongkong & Shanghai Banking Corporation vs. Vera and Cu Unjieng*, 37 Off. Gaz., 187.

Act No. 1639 satisfies these requirements. The classification rests on real or substantial, not merely imaginary or whimsical, distinctions. It is not based upon "accident of birth or parentage," as counsel for the appellant asserts, but upon the degree of civilization and culture. "The term 'non-Christian tribes' refers, not to religious belief, but, in a way, to the geographical area, and, more directly, to natives of the Philippine Islands of a low grade of civilization, usually living in tribal relationship apart from settled communities."²⁹ This distinction is unquestionably reasonable, for the Act was intended to meet the peculiar conditions existing in the non-Christian tribes. The exceptional cases of certain members thereof who at present have reached a position of cultural equality with their Christian brothers, cannot affect the reasonableness of the classification thus established.

That it is germane to the purposes of law cannot be doubted. The prohibition "to buy, receive, have in his possession, or drink any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind, other than the so-called native wines and liquors which the members of such tribes have been accustomed themselves to make prior to the passage of this Act," is unquestionably designed to insure peace and order in and among the non-Christian tribes. It has been the sad experience of the past, as the observations of the lower court disclose, that the free use of highly intoxicating liquors by the non-Christian tribes have often resulted in lawlessness and crimes, thereby hampering the efforts of the government to raise their standard of life and civilization."³⁰

To understand the basis for classifying the identity of indigenous peoples as 'non-christian tribes' we need to refer back to the case of *Rubi v Provincial Board of Mindoro*.³¹

²⁹ *Rubi vs. Provincial Board of Mindoro*, supra

³⁰ *People v Cayat*, G.R. No. 45987. May 5, 1939

³¹ G.R. No. 14078. March 7, 1919, per Malcolm J.

Spanish colonizers labeled us as *indios*. But more than *indios*, we were the *infieles* and the *feroces* (pagans) as opposed to those who were *binyag* (baptized). The *feroces* also came to refer to groups that were not subdued by their army. But to many of our ancestors, they were *Ibaloi*, *Kankana-ey*, *Bontok*, *Isneg*, *Tagbanua*, *Palawanon*, *Higaonon*, *Aromanon*, *Manobo*, *Bagobo*, *Subanen* and many other labels. Of course, the *binyag* also were truly *Ilocano*, *Tagalog*, *Bicolano* and also other colorful labels.

None of the *feroces* participated in the Treaty of Paris of 1898, the agreement to cede Spanish sovereignty over the archipelago to the Americans. By 1903, American colonial administrators created a Bureau of Non-Christian Tribes following the suggestions of the Philippine Commissioner (later Secretary of the Department of Interior) Dean Worcester. Dr. Owen Lynch chronicles this era and referred to this process of labeling as “minoritization” fundamental in the policy of colonization and disenfranchisement of the early American Colonial period.

By 1957, more enlightened legislators pursued a policy that led to the creation of the Bureau of National Integration (BNI). During martial law, the agency became the Philippine Agency for National Minorities (PANAMIN) of Martial Law. This metamorphosed as the Office of Southern Cultural Communities (OSCC) and the Office of Northern Cultural Communities (ONCC) produced as a result of the Provisional Freedom Constitution of 1986. What we now refer to as indigenous peoples were once then non-christian tribes, national minorities, tribal minorities, and indigenous cultural communities.

Rubi v. Provincial Board of Mindoro, penned by no less than Justice George Malcolm, the first Dean of the College of Law of the UP, reveals the reasons for these labels. Claiming protection from the due process clause, Rubi, a Mangyan from Mindoro, filed an original petition for habeas corpus against the provincial government to prevent them from proceeding to forcibly place their communities in civil reservations. The Provincial Government relied on legislation that allowed them to do this for “non-christian tribes”. Many of the Mangyan’s however, at that time, were already Christianized.

After reviewing their colonial history in the Philippines and the efforts of colonial administrators, the Supreme Court declared:

“In resume, therefore, the Legislature and the Judiciary, inferentially, and different executive

officials, specifically, join in the proposition that the term "non-Christian" refers, not to religious belief, but, in a way, to geographical area, and, more directly, to natives of the Philippine Islands of a low grade of civilization, usually living in tribal relationship apart from settled communities."³² (emphasis provided)

Justifying the denial of habeas corpus petition, the eminent jurist emphasized:

"...Segregation really constitutes protection for the Manguianes....Theoretically, one may assert that all men are created free and equal. Practically, we know that the axiom is not precisely accurate. The Manguianes, for instance, are not free, as civilized men are free, and they are not the equals of their more fortunate brothers. True, indeed, they are citizens, with many but not all the rights which citizenship implies. And true, indeed, they are Filipinos. But just as surely, the Manguianes are citizens of a low degree of intelligence, and Filipinos who are a drag upon the progress of the State."³³ (emphasis ours)

Constitutional law professors face a dilemma whenever these cases are decided in our classrooms. With *People v Cayat*, many stop at distilling the four questions which are relevant to determining whether specific fact templates transgress the equal protection clause. *People v Cayat* is still cited in many cases involving equal protection. Few go further to question the validity of the application of these tests.

