

CONCLUSION

The struggle of the Filipinos throughout colonial history had been plagued by ethnic and religious differences. These differences were carried over and magnified by the Philippine government through the imposition of a national legal order that is mostly foreign in origin or derivation.^[251]

Largely unpopulist, the present legal system has resulted in the alienation of a large sector of society, specifically, the indigenous peoples. The histories and cultures of the indigenes are relevant to the evolution of Philippine culture and are vital to the understanding of contemporary problems.^[252] It is through the IPRA that an attempt was made by our legislators to understand Filipino society not in terms of myths and biases but through common experiences in the course of history. The Philippines became a democracy a centennial ago and the decolonization process still continues. If the evolution of the Filipino people into a democratic society is to truly proceed democratically, i.e., if the Filipinos as a whole are to participate fully in the task of continuing democratization,^[253] it is this Court's duty to acknowledge the presence of indigenous and customary laws in the country and affirm their co-existence with the land laws in our national legal system.

With the foregoing disquisitions, I vote to uphold the constitutionality of the Indigenous Peoples Rights Act of 1997.

^[1] Chief Judge, US Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School.

^[2] The University of Chicago Law Review, Vol. 67, Summer 2000, No. 3, p. 573.

^[3] Dominium is distinguished from imperium which is the government authority possessed by the state expressed in the concept of sovereignty-- Lee Hong Hok v. David, 48 SCRA 372, 377 [1972].

^[4] Valenton v. Murciano, 3 Phil. 537, 543 [1904]; See also Florencio D.R. Ponce, The Philippine Torrens System, p. 13 [1964].

^[5] Antonio H. Noblejas, Land Titles and Deeds, p. 5 [1986]; these grants were better known as repartimientos and encomiendas. Repartimientos were handouts to the military as fitting reward for their services to the Spanish crown. The encomiendas were given to Spaniards to administer and develop with the right to receive and enjoy for themselves the tributes of the natives assigned to them.-- Ponce, *supra*, p. 12, citing Benitez, History of the Philippines, pp. 125-126.

^[6] Narciso Pena, Registration of Land Titles and Deeds, p. 2 [1994].

[7] The Mortgage Law is a misnomer because it is primarily a law on registration of property and secondarily a mortgage law-- Ponce, *supra*, at 16.

[8] Ponce, *supra*, at 15.

[9] 3 Phil. 537 [1904].

[10] *Id.* at 540.

[11] *Id.* at 548.

[12] *Id.* at 543-544.

[13] *Id.* at 543.

[14] *Id.* at 542-543. These comments by the court are clear expressions of the concept that Crown holdings embraced both *imperium* and *dominium*--Ma. Lourdes Aranal-Sereno and Roan Libarios, *The Interface Between National Land Law and Kalinga Land Law*, 58 P.L.J. 420, 423 [1983].

[15] *Id.* at 545-546.

[16] *Id.* at 543.

[17] *Id.* at 557.

[18] *Id.* at 553-554; Valenton was applied in Cansino v. Valdez, 6 Phil. 320 [1906]; Tiglao v. Insular Government, 7 Phil. 80 [1906]; and Cariño v. Insular Government, 7 Phil. 132 [1906]; all decided by the Philippine Supreme Court.

[19] Please see Section 70, Act 926.

[20] Ponce, *supra*, at 33.

[21] Montano v. Insular Government, 12 Phil. 572 [1909]; also cited in Ponce, *supra*, at 32.

[22] Archbishop of Manila v. Director of Lands, 27 Phil. 245 [1914]; also cited in Ponce, *supra*, at 32.

[23] Antonio H. Noblejas, *Land Titles and Deeds*, p. 250 [1961].

[24] Ponce, *supra*, at 32.

[25] Peña, *Registration of Land Titles and Deeds*, p. 26 [1982]; Noblejas, *supra*, at 32.

[26] Noblejas, *supra*, at 32.

