THE ROLE OF ENVIRONMENTAL GOVERNANCE IN IMPROVING THE POTENCY OF PHILIPPINE FORESTRY RULES

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ACRONYMS

CBFM	-	Community-Based Forest Management
DENR	-	Department of Environment and Natural Resources
EO	-	Executive Order
FMB	-	Forest Management Bureau
IFMA	-	Industrial Forest Management Agreement
LGU	-	Local Government Unit
NGO	-	Non-Government Organization
PD	-	Presidential Decree
SIFMA	-	Socialized Industrial Forest Management

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Ben S. Malayang III

INTRODUCTION

Environmental agencies like FMB are reposed with the responsibility to protect and develop the natural assets of the nation.

With the responsibility is authority. The agencies are to prescribe the necessary rules and regulations to govern how the assets are to be managed, utilized and kept for the common good. They are in the business of making and enforcing rules.

This paper discusses the nature of rules. It looks into how their potency to enforce their aims and intentions rests on the ability of environmental agencies to overcome certain issues relating to governance. It examines the measures that might be undertaken to improve both the rules and the governance of the Philippine environment.

THE NATURE OF RULES

1. FORMAL AND NON-FORMAL

Rules are directions concerning methods and procedures for implementing and observing a custom or a law. It may refer to a non-formal stipulation of conduct when viewed in the context of how communities behave by tradition, and to how a statute is to be executed or applied when viewed in the context of formal governmental functions (see Collins: *Concise Dictionary*, 1999).

This definition of "rules" points to one basic nature of rules: it can be both formal (e.g., statutory) and non-formal (e.g., customary). A rule can be a product of behavioral tradition, or of political and legal constructions of the State.

The first (a rule based on tradition) may be exemplified by the tenure arrangements governing the use of land among the Bontok in Mountain Province (see Prill-Brett 1984).
The second (a rule based on statutes) may be exemplified by the many rules and regulations of FMB (see EcoGov-Oliva 2002).

[1] Presented and read before the Workshop on Philippine Forestry Policy, conducted by the Forest Management Bureau, Department of Environment and Natural Resources, Republic of the Philippines, 23-25 September 2002, Eugenio Lopez Center, Antipolo, Rizal.

2. DESCRIPTIVE AND PRESCRIPTIVE

As stipulations of conduct, rules describe the situations and the conditions under which a conduct is stipulated to be done. For instance, the rules on IFMA include a description of what lands might qualify for its coverage. The rules on CBFM describe the type of community organizations that can qualify for it.

In virtually all formal rules issued by the government, the descriptive aspects include what laws the rules are based upon, the policies enunciated in the rules, the publics that the rules are intended to govern, and the requirements, incentives and penalties that they contain.

In the case of customary rules, descriptions often refer to the type of vegetative cover, floral or faunal species, or the specific landscapes that are covered by the rules (e.g., see Plopino 2001; Fujisaka & Capistrano 1978; Conklin 1953). In the case of the Bontok, the tenure rules on cultivated lands describe only *u-ma's* as its coverage. Tenure rules on uncultivated lands are entirely different, based on the landscape that they describe for their coverage (Prill-Brett 1984).

But the rules do not only describe. A basic intention of rules is to prescribe the procedures of conduct for a given situation or condition, or when certain particular events occur. IFMA and CBFM rules prescribe what actions are needed to be done under the two tenure instruments, such as establishment of plantations and the utilization of forest products. Formal rules like IFMA and CBFM likewise prescribe explicit and specific requirements to avail of the rights and tenure security offered under the rules. They also prescribe the explicit and specific penalties for violating them (EcoGov-Oliva 2002).

Customary rules also prescribe. In the Bontok case, a user of a cultivated land is reposed with certain obligations on its use and care, which qualify the user to continue to avail of the community-recognized rights to the land as prescribed in the rules. The rules also prescribe that the user loses all rights to the land whenever he or she abandons it for a certain prescribed period of time (Prill-Brett 1984).