To allude that an entire group has a low level of intelligence simply on the basis of their ethnicity simply cannot be right. Assuming this to be abhorrently true, to equate the *Mangyans* with their complex levels of societies with the *Ibaloi*, with their own peculiar forms of governance and customs is also not right. It is not as accurate as saying that there are many more things in common between the Ilocano and the *Tagalog*. And finally, even if all these are morally acceptable; to say that the proper governmental response would be to segregate them or to incarcerate them should they not

³² *Supra* note 31.

³³ *Id.*

follow the colonizer's rules smacks of a civilization with a warped sense of freedom. It has as much effect as simply prescribing the whip.

These cases lead us to inescapable conclusions. The difference between non-christian tribes and who were christian, the difference between those who belonged to national cultural minorities and those in the majority was based on an interpretation of who they are, i.e. the essential characteristics of their person and their culture that is judicially salient. The determination of the essence of their identity was therefore originally judicially constructed and imposed.

That it was the venerable Justice George Malcolm that penned the decision in *Rubi v Provincial Board* for me is significant. Meanings of legal terms are always contested territory. They are not negotiated with those who are subject to it but rather by the actors that have the appropriate status to be in that forum: i.e. the lawyers and the judges. Too often, the arguments of those affected do not become salient often because it has to be drawn from the values and meanings congealed in legal texts.

The irony in *People v Cayat* is even more pronounced. If it was Atty. Sinai Carino Hamada who drank non-native wine instead of Cayat, he would have also been imprisoned. But, Sinai Carino Hamada was a graduate of journalism and law in the University of the Philippines. He was also a pioneer fictionalist. National Artist Francisco Arcellana in a preface to his collected short stories called him one of the greatest love story writers. This is hardly someone who is "...of a low degree of intelligence, and ...a drag upon the progress of the State."

What the court accomplished in both Cayat and Rubi was to essentialize and then generalize an identity. Essentialism is a central mode of representation. Diana Fuss says that essentialism

"...is most commonly understood as a belief in the real, true essence of things, the invariable and fixed properties which define the 'whatness' of a given entity. . .Importantly, essentialism is typically defined in opposition to difference. . .The opposition is a helpful one in that it reminds us that a complex system of cultural, social, psychological, and historical differences, and not a set of preexistent human essences, position and constitute the subject. However, the binary articulation of essentialism and difference can also

be restrictive, even obfuscating, in that it allows us to ignore or deny the differences within essentialism.”³⁴

Not only did the court essentialize, it did so by choosing a characteristic that was not realistically salient but truly imagined. Certainly, there was no effort to empirically verify whether all those who belonged to that category had “a low level of intelligence”. Neither had there been efforts to determine verifiable measures of being a “drag upon society.”

We must remember that culture and law interact with each other. Hence:

“To recognize that law has meaning-making power, then, is to see that social practices are not logically separable from the laws that shape them and that social practices are unintelligible apart from the legal norms that give rise to them. Therefore, if one were to talk about the relationship between culture and law, it would certainly be right to say that it is always dynamic, interactive, and dialectical--law is both a producer of culture and an object of culture. Put generally, law shapes individual and group identity, social practices, and the meaning of cultural symbols, but all of those things (culture in its myriad manifestations) also shape law by changing what is socially desirable, politically feasible, legally legitimate. As Pierre Bourdieu puts it, “law is the quintessential form of ‘active’ discourse, able by its own operations to produce effects. It would not be excessive to say that it creates the social world, but only if we remember that it is this world which first creates the law.”³⁵

The essentialist approach to defining identities within cultures in *Rubi v. Provincial Board* resulted in the coerced segregation of the Mangyans and the incarceration of Cayat. More importantly, in law, this also created the distinction between them and us. Never mind if the them consists of

³⁴ Dianna Fuss, *Essentially Speaking*, xi-xii (1989)

³⁵ Mezey, *Law as Culture*, citing Clifford Geertz, *Local Knowledge: Further Essays in Interpretative Anthropology*, 184 (1983), Sarat and Kearns, “The Cultural Lives of Law,” in *Law in the Domains of Culture*, 10n at 10, Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field,” 38 *Hastings L. J.* 814, 839 (1987).

about one hundred ten ethnolinguistic groups and that within each group there could be varieties of subcultures and nuances of governance. Never mind if the us consisted of peoples like Ilocanos, Tagalogs, Bicolanos, Cebuanos who had no commonality except that we had assimilated or adapted to the laws and ways of our earlier colonizers relatively easier.

The choice of the alleged characteristic of peoples that would be given salience is also important. Legal categories always congeal perspective and value. In the creation of a minority culture, it was the superiority of the culture of the colonizer and the valorization of all that came from them which was important. Conversely, because in the eyes of the law they were inferior, many of those who were unfortunately lumped in this category would later on act that part.

Iris Marion Young, following other authors³⁶, calls this process cultural imperialism.

“To experience cultural imperialism means to experience how the dominant meanings of a society render the particular perspective of one’s own group invisible at the same time as they stereotype one’s group and mark it out as the Other.

“Cultural imperialism involves the universalization of a dominant group’s experience and culture, and its establishment as the norm. Some groups have exclusive or primary access to what Nancy Fraser calls the means of interpretation and communication in a society. As a consequence, the dominant cultural products of the society, that is, those most widely disseminated, express the experience, values, goals, and achievements of these groups. Often without noticing they do so, the dominant groups project their own experience as representative of humanity as such. Cultural products also express the dominant group’s perspective on and interpretation of events and elements in the society, including other groups in the society, insofar as they attain cultural status at all.