[27] Ponce, *supra*, at 123-124; Noblejas, *supra*, at 33.

[28] 2 Aruego, *The Framing of the Philippine Constitution*, p. 592 [1937].

[29] *Id.* at 600.

[30] *Id.* at 600-601.

[31] *Ibid.*

[32] Section 7.

[33] Section 8.

[34] Sections 13 to 20.

[35] Sections 21 to 28.

[36] Sections 29 to 37.

[37] Sections 38 and 40.

[38] Sections 74 to 77.

[39] Section 69.

[40] Section 73.

[41] Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989.

[42] Guide to R.A. 8371, published by the Coalition for Ips Rights and ancestral Domains in cooperation with the ILO and Bilance-Asia Department, p. 4 [1999]--hereinafter referred to as *Guide to R.A. 8371*.

[43] Taken from the list of IPs sbmitted by Rep. Andolana to the house of Representatives during the deliberations on H.B. No. 9125--Interpellations of Aug. 20, 1997, pp. 00086-00095. "lost tribes" such as the Lutangan and Tatang have not been included.

[44] How these people came to the Philippines may be explained by two theories. One view, generally linked to Professor Otley H. Beyer, suggests the "wave theory"--a series of arrivals in the archipelago bringing in different types and levels of culture. The Negritos, dark-skinned pygmies, came between 25,000 to 30,000 B.C. Their cultural remains are preserved by the Negrito-type Filipinos found in Luzon, Visayas and Mindanao. Their relatively inferior culture did not enable them to overcome the pressures from the second wave of people, the Indonesians A and B who came in 5,000 and 3,500 B.C. They are represented today by the Kalinga, Gaddang, Isneg, Mangyan, Tagbanua, Manobo, Mandaya, Subanon, and Sama. The first group was pushed inland as the second occupied the coastal and downriver settlements. The last wave involved Malay migrations between 500 B.C. and 1,500 A.D. they had a more advanced culture based on metal age technology. They are represented by the Christianized and Islamized Filipinos who pushed the

Indonesian groups inland and occupied much of the coastal, lowland and downstream areas.

A second view is postulated by Robert Fox, F. Landa Jocana, Alfredo Evangelista, and Jesus Peralta. Jocano maintains that the Negritos, Indonesians and Malays stand co-equal as ethnic groups without any one being dominant, racially or culturally. The geographic distribution of the ethno-linguistic groups, which shows overlapping of otherwise similar racial strains in both upland and lowland cultures or coastal and inland communities, suggests a random and unstructured advent of different kinds of groups in the archipelago--Samuel K. Tan, *A History of the Philippines*, published by the Manila Studies Association, Inc. and the Philippine National Historical society, Inc., pp. 33-34 [1997]; Teodoro A. Agoncillo, *History of the Filipino People*, p. 21 [1990].

[45] Tan, *supra*, at 35-36.

[46] Onofre D. Corpuz, *The Roots of the Filipino Nation*, Philippine Centennial (1898-1998) Edition, vol. 1, p. 13, Aklahi foundation, Inc. [1989]. It was in 800-1,000 A.D. that the Ifugaos of Northern Luzon built the rice terraces--*Id.* at 37.

[47] *Id.* at 5-6.

[48] *Id.* at 13.

[49] Teodoro A. Agoncillo, *History of the Filipino People*, p. 54 [1990].

[50] Corpuz, *supra*, at 5.

[51] *Id.* at 44-45.

[52] Agoncillo, *supra*, at 40.

[53] *Id.* at 40-41.

[54] Rafael Iriarte, *History of the Judicial System, the Philippine Indigenous Era Prior to 1565*, unpublished work submitted as entry to the Centennial Essay-Writing Contest sponsored by the National Centennial Commission and the Supreme Court in 1997, p. 103, citing Perfecto V. Fernandez, *Customs Laws in Pre-Conquest Philippines*, UP Law Center, p. 10 [1976].