3. ASSUMPTIVE AND PROACTIVE

Rules invariably contain certain assumptions about their objects and subjects. The assumptions act as the tacit substratum of the rules on which are based their intentions to prevent certain unwanted events to occur, or to cause desired outcomes to follow from their implementation. The assumptions become the basis for the proaction being intended by the rules.

In the case of formal rules on forest management, certain assumptions are invariably implied concerning, say, growth rates and silvicultural procedures being known to forest managers. Assumptions are implied concerning "normal" conditions of stands and of biogeochemical conditions of forests and soils. Risks from climatic regimes, fire, pests and diseases are often left unstated, but assumed to be within certain known ranges. Stipulations are made in the rules on the basis of these assumptions, to bring about a particular configuration of events that are intended by the rules to reduce the chances of unwanted outcomes and to improve the likelihood that desired outcomes would occur.

Certain assumptions are also implied in customary rules. Among the Bontok, the rules on land use assume that when an individual ceases to cultivate a *u-ma* there is an intention to abandon it altogether. And abandonment is assumed to be a surrender of usufruct rights to the *u-ma*. This is the basis for why the rules prescribe that an abandoned *u-ma* is open to others' occupation and use, which, itself, is a proactive measure to ensure that the *u-ma* is kept productive for the greater good (Prill-Brett 1984).

4. INCENTIVE AND DISINCENTIVE

Rules embed both incentives (for compliance) and disincentives (for non-compliance). Formal forestry rules invariably include prescriptions of benefits and rewards for complying with them. For example, the rules on IFMA, SIFMA and CBFM prescribe certain tenure rights to trees and to the forest area, which the recipients of the instruments might use for their advantage and gain. The rules on natural forests and on forest land use are intended to improve the country's forest resource base which, if successful, would be to the benefit of the country and to local communities. For one, a robust forest base will translate to improved environmental security to downstream communities.

Formal rules almost always stipulate penalties and censures for non-compliance. These serve as disincentives for their non-observance. For example, cutting outside an approved cutting area, or exceeding the allowed volume, can carry a penalty of imprisonment from 4-20 years (depending on volume cut) and the confiscation of the equipment and vehicles used (Oliva 2002).

Customary rules, too, embed both incentives and disincentives. Rice (undated) once told of how the Kalahan Council of Elders in Sta. Fe, Nueva Vizcaya, would regularly give consent to members' use of community lands, for the members to gain an income from the land. The consent ascribes legitimacy to the use of an otherwise common property land resource. But, when an instance occurred where one member, given a use right to an area in which, under traditional norms, swiddening was not to be done, the whole Council approached the erring community member to stop him. The Council did not only admonish the member, but warned him of the imposition of a custom on banishment if he will not desist. Banishment, of course, is a harsh penalty, and certainly a powerful disincentive to continue violating a rule of custom.

WHY RULES BECOME WEAK

Effective rules are *not* issues in governance. It is weak rules. And rules can be weak because they may suffer either structural or formulation defects.

The first – *structural defects* – refer to problems associated with the nature of rules. A rule can be weakened when:

1. *It is enforced in situations where other forms of rule provide conflicting stipulations on the same matter it addresses*. A rule could suffer diminished effectiveness if it is enforced in areas with inconsistent other forms of rule (e.g., a formal rule being inconsistent with a customary rule). Depending on their degree of conflict (or the extent to which they are in direct opposition to each other), rules would sap each others' potency when, *cet. par.,* they have disharmonized or inconsistent stipulations. For instance, the formal rules on controlling forest cutting and on banning fellings in old-growth forests would naturally tend to have diminished effectiveness when in contravention with customary rules allowing cuttings for traditional uses (e.g., for housing or for swiddening). The same effect would befall the customary rules on cutting when faced with formal rules against it.

2. *There are inconsistencies between the descriptive and prescriptive elements of the rules*. It can happen that rules might describe conditions that are not supportive of their prescriptive stipulations. This happened before in the case of the rules on IFMA II. The description of adequately and inadequately stocked forests lent to an almost discretionary (or at least a loose) determination of stocking conditions so that the prescriptive element of the rule – to allow cutting before planting – became a cause for confusion. The rules were eventually rescinded, including the IFMA II program itself. Customary rules tend to

generally fare better than formal rules in this regard. This is because customary rules have usually stood the tests of time, and because of their usually longer period of development, they have had the benefit of recurring corrections than often the case with formal rules.