³⁶ Lugones and Spelman (1983) in Iris Marion Young, *Justice and the Politics of Difference*, 58

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“The culturally dominated undergo a paradoxical oppression, in that they are both marked out by stereotypes and at the same time rendered invisible. As remarkable, deviant beings, the culturally imperialized are stamped with essence. The stereotypes confine them to a nature which is often attached in some way to their bodies, and which thus cannot easily be denied. These stereotypes so permeate the society that they are not noticed as contestable. Just as everyone knows that the earth goes around the sun, so everyone knows that gay people are promiscuous, that Indians are alcoholics, and that women are good with children. White males, on the other hand, insofar as they escape group marking, can be individuals.”³⁷

Thus, essentialism is necessary for both oppression³⁸ and domination³⁹. Full political participation is the negation of oppression and domination.

Given the constructed nature of these identities, the question we now turn to now is whether these distinctions should still be accepted and whether these distinctions are still fundamentally the same if we call them “indigenous peoples.”⁴⁰

Identity is still essential even though it is a vexed term.

At the level of metaphysics and relating to one’s personal identity it is the sense of “one’s sense of worth and its persistence.”⁴¹ It is at this level

³⁷ Iris Marion Young, *Justice and the Politics of Difference*, *ibid.*

³⁸ “Oppression consists in systematic institutional processes which prevent some people from learning and using satisfying and expansive skills in socially recognized settings, or institutionalized social processes which inhibit people’s ability to play and communicate with others or to express their feelings and perspective on social life in contexts where others can listen.” Iris Marion Young, *Justice and the Politics of Difference*, 38

³⁹ “Domination consists in institutional conditions which inhibit people from participating in determining their actions or the conditions of their actions. Persons live within structures of domination if other persons or groups can determine without reciprocation the conditions of their action, either directly or by virtue of the structural consequences of their actions. Thorough social and political democracy is the opposite of domination.” Young, *Justice and the Politics of Difference*, 38

⁴⁰ Iris Marion Young, *Justice and the Politics of Difference*, 58-59

⁴¹ See Taylor, Charles, *Sources of the Self: The Making of the Modern Identity* (Cambridge, MA: Harvard University Press, 1989)

subjective and may have references to individual or collective references to what is deemed to be meaningful and authentic.

Traditional doctrines of equality imply that each human being must be allowed to be able to assert her/his rational choices just because she or he is a human being. On the other hand, given current realities, equality and social justice might require some level of a politics of recognition. Here lies the classic debate relating to the recognition of group rights. The resolution of these points of views can perhaps determine how indigenous peoples can be defined and to what extent their rights and prerogatives will be different from other citizens within a given state.

Much of the discussion regarding the defense of minority cultural rights within the context of liberalism stems from the work of Will Kymlicka. Kymlicka rejects the individual atomistic level of liberal democracy based on interest and instead reasserts the role of national and cultural communities in the construction of individual identity. He asserts that cultural survival should be seen not only as a collective good in itself but more importantly necessary to assure individual autonomy. He argues that this should translate into a system of limited self government which he calls "multilateral citizenship."⁴²

Kymlicka justifies state recognition of special rights and protections for minority groups on the basis of his concept of liberal neutrality. Support for individual rights must assume that all persons situate themselves within shared social and cultural contexts.⁴³

"It is this social and cultural community which provides the roles and narratives enabling individuals to develop or construct themselves and make sense of their place in the world, as well as their view of the good life, and their shared moral and political principles. In order for the state to maintain neutrality and to treat all citizens equally, state policy must ensure that all citizens have access to a range of available options from which to choose their 'plan of life'. Moreover, the critical evaluation and selection of life plans is essential to

⁴² See Katherine Smits, "Liberalism's Identity Problem," 35 *Polity* No. 3, 347, 348 (2003) citing Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995).

⁴³ Smits, *Liberalism's Identity Problem*, supra at 349 citing will Kymlicka, *Liberalism, Community and Culture* (Oxford: Oxford University Press, 1989), 2.

autonomous agency, and self respect, to which all are entitled, depends upon feeling that one's life plan is worth carrying out. ..the range of options essential to the free choice and legitimization of ends is provided and determined by cultural membership."⁴⁴

From his view, individuals are not however determined by their social affiliation. Rather, as individuals they choose and deliberate between ends which are already socially constructed. He argues that individuals may still be autonomous agents but they are only as autonomous given the social contexts, cultures and environments they find themselves in. It may also be these social contexts, cultures and environments which provide them with the limits of their imaginations for their own life's goals.⁴⁵

There is also substantial critique to this position among those who take the liberal standpoint.

The strongest arguments are twofold.⁴⁶ First, there is the liberal anxiety that the price of recognition of group rights may be the violation or erosion of basic individual rights and liberties. The second is the fear that encouraging people and community loyalty to ethnic, racial or religious groups and the identities that it may foster threatens graver moral and political identity among citizens essential to maintain a stable democracy and hence human dignity.

Although not of the liberal tradition, Iris Marion Young and Nancy Fraser arrive at the same conclusion as Kymlicka. They agree that recognition of special group rights is essential to foster more participative discussion. But, they do so because they believe that group identity is itself a social good and that any pretension of universal citizenship only privileges dominant political views.