[55] Agoncillo, *supra*, at 41.

[56] Amelia Alonzo, *The History of the Judicial System in the Philippines, Indigenous Era Prior to 1565*, unpublished work submitted as entry to the Centennial Essay-Writing Contest sponsored by the National Centennial Commission and the Supreme Court in 1997.

[57] Agoncillo, *supra*, at 42.

[58] Renato Constantino, *A Past Revisited*, p. 38 [1975].

[59] Samuel K. Tan, *A History of the Philippines*, published by the Manila Studies Ass'n., Inc. and the

Phil. National Historical Society, Inc., p. 43 [1997].

[60] *Id.*

[61] *Id.* at 43-44.

[62] Tan, *supra*, at 47-48.

[63] *Id.* at 48-49.

[64] Cacho v. Government of the P.I., 28 Phil. 616, 625-627 [1914]; see also Ponce, *The Philippine Torrens System*, pp. 11-12 [1964]. In Philippine pre-colonial history, there was only one recorded transaction on the purchase of land. The Maragtas Code tells us of the purchase of Panay Island by ten Bornean datus led by Datu Puti from the Atis under Marikudo in the 13th century. The purchase price for the island was a gold salakot and a long gold necklace - Agoncillo, *supra*, at 25.

[65] Constantino, *supra*, at 38.

[66] Corpuz, *supra*, at 39.

[67] Resettlement-- "*bajo el son de la campana*" (under the sound of the bell) or "*bajo el toque de la campana*" (Under the peal of the bell).

[68] People v. Cayat, 68 Phil. 12, 17 [1939].

[69] *Id.* at 17, citing the Decree of the Governor-General of the Philippines, Jan. 14, 1887.

[70] Agoncillo, *supra*, at 80.

[71] *Id.* at 80.

[72] Corpuz, *supra*, at 277-278.

[73] *Id.* at 277.

[74] *Id.*, **N.B.** But see discussion in Cariño v. Insular Government, *infra*, where the United States Supreme Court found that the Spanish decrees in the Philippines appeared to recognize that the natives owned some land. **Whether in the implementation of these decrees the natives' ancestral rights to land were actually respected was not discussed by the U.S. Supreme Court; see also Note 131, *infra*.**

[75] Tan, *supra*, at 49-50.

[76] *Id.* at 67.

[77] *Id.* at 52-53.

[78] *Id.* at 53.

[79] *Id.* at 55.

[80] *People v. Cayat*, 68 Phil. 12, 17 [1939].

[81] Memorandum of the Secretary of the Interior, quoted in *Rubi v. Provincial Board of Mindoro*, 39 Phil. 660, 714 [1919]; also cited in *People v. Cayat*, *supra*, at 17-18.

[82] *Rubi v. Provincial Board of Mindoro*, *supra*, at 693.

[83] Charles Macdonald, *Indigenous Peoples of the Philippines: Between Segregation and Integration*, Indigenous Peoples of Asia, p. 348, ed. by R.H. Barnes, A. Gray and B. Kingsburry, pub. by Association for Asian Studies [1995]. The BNCT made a Bontok and subanon ethnography, a history of Sulu genealogy, and a compilation on unhispanized peoples in northern Luzon.--Owen J. Lynch, Jr., *The Philippine Colonial Dichotomy: Attraction and Disenfranchisement*, 63 P. L. J. 139-140 [1988].

[84] R.A. No. 1888 of 1957.

[85] See *People v. Cayat*, *supra*, at 21; See also *Rubi v. Provincial Board of Mindoro*, 39 Phil. 660, 694 [1919]

[86] MacDonald, *Indigenous Peoples of the Philippines*, *supra*, at 351.

[87] The construction of the Ambuklao and Binga dams in the 1950's resulted in the eviction of hundreds of Ibaloi families - Cerilo Rico S. Abelardo, *Ancestral Domain Rights: Issues, Responses, and Recommendations*, Ateneo Law Journal, vol. 38, No. 1, p. 92 [1993].