3. *The assumptions of the rule are not supportive of its intended actions.* A rule can be infirmed when its stipulations are not within its assumptions. For example, a rule can stipulate that a tree can be cut only when it has a dbh of at least 60 cm. This is to be observed by licensees and plantation operators alike. It would seem that the rule is based on the assumption that trees of commercial value can grow to such a trunk size within the period of operation of a license or plantation holder. It assumes that licensees and plantation holders would have the opportunity to cut the trees that they plant, well within the tenure provided them. It assumes a growth rate of timber trees that equal or exceeds 60 cm dbh within a maximum of 50 years (the maximum allowable years covered by a license or plantation tenure).

4. *Neither the incentives nor disincentives stipulated in the rule are sufficient either to arouse compliance or to defuse defiance to it*. Mancur Olson (1953) explained that people act on the basis of their estimation of their potential gains exceeding their potential costs for doing the act. They are rational. They invoke equimarginality as basis for action. When faced with a rule, the act either to follow or to defy it would presumably entail some gains and costs to the affected actor. If the gains implied in the observance of the rule or which the rule stipulates as being an outcome to its observance, is insufficient in relation to the actor's costs for observing it, it can be anticipated that their will be defiance to it. This would be true as well if the rule implies more costs than the gains it proffers. The reverse can be expected to be also true. If the expected costs are much lower than the expected benefits, a rule is likely to be observed, just as when the expected benefits exceed the costs. It is a question of a calculus of gains and costs. Thus, a rule is more likely to be either observed or defied depending on the sufficiency or insufficiency of the incentives it proffers with respect to the costs it requires.

The second – *formulation defects* – refer to the more familiar infirmities of rules arising from how its stipulations are stated. The defects can be because of:

1. *Vocabulary*. The stipulations use certain key words that lend to or allow numerous meanings. Example: "NGOs" in the rules on contract reforestation which accommodates organizations set up for only the purpose of winning an evaluation contract. It allowed for just about anyone to set up an "NGO" to do it, even the same persons who had the planting contracts or who were employees of DENR. It defeated the purpose of the rule which was to have an independent verification of reforestation performance. The same vagueness of language attended the Global Agenda 21. It stipulates a "precautionary principle" which up to recently accommodated at least 17 definitions of the term. The vagueness of the terms "ISLO" and "ASLO" in IFMA brought about serious consequences to the program.

2. *Grammar*. Grammatical nuances may mislead the interpretations of a rule. Section 16 of Article II of the Constitution is a case in point. The language of the entire section which "borders on poetry" (Oposa 2002) is unfortunately, strictly, a grammatical blunder. The phrase "right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature" is informed by the inclusion of the three words "balanced", "healthful" and "ecology". While each word lends to a precise meaning, putting them together makes the phrase grammatically funny. First, "ecology" has a precise meaning, which is "the study of the relationships between living organisms and their environment" (Collins 1999). How might this be "healthful"? Second, even allowing for "ecology" to assume its secondary (and perhaps allowable) meaning which is "the set of relationships

of a particular organism with its environment" (Collins 1999), how will "balanced", in relation to right, refer to this?

3. *Requirements*. Too often, rules mix up their substantive stipulations with the administrative requirements to ensure compliance to them. The substance of the rule (e.g., how might forests be made available to local communities for their use and welfare, or how might production forests be managed to ensure the least damage to biodiversity) gets mired in a "forest" of documentary and other requirements. This discourages target groups to avail of what the rule might offer, or to observe it or comply with it. The rule is weakened when positive responses to it are diminished. One example stands out: the rules on CBFM. They require so much documentation from a target group whose literacy is often low, and who usually does not make it a habit to amass and keep documents. Theirs is a paper-less society, by practice and culture, and yet, to participate in CBFMP, they would have to show documents on who they are, what they do, and most everything about their precisely undocumented life. The requirements often become the dominant tint in the otherwise pleasant landscape of colors intended in the rule.