⁴⁴ Smits, *Liberalism's Identity Problem*, supra at 349

⁴⁵ Smits, *Liberalism's Identity Problem*, supra at 349 to 350 citing Kymlicka, *Multicultural Citizenship*, Chapter 5 emphasizing importance of culture to freedom. This is similar to the argument about the use of culture as "both the meaning and values which arise among distinctive social groups and classes...through which they 'handle' and respond to the conditions of existence; and as the lived traditions and practices through which those 'understandings' are expressed and in which they are embodied." Stuart Hall, "Cultural Studies: Two Paradigms," cited in Naomi Mezey, *Law as Culture*.

⁴⁶ See for instance Gerald Doppelt, *Liberalism and Illiberalism: Illiberal Cultures and Group Rights: A Critique of Multiculturalism in Kymlicka, Taylor, and Nussbaum*, 12 *J. Contemp. Legal Issues* 661 (2002)

With regard to the view that all citizens should take a general view that transcends particular interests, perspectives and experiences, Young therefore protests:

“But such an impartial general perspective is a myth. People necessarily and properly consider public issues in terms influenced by their situated experience and perception of social relations. Different social groups have different needs, cultures, histories, experiences, and perceptions of social relations which influence their interpretation of the meaning and consequences of policy proposals and influence the form of their political reasoning. These differences in political interpretation are not merely or even primarily a result of differing or conflicting interests, for groups have differing interpretations even when they seek to promote justice and not merely their own self-regarding ends. In a society where some groups are privileged while others are oppressed, insisting that as citizens persons should leave behind their particular affiliations and experiences to adopt a general point of view serves only to reinforce that privilege; for the perspectives and interests of the privileged will tend to dominate this unified public, marginalizing or silencing those of other groups.”⁴⁷

Young argues that there is a difference between plurality and privatization. Plurality in public life should assume that different groups, with their own perspectives and experiences, could understand as well as dialogue with other individuals and groups to do the same. Privatization on the other hand, which is the process of relegating into the private domain not deserving of public and political discussion, causes oppression and domination.⁴⁸ She therefore argues for repolitization of differences and valorizes plurality.

Nowhere is the necessity for recognition of group rights more salient than in the relationship of indigenous peoples to their ancestral territories.

⁴⁷ Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99-
Ethics No. 2, 250, 257 (1999)

⁴⁸ Young, *Justice and the Politics of Difference*

Following the more dominant view of property taught in our law schools, ownership is defined in our laws by Article 427 and 428 of our Civil Code. Ownership is understood as either: ". . .the independent and general power of a person over a thing for purposes recognized by law and within the limits established thereby," or "a relation in private law by virtue of which a thing pertaining to one person is completely subjected to his will in everything not prohibited by public law or the concurrence with the rights of another." Moreover, ownership is said to have the attributes of *ius utendi, fruendi, abutendi, disponendi et vindicandi*.⁴⁹ One therefore is said to own a piece of land when he exercises, to the exclusion of all others, the rights to use, enjoy its fruits and alienate or dispose of it in any manner not prohibited by law.

Among indigenous, unwesternized or unhispanicized Philippine population, there are differing concepts of ownership. An attempt at a synthesis is as follows:

" . . .'Ownership' more accurately applies to the tribal right to use the land or to territorial control. Ownership is tantamount to work. If one ceases to work, he loses his claim to ownership. At best, the people consider themselves as "secondary owners" or stewards of the land, since the beings of the spirit world are considered as the true and primary or reciprocal owners of the land. "Property" usually applies only to the things which involve labor, or the things produced from labor. . . "Communal" as a description of man-land relationship carries with it extra connotations that the land is used by anybody, but actually, is limited only to the recognized members of the tribe, and is a collective right to freely use the particular territory. . . .There is also the concept of "trusteeship" since not only the present generation, but also the future ones, possess the right to the land."

This concept found its way to the present section 5 of the Indigenous Peoples Rights Act (IPRA).⁵⁰

⁴⁹ II Tolentino, Civil Code

⁵⁰ Rep Act No. 8371, SECTION 5. Indigenous Concept of Ownership. — Indigenous concept of ownership sustains the view that ancestral and all resources found therein shall serve as the material bases of their cultural integrity. The indigenous concept of ownership generally holds that ancestral domains are the

In December 2000, the Supreme Court rendered its ruling in *Cruz v NCIP*. Challenged was the constitutionality of the Indigenous Peoples' Rights Act fundamentally because it violated what allegedly was a fundamental precept with respect to our natural resources, that is, *Jura Regalia* or the Regalian Doctrine. The court was evenly divided. Seven (7) of fourteen voted to dismiss the Petition. The other seven (7) wanted portions of the law declared as unconstitutional. By constitutional fiat and because of the presumption of constitutionality, the challenge failed.

Of significance however, is the characterization of indigenous peoples in the *ponencia* of various justices. The dominant view was that:

"Indigenous peoples share distinctive traits that set them apart from the Filipino mainstream. They are non-Christians. They live in less accessible, marginal, mostly upland areas. They have a system of self-government not dependent upon the laws of the central administration of the Republic of the Philippines. They follow ways of life and customs that are perceived as different from those of the rest of the population. The kind of response the indigenous peoples chose to deal with colonial threat worked well to their advantage by making it difficult for Western concepts and religion to erode their customs and traditions. The "infield societies" which had become peripheral to colonial administration, represented, from a cultural perspective, a much older base of archipelagic culture. The political systems were still structured on the patriarchal and kinship oriented arrangement of power and authority. The economic activities were governed by the concepts of an ancient communalism and mutual help. The social structure which emphasized division of labor and distinction of functions, not status, was maintained. The cultural styles and forms of life portraying the varieties of social courtesies and ecological adjustments were kept constantly vibrant.