[88] Section 11, Art. XV, 1973 Constitution.

[89] Presidential Decrees Nos. 1017 and 1414.

[90] The PANAMIN, however, concentrated funds and resources on image-building, publicity, and impact projects. In Mindanao, the agency resorted to a policy of forced resettlement on reservations, militarization and intimidation-- MacDonald, *Indigenous Peoples of the Philippines*, *supra*, at 349-350.

[91] No occupancy certificates were issued, however, because the government failed to release the decree's implementing rules and regulations-- Abelardo, *supra*, at 120-121.

[92] *Id.*, Note 177.

[93] *Id.*, at 93-94.

[94] MacDonald, *Indigenous People of the Philippines*, *supra*, at 351.

[95] E.O. Nos. 122-A, 122-B and 122-C. The preamble of E.O. No. 122-B states:

"Believing that the new government is committed to formulate more vigorous policies, plans, programs, and projects for tribal Filipinos, otherwise known as Indigenous Cultural Communities, taking into consideration their communal aspirations, customs, traditions, beliefs, and interests, in order to promote and preserve their rich cultural heritage and insure their participation in the country's development for national unity; xxx"

[96] Article II, sec. 22; Article VI, sec. 5, par. 2; Article XII, sec. 5; Article XIII, sec. 6; Article XIV, sec. 17; and Article XVI, sec. 12.

[97] MacDonald, Indigenous Peoples of the Philippines, *supra*, at 345.

[98] Samuel K. Tan, A History of the Philippines, p. 54 [1997].

[99] Cordillera Studies Program, Land Use and Ownership and Public Policy in the Cordillera, 29-30 [n.d.]; also cited in Dante B. Gatmaytan, Ancestral Domain Recognition in the Philippines: Trends in Jurisprudence and Legislation, 5 Phil. Nat. Res. L.J. No. 1, pp. 47-48 [1992].

[100] Abelardo, Ancestral Domain Rights, *supra*, at 98-99, citing Ponciano L. Bennagen, Indigenous Attitudes Toward Land and Natural Resources of Tribal Filipinos, 31 National Council of Churches in the Philippines Newsletter, Oct.-Dec. 1991, at 4-9.

[101] *Id.* at 99, citing June Prill-Brett, Bontok Land Tenure (UP Law library, mimeographed).

[102] Ma. Lourdes Aranal-Sereno and Roan Libarios, The Interface of National Land Law and Kalinga Law, 58 P.L.J. 420, 440-441 [1983].

[103] *Ibid.*

[104] *Ibid.*

[105] *Ibid.*

[106] Ma. Lourdes Aranal-Sereno and Roan Libarios, The Interface, *supra*, at 420.

[107] Senate Bill No. 1728 was co-sponsored by Senator Macapagal-Arroyo and co-authored by Senators Alvarez, Magsaysay, Revilla, Mercado, Enrile, Honasan, Tatad, Maceda, Shahani, Osmena and Romulo.

The Eighth Congress, through Senators Rasul, Estrada and Romulo filed a bill to operationalize the mandate of the 1987 Constitution on indigenous peoples. The bill was reported out, sponsored an interpellated but never enacted into law. In the Ninth Congress, the bill filed by Senators Rasul and Macapagal-Arroyo was never sponsored and deliberated upon in the floor.

[108] Sponsorship Speech of Senator Flavio, Legislative History of SBN 1728, Tenth Congress, Second Regular Session, Senate, Oct. 16, 1996, pp. 15-16.

[109] *Id.* at 12.

[110] *Id.* at 17-18.

[111] *Id.* at 13.

[112] Journal of the Tenth Congress of the Philippines, Senate, Session No. 5, Aug. 5-6, 1997, pp. 86-87.