4. *Legal imprecision*. Certain terminologies have precise legal meanings. A careless use of a term may infirm a rule. For example, "slander" and "libel" are quite distinct in legal parlance, the first being mainly oral and the second being exclusively written. To confuse the two may weaken a rule in that its penal intentions can be mired with confused evidentiary requirements. Even "illegal logging" can be legally imprecise. When viewed against its definition in PD 705, it would require actually seeing a person cut a tree without the necessary permits, for the charge of "illegal logging" to progress in court. The intention of the law is constricted in that it gets limited to those who are actually seen cutting trees, rather than include large financiers of illegal logging. Thus, the need for EO 277 (Oliva 2002).

THE NATURE OF ENVIRONMENTAL GOVERNANCE

Environmental governance refers to the system of controls with which society regulates human behaviors that affect natural resources and Nature. It refers to the complex of decisions and actions of different sectors of society (public and non-public), acting in various levels that society makes decisions and actions on the environment (global, national, sub-national, and local), to address different concerns relating to natural resources and ecosystems (see Malayang and Toribio 2002).

In brief, environmental governance is the basket of decisions and actions that have three intrinsic features:

1. The *sectors* that make them;
2. The *level of decision making* (or action taking) in which they are made; and
3. The natural resources or environmental *concerns* that they address.

A decision or action of an environmental governance institution – such as when FMB decides to adopt and then to enforce certain regulations on IFMA, natural forests, CBFM or forest land use – the decision or action can be characterized and distinguished for its being a public sector decision, at the national level, over certain uses and development intentions on forests. Likewise, the decision of an indigenous cultural community to open certain areas of its surrounding forests to swiddening may be characterized for being a non-public sector decision, at the local level, on how a forest land shall be used for economic production and income.

There is no decision or action that would not have an aspect of who makes them, the level of governance it is made, and the particular aspect of its use for human welfare that the decision or action covers.

This leads to a second aspect of the nature of environmental governance. The decisions and actions that comprise governance is invariably the product of the *power* of environmental institutions to prevail over other institutions. The decisions and actions preferred by an institution, to be those that shall govern the use and development of natural resources and other assets of Nature, can be held over others – and made into policy – when the institution advancing them acquires sufficient ascendancy over other institutions that might otherwise prefer other decisions and actions as basis of governance.

This is where governance can become messy. This is when more than one institution vies for the power to shape the decisions and actions that will comprise policy, or which are to become the substance of environmental governance. The competition can eventually turn to be a mixed dynamics of politics & technocracy, and a competition for which institution wins the most public confidence to make the decisions or to take the action. Here, power is a function of public support. This means that (1) the institution with the more support will tend to acquire the more power to shape policy; (2) eventually, the decisions and actions that comprise policy, and which will dictate the shape & content of environmental governance, will be those which are the product of agreement and compromise among the most powerful and, hence, influential institutions, whose power and influence extends across the most levels of governance and the most diverse range of environmental concerns; and (3) policy will tend to be less subject to change if it is the product of agreement and consensus of a large number institutions (see Malayang1998b; Plopino 2001; IGES-SUIGES 2001; Contreras 2001(a)(b); Halachmi 1995; Rambo 1983; Anderson et al. 1984; Blondel 1995; Boserup 1965; Hayami et al. 1976; O'Riordan 1971; Kasperson 1969; Cobb & Elder 1972; and Bentley 1967).

WHAT WEAKENS, STRENGTHENS ENVIRONMENTAL GOVERNANCE INSTITUTIONS

1. DRIVERS OF WEAKNESS.

The literature above suggests that the ability of environmental governance institutions to influence policy is a function of their legitimacy, public trust and credibility, to act for and on behalf of their constituencies. Having a strong influence on policy is not a problem because the more institutions agreeing on a policy make the policy stable. The problem is when environmental institutions have unequal powers to influence policy so that only a few is able to do so. This makes for a weak regulatory regime that can easily flounder when tossed by the uneven tides of competition among institutions.

Strengthening policy and regulations would perforce require strengthening environmental governance institutions. And this means addressing the reason for why they could be weak and these are (1) low legitimacy, (2) low public trust, and (3) poor credibility.