Land is the central element of the indigenous peoples' existence. There is no traditional concept

of permanent, individual, land ownership. Among the Igorots, ownership of land more accurately applies to the tribal right to use the land or to territorial control. The people are the secondary owners or stewards of the land and that if a member of the tribe ceases to work, he loses his claim of ownership, and the land reverts to the beings of the spirit world who are its true and primary owners. Under the concept of "trusteeship," the right to possess the land does not only belong to the present generation but the future ones as well."⁵¹

These statements certainly is a sea change of perspective of indigenous peoples from the idea of the community of "low level of intelligence" reified in *Rubi v Provincial Board*. However, there are still dangers however to this way of essentializing indigenous peoples rights to their territory. The concept of indigenous peoples in relation to their ancestral territories is dynamic.

Current literature challenges the notion that it is possible to generalize tenurial arrangements for specific cultures.⁵² There is growing recognition that indigenous tenure systems change through time. Also, the notion that individual ownership of certain portions of ancestral territory only came through colonialism, in some communities, are now being challenged.⁵³

The *Banwaons* of Balit, San Luis, Agusan del Sur understand that while their entire territory belongs to their community, they consider their internal boundaries as fluid and subject to negotiation with others even to the extent of including outsiders who have acquired legitimate claims through hard work. Within their territories, individual claims may prevail.⁵⁴

⁵¹ Cruz v NCIP, supra per Puno J., December 6, 2000. The court was divided 7 to 7.

⁵² Royo, Antoinette and Bennagen, Ponciano, MAPPING THE EARTH, MAPPING LIFE (LRCKSK:2000)

⁵³ See for instance Zialcita, Fernando N., "Land Tenure among Non-Hispanized Filipinos", in Peralta, Jesus T., ed., REFLECTIONS ON PHILIPPINE CULTURE AND SOCIETY: FESTSCHRIFT IN HONOR OF WILLIAM HENRY SCOTT (Ateneo de Manila Press: 2001) 107-132. Zialcita challenges the notions presented in staple "progressive" history textbooks like Constantino, Renato, THE PHILIPPINES: A PAST REVISITED (TALA Publishing: 1975) and Ofreneo, Rene E, CAPITALISM IN PHILIPPINE AGRICULTURE (Foundation for Nationalist Studies: 1980).

⁵⁴ Gatmaytan, Augusto B., "Mapmaker: Mythmaker," in Royo, Antoinette and Bennagen, Ponciano, MAPPING THE EARTH, MAPPING LIFE (LRCKSK:2000) 64.

In 1979, Shlegel wrote about *Tirurays* in Figel, a village in Mindanao⁵⁵. He observed that the rights to possession by this indigenous community were conditioned on their ability to make the land productive. Failure to do so would allow the area devoted to agriculture to be reoccupied by other individuals within their village. Within their swidden farms therefore, they were more concerned with making the lands productive rather than establishing individual (private) ownership over the land. However, in 1981, the same author saw that the introduction of the plow created the condition to induce individual ownership of the land rather than simply exclusive rights to use property.⁵⁶ Permanent fields require more investments and energy thus fostering a more permanent relationship to the land.

Kaingin or swidden farming⁵⁷ is generally a method of cultivation that uses fire, cutting tools and sticks. After clearing a patch through fire and cutting within a forest, the farmer punches holes on the ground and buries seeds. The method relies heavily on rain and is fertilized by the ashes of the forest and the remains of the plants and harvest of the last cultivation. Although productive, it does not last long. The area is then left to fallow for periods from ten to twenty years within which the soil and the forest regenerate. A new cycle of cultivation and fallow may follow on the original patch.

The ecological viability of swidden agriculture among indigenous peoples has been amply demonstrated.⁵⁸ However, these studies were undertaken of communities where population densities were lower, forests still abundant and the migrant intrusion sparse and controlled.⁵⁹ It is therefore difficult to make sweeping conclusions as whether this type of cultivation causes forest denudation or assists in regeneration. Definitely however, the shift in cultivation technology adds pressure in a community's rethinking of tenure rights.

⁵⁵ Schlegel, Stuart, *TIRURAY SUBSISTENCE: FROM SHIFTING CULTIVATION TO PLOW AGRICULTURE* (Ateneo de Manila Press: 1979) 29 cited also in Zialcita, Fernando N., "Land Tenure among Non-Hispanized Filipinos". "Private" in this quotation actually means "individual".

⁵⁶ Shlegel, Stuart, "Tiruray Gardens: From Use Right to Private Ownership," 9 *Phil. Quarterly of Culture and Society*, No. 1, 5-8 (1981).

⁵⁷ Alternatively referred to also as "slash and burn" or shifting cultivation.

⁵⁸ See for instance Conklin, Harold C, *HANUNOO AGRICULTURE: A REPORT ON AN INTEGRAL SYSTEM OF SHIFTING CULTIVATION IN THE PHILIPPINES* (FAO: 1957).

⁵⁹ See Gatmaytan, Augusto B, "Peoples: A View of Indigenous Peoples of the Philippines", unpublished Policy Paper of LRCKSK, 17 (1999).

The *Calamian Tagbanwa* of Coron filed the first formal ancestral domain claim over "ancestral waters" or their *teeb ang surublien*. The tenurial system of the *Calamian Tagbanwa* are different from the *Tagbanwa* of mainland Palawan. Distinct from many land based indigenous groups, dependence for traditional livelihood over marine resources also exists among the *Badjaos* of Basilan and Sulu, the *Molbog* of Balabac, Palawan, the *Agtas* of Northeastern Luzon and the Ati of Boracay.

It is not possible, on a national scale, to generalize the content of tenurial arrangements corresponding to unique communities of specific ethno-linguistic groups. It is only within specific communities that it is possible to understand their existing tenurial systems and also the processes through which these systems change.

Categories related to indigenous peoples can never be neat. The discomfort of the lawyer in dealing with these nuances to the simple legal concept of ancestral domains or indigenous peoples is almost understandable. But, it is certainly a discomfort that must be endured. In failing to rigorously understand the effect of our worn legal categories, we participate in creating what Marion Young refers to as Othering. We have to be careful in making identities official and asymmetrical. Thus:

"Where the social relation of the groups is one of privilege and oppression, this attribution of Otherness is asymmetrical. While the privileged group is defined as active human subject, inferiorised social groups are objectified, substantialised, reduced to a nature or essence. Whereas the privileged groups are neutral, exhibit free, spontaneous and weighty subjectivity, the dominated groups are marked with an essence, imprisoned in a given set of possibilities... Group differences as otherness thus usually generates dichotomies of mind and body, reason-emotion, civilized and primitive, developed and underdeveloped."⁶⁰

⁶⁰ Young, Iris Marion, "Together in Difference: Transforming the Logic of Group Political Conflict", in Kymlicka, Will, *THE RIGHTS OF MINORITY CULTURES* (Oxford: 1999), 158.

In our desire to acknowledge the group rights of a whole category of “indigenous peoples” therefore, we may, without nuance and without contribution from them, participate in their further marginalization.

OPENINGS IN OUR CONSTITUTION

The present language in our Constitution compels us to deal with identity and all its complexities.

Full participation is enshrined in two important provisions in the constitution. Article II, Section 1 assures that “...sovereignty resides in the people and all governmental authority emanates from them.” In a departure from the 1973 Constitution it characterizes the Philippines as “a democratic” as well as a republican state.” There is nothing in this provision that discriminates in the treatment of peoples. It does not suggest the rugged, atomistic, individualism of libertarians.

The Constitution however assures group participation. In Article XIII, Section 16 guarantees that “...the right of the people and their organizations to effective and reasonable participation at all levels of social, political, and economic decision making shall not be abridged.” More specifically, in Article II, Section 22 it assures that the state “recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development.”

These provisions can be read to assure recognition of the rights of indigenous peoples from the rationale provided by Kymlicka as well as that from Young or Fraser.

The more pressing problem however is how indigenous peoples are defined in the IPRA. Section 3 (h) of the Indigenous Peoples Rights Act (IPRA) defines “indigenous cultural communities/indigenous peoples”.⁶¹

⁶¹ The provision states: “...a group of people or homogenous societies identified by self-ascription and 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, became historically differentiated from the majority of Filipinos. ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonization, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of

The term indigenous peoples refer to “a group of people” or “homogenous societies”. The distinction recognizes situations where communities have intermarried or partially allowed entry to some extent non-natives.

The provision suggests that fundamental mode of determining who indigenous peoples are “self-ascription and ascription by others”. Self-ascription is an important qualifier and one that can be determining. It should be a first tier and its implications should be the subject of conscious and deliberate judicial interpretation.

There is an important difference between the concept of associations⁶² and groups.⁶³ A person’s relation with an association is voluntary. S/he chooses to join this collective or if her or his membership has already been predetermined for him or her, s/he still chooses to stay. The person’s identity and self worth are prior to the existence of an association and is relatively more autonomous from it.

Unlike associations, groups constitute individuals. Thus:

“A person’s particular sense of history, affinity, and separateness, even the person’s mode of reasoning, evaluating, and expressing feeling are constituted partly by her or his group affinities. This does not mean that persons have no individual styles, or are unable to transcend or reject a group identity. Nor does it preclude persons from having many aspects that are independent of these group identities.”⁶⁴

In a way, the identities we belong to define some choices for us but does not necessarily predetermine what it is to do. This is different from a view that we are independent, rugged and atomized individuals.

“One of the main contributions of poststructuralist philosophy has been to expose as

their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains.”

⁶² Association is used here in its loose sense and not in terms of its definition in the bill of rights.

⁶³ I borrow from the distinction of association and group in Iris Marion Young, *Justice and the Politics of Difference* 44 and 45 as well as the various conceptions in writings on the politics of identity.