Legitimacy refers to the degree that the constituency of an environmental institution accepts the institution to be the correct agency to exercise a mandate. Its publics recognize the validity of the institution's authority. When legitimacy is low, an institution would be hard pressed to exercise public leadership to address environmental problems, or to muster public support for its decisions and actions at a level that will give them clout and influence on policy.

Public trust is the extent that an environmental institution's constituency has confidence that it works to protect their interests and promote their welfare, and only them. When public trust is low, an environmental institution would find difficulty gaining public support for its programs, and hence the ability to influence environmental policy.

Credibility is the degree that an institution's constituency has confidence on its ability to execute its mandate. When low, an institution would be hard pressed to exercise public leadership in addressing environmental problems and to muster public support for it, at a level that will give it clout and influence on environmental decisions and actions.

2. DRIVERS OF STRENGTH

To address low *legitimacy*, an institution would need to win public confidence that it is pursuing its mandate. This means, mainly, that it is *transparent* or that its constituencies are always correctly, accurately and regularly informed of its decisions and actions, in a manner that will allow them to register their support or objections to them and to correct them if necessary. Full knowledge of the institution's decisions and actions would allow an institution's publics to give it legitimacy.

To address *public trust*, the core concern is to elevate public confidence that when doing its mandate an environmental institution seeks only to serve the public's interests. It will not use the measures it can wield to address environmental problems as cover for graft or as opportunities for corruption, or to align public rents and environmental assets for the benefit of only a few. In this case, strengthening *public accountability* – or having working mechanisms of command and control, checks-and-balance, standards of due diligence, and rewards and sanctions, that, together, allow the institution to readily explain what it does and how it uses its resources for the public good – would be a key measure to be pursued to improving public trust.

To address *credibility*, the core concern is to ensure that the decisions and actions of an environmental institution are technically solid and robust. That is, they reflect a wider range of collective wisdom that emanates from the larger public rather than from only their staff or officials. Technical competence and environmental wisdom must be clearly distinguished here. The first is a function of schooling while the second, of experience. An institution may have large concentrations of technical competence, but environmental wisdom is almost always ensured and sharpened only by deriving it from the sense of a larger public than is represented in its internal staffing. In this sense, one measure to address low credibility is for an institution to widen the *participation* to its processes. This means routinely involving representations from different sectors, constituencies and stakeholders in matters affecting their interests and welfare.

Transparency, accountability and participation – together – will likely elevate the power of forestry governance institutions like FMB, to influence, shape and enforce rules on forest protection and development in the country, even as many other institutions from the public sector (e.g., LGUs) or non-public sector (e.g., NGOs) seek to do the same.

RULES AND INSTITUTIONS

Rules – whether in the form of policy, statutes or regulations – articulate the controls on human behavior to achieve a desired end. They are creations of governance institutions, to the extent that the institutions are able to influence the content and shape of the decisions and actions that make up the rule. Rules are thus creations of the power of institutions, and they are less likely capricious, nor possibly avaricious, when they are a creation of a large community of institutions weaving a wide array of interests and public concerns.

Forestry rules, too, are a product of an "ecology of power" among forestry governance institutions – institutions from the public sector like FMB, primarily, and LGUs and sometimes state school offering forestry courses, and the non-public sector like NGOs, POs, indigenous peoples' groups, the forest and furniture industries, and many others. Even as FMB assumes the *legal* ascendancy to make forestry rules in the Philippines, it cannot be denied that its ability to "make the rules stick" is affected (boosted or diminished) by the ability of the other institutions to muster public support – and, hence, power – to articulate collaborating or contrasting regulatory preferences.

It would seem that, to ensure a rules-based decision making and action taking on forestry in the Philippines, it is to FMB's interest to improve its transparency, accountability and participatory processes, to ensure its leadership in forest policy and regulations in the country. And in order for the policy and regulations to be anchored on a stable substrate of public consensus and harmony, it, too, is FMB's interest to support other forest governance institutions in the nation – formal and customary, public and non-public – to elevate their power to contribute to local and national decisions and actions on forests.

There seem to be no other way, at this time.

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