⁶⁴ Young, *Justice and the Politics of Difference*, 45. Young also explains that Habermas prescribes a theory of communicative action to challenge the philosophy of consciousness which locates intentional egos as the ontological origins of social relations.

illusory this metaphysic of a united self-making subjectivity, which posits the subject as an autonomous origin or an underlying substance to which attributes of gender, nationality, family role, intellectual disposition, and so on might attach. Conceiving the subject in this fashion implies conceiving consciousness as outside of and prior to language and the context of social interaction, which the subject enters.”⁶⁵

We are however constituted by our different identities and our choices are not coextensive only with one of them. Thus the identity male Kankana-ey is constituted differently from a female Kankana-ey. So are those who are lawyers-Kankana-ey different from those who are farmers Kankana-ey. But they have some things in common as Kankana-ey.

But standing alone, therefore, self ascription is important and should be given salience. But, it will not make full judicial sense. Individuals or communities wanting to make use of the special rights provided in the law would simply claim to be “indigenous” thereby defeating the very spirit behind the recognition of these identities.

What matters would be the parameters of the second requirement: “ascription by others”. Others here can mean those within the same community hence assuring some form of collectivity. Or, it can mean outsiders. The law presents three possible criteria for ascription by outsiders.

The first criterion acknowledges relationship to territory and the uniqueness of the group’s culture. Indigenous peoples are those--

“ . . . 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. . . .”⁶⁶

⁶⁵ *Id.*

⁶⁶ Comes from *Carino v. Insular Government*, 41 Phil. 935, 212 U.S. 449 (1909) where the US Supreme Court recognized ownership of the Ibaloi Mateo Carino stating that “. . . When as far back as testimony 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 from before the Spanish conquest, and never to have been public land.”

The second criterion acknowledges distinction through resistance to inroads of both colonization and non-indigenous religions and cultures. Thus –

“or who have, through resistance to political social and cultural inroads of colonization, non-indigenous religions and cultures, became historically differentiated from the majority of Filipinos.”⁶⁷

The third criterion traces physical origins of communities and acknowledges distinctions in cultural traits. Thus –

“...peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonization, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains”⁶⁸

Any of these three criteria would suffice to make ascription by others that a “group of people” or a “homogenous society” would be considered as an indigenous community valid.

Nothing in the law clarifies which criterion should be dominant. Definitely, they could not be taken together. This constitutes the first level of ambiguity. Interpretation of open-ended terms within each of the criteria constitutes the second level of ambiguity.

The existence of three different sets of criteria reveals three different choices of substantive characteristics of indigenous peoples groups to privilege.

⁶⁷ Comes from ILO Convention No. 107 and 169.

⁶⁸ Based on the proposed definition of Jose Martinez-Cobo, Former Rapporteur UN Subcommission on the Prevention of Discrimination against Minorities as adopted in the Draft UN Declaration for Indigenous Peoples.

The first criterion requires time immemorial relationship to territory and therefore excludes indigenous groups that have migrated or are no longer fully dependent on natural resources. It is therefore biased towards a conception of indigenous groups which remain rural. It even excludes acceptance of individuals or groups that have embraced “cosmopolitanism”.⁶⁹

The second criterion privileges “differentiation from the majority of Filipinos”. Thus, it requires definition of norms for the “majority” against which indigenous peoples need to be measured. In a subtler way it therefore preserves the stereotyped dichotomy of “minority” and “majority”.

The third criterion presents the most ambiguity. It emphasizes retention of “some or all of their own social, economic, cultural and political institutions”. It however excludes relationship to territory and is not clear with respect to the relationship of the retained institutions to that of “majority of Filipinos.” It is perhaps this criterion that is being used in the current controversy relating to the Bangsa Moro Juridical Entity.

Administrative interpretation adds further complications.

Following the tradition of earlier agencies and the possible interpretations of the provisions of the new law, the National Commission on Indigenous Peoples (NCIP)⁷⁰ persists in categorizing indigenous groups by identifying ethnolinguistic groupings.⁷¹

The category of indigenous peoples based on ethnolinguistic affiliation misses on the other nuances of individual and group identity.

First, the categories as well as the statistics are class and gender blind.⁷²

⁶⁹ See for instance Waldron, Jeremy, “Minority Cultures and the Cosmopolitan Alternative,” in Will Kymlicka, *THE RIGHTS OF MINORITY CULTURES* (1997) 93.

⁷⁰ The principal executing agency attached to the Office of the President created by the Indigenous Peoples Rights Act (Rep. Act No. 8371)

⁷¹ 110 ethnolinguistic groups therefore belong to its official category of indigenous peoples. NCIP believes that indigenous peoples constitute seventeen percent (17%) of the total population occupying about five million hectares of a total of thirty million hectares of land area. NCIP however admits that they have no way at present to validate the population figures. Nor is it believable that their estimate of total land area occupied has been empirically verified. Depending on how one defines who indigenous peoples are as well as what it means for them to possess or occupy land, the figures could be larger.

⁷² There are no available statistics that could reveal these more useful categories.

For instance, while many households of indigenous peoples are still very dependent on agriculture the listing by NCIP do not reveal the exact relationship of indigenous peoples' households to agricultural production or use or development of natural resources. NCIP cannot validate the claim that in Northern Mindanao indigenous groups (*Lumads*) are becoming farm-workers more rather than owner cultivators⁷³ or the causes of this phenomenon. They do not differentiate between the farmer-gardeners among the *Kankanaey* and the tenant farmers of *Ifugao* peoples in their rice terraces. They also have no capability to validate the claim that while some indigenous peoples have diversified their marketable crops, many have retained traditional methods for staple crops (e.g. rice and corn).

Categorizing indigenous peoples based on ethno-linguistic affiliation also fails to capture the differences among groups which have had a greater possibility for upward mobility and those that are still especially economically vulnerable. For instance, indigenous communities in the northern *Cordillera* have greater possibilities of succeeding through education as compared with groups in *Palawan* and *Mindoro*. Thus, it is more likely that there would be a lawyer from most of the groups in the *Cordillera* than from the *Batak* of *Palawan* or any of the *Mangyan* groups in *Mindoro*.

Neither is the government sensitive to making distinctions among indigenous groups or among communities within ethno-linguistic groups in so far as their dependence on natural resources are concerned (e.g. forest dependent vs non forest dependent, small scale miners, those dependent on tourism et al.)

More importantly, statistics for indigenous peoples groups do not identify the number of women within the population and fail to distinguish roles that they have taken within communities in general.

Second, some of the categories which are based on language fail to make distinctions within groups.

The *Subanen* is considered as one ethno-linguistic group. However the reality is that this classification is comprised of a number of communities speaking different dialects and occupying territory in northwestern Mindanao which stretches from the Zamboanga peninsula to Misamis Oriental. They share in many customary political structures, such as

⁷³ Discussion with Datu Tony Lumadnong (Higaonon), Cagayan de Oro, March 2003.

multilevel *timuay* (village leader) but differ in details regarding their customary laws. The *Kalinga* peoples are grouped into *ili* (villages) some of which are *binodnan* areas or areas that still use the *bodong* (peace pact) negotiated through their *pangat* (peace pact holder). A minority of the villages however do not have this institution either because it has not been used or had not been present customarily.

Significantly, categorizing based on ethnolinguistic affiliation fails to capture the discussions and debate within communities regarding the use of customary law, their relationship to outsider's culture, the role of local government institutions vis-à-vis their own customary political units et al. The cultures of almost all indigenous communities in the Philippines are open to interactions with outsiders. In fact, it is possible to identify many customary norms in some of them which pertain to rules governing treatment of "aliens". Their various histories also show a great deal of trade and other forms of contact with other indigenous groups even those coming outside the Philippines. As a result, cultures have been dynamic. They have evolved in various ways as a result of interaction with outsiders and changes in the economic, political and social system outside their communities.

Third, the unreasonable distinction between Muslim indigenous peoples and non-Muslim indigenous peoples persists.

Many members of communities within specific ethnolinguistic affiliations have embraced Islam as a religion. Identification dominantly based on the political agenda of Muslim collectivities is largely due to a common history of discrimination and oppression because they were a minority religion. Traditionally however, government agencies dealt with Muslim groups as Muslim groups with no reference to ethnicity or indigeneity. The intersection of religion and indigeneity therefore is not satisfactorily handled in the law nor in its implementation.

Defining indigenous peoples by ethnolinguistic affiliation therefore is of the same kind of essentialism as that pronounced in Rubi and Cayat.

BACK TO OUR PROBLEM

Indigenous peoples' rights are constitutional rights. They are to be recognized because it is a fundamental element of democratic participation and social justice. Rather than a temporary means to correct a historical injustice, it is a permanent measures that assures plurality. Plurality is

essential if we are true to the constitutional mandates of democracy and participation.

Categories of indigenous peoples however cannot be defined wholesale and without reference to their corresponding rights. Hence, time immemorial possession as a community is relevant to defining their ancestral domains. The existence of legal pluralism in a community especially the working of unofficial law is suggestive of a recognition of the ability to have some level of autonomy.

Thus, ancestral domains should be different from ancestral land. Full participation should mean that indigenous communities should have veto power, as private citizens, over natural resource extractive decisions. Governance will not necessarily inure to ethnolinguistic groups, but to communities that still have a strong sense of indigenous governance rivaling that of the national government. In this sense, we should remain open to the plurality suggested by the *bangsa moro*. And, if we are true to our recognition of peoples, cultural exceptions must constitutionally exist for some indigenous groups in relation to their personal and family laws. This is a matter of constitutional protection and the absence of a law constitutes a continuing violation of the tenets of full participation mandated by the constitution.

CONCLUSION

Law stands at its margins whenever its universalist and generalist aspirations are contested by the stark realities of particularity and difference. If it fails to adjust, the meanings of these laws—and therefore their social practice—can cause injustice.

But, as we have discussed, dealing with identity and culture can never come in neat packages. They always come in incomplete and tentative solutions each one bringing in a host of their own problems. Law and its interpretation are adapted and adapt to social realities. Intentions diffuse within the fog of everyday life.

We need to continue expand our imaginings of law and, as important, what we do exactly when we say we do law. It cannot be that we simply remain positivists: slaves of the echoes coming from another jurisdiction. Judges must become more self conscious, become more sensitive to what our society really is. And maybe, just maybe, we see the

manifest injustice that those who become mere subjects of the law—definitely not the actors—endure. It is our duty to theorize and convince. Judges declare meanings. These meanings are negotiated. And these meanings, like for the non christian tribe/tribal filipino/ national minority or indigenous person, partake of social reality.

Our sensitivity to manifest injustice should stoke our passion. As Hume would say, every reason, no matter how theoretical, is always the slave of passion.

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