[113] Co-authors of the bill were Reps. Ermita, Teves, Plaza, Calalay, Recto, Fua, Luciano, Abad, Cosalan, Aumentado, de la Cruz, Bautista, Singson, Damasing, Romualdo, Montilla, Germino, Verceles--Proceedings of Sept. 4, 1997, pp. 00107-00108.

[114] Sponsorship speech of Rep. Andolana of House Bill No. 9125, March 20, 1997.

[115] Interpellation of Aug. 20, 1997, 6:16 p.m., p. 00061.

[116] Section 3 [a], IPRA.

[117] Section 3 [b], IPRA.

[118] Guide to R.A. 8371, p. 14.

[119] Section 44 [e], IPRA.

[120] Section 51, IPRA.

[121] Guide to R.A. 8371, p. 15.

[122] A CADT refers to a title formally recognizing the right of possession and ownership of ICCs/IPs over their ancestral domains identified and delineated in accordance with the IPRA--Rule II [c], Rules & Regulations Implementing the IPRA, NCIP Admin. Order No. 1.

[123] Section 53 [a], IPRA.

[124] A CALT refers to a title formally recognizing the rights of the ICCs/IPs over their ancestral lands-- Rule II [d], Implementing Rules, NCIP A.O. No. 1.

[125] Section 52 [k], IPRA.

[126] Section 3 [l], IPRA.

[127] Section 11, IPRA.

[128] *Ibid.*

[129] 41 Phil. 935 (1909), 212 U.S. 449, 53 L.Ed. 594.

[130] Sponsorship Speech of Senator Juan Flavio Velez, Leg. History of SBN 1728, Tenth Congress, Second Regular Session, Oct. 16, 1996, p. 13.

[131] It was the practice of the Spanish colonial government not to issue titles to Igorots--Owen J. Lynch, Jr., *Invisible Peoples and a Hidden Agenda: The Origins of Contemporary Philippine Land Laws (1900-1913)*, 63 P.L.J. 249, 288 [1988], citing the testimony of Benguet Provincial Governor William F. Pack, Records at 47, Cariño.

[132] Maura Law or the Royal Decree of Feb. 13, 1894.

[133] Later named Camp John Hay.

[134] Lynch, *Invisible Peoples*, *supra*, at 288-289.

[135] 7 Phil. 132 [1906].

[136] In 1901, Cariño had entered into a promissory agreement with a U.S. merchant in Manila. The note obliged Cariño to sell the land at issue "as soon as he obtains from the Government of the United States, or its representatives in the Philippines, real and definitive title." See Lynch, *Invisible Peoples*, *supra*, at 290, citing Government's Exhibit G, Records, at 137-138, Cariño.

[137] *Cariño v. Insular Government*, *supra*, at 939.

[138] *Ibid.*

[139] *Id.* at 940.

[140] *Id.* at 941.

[141] *Id.* at 941-942.

[142] Aranal-Sereno and Libarios, *The Interface Between Kalinga Land Law*, *supra* at 428--This article was one of those circulated among the Constitutional Commissioners in the formulation of Sec. 5, Article XII of the 1987 Constitution (4 Record of the Constitutional Commission 33).

[143] *Id.* at 944.

[144] Certificate of Title No. 2 covering the 148 hectares of Baguio Municipality was issued not in the name of Cariño who died on June 6, 1908, but to his lawyers John Hausserman and Charles Cohn and his attorney-in-fact Metcalf Clarke. Hausserman, Cohn and Clarke sold the land to the U.S. Government in a Deed of Quitclaim--Richel B. Langit, *Igorot Descendants Claim Rights to Camp John Hay*, Manila Times, p. 1, Jan. 12, 1998.

[145] *Id.* at 939.

[146] 57 P.L.J. 268, 293-296 [1982].

[147] From 1987 to 1988, Prof. Lynch allowed the P.L.J. to publish parts of his doctoral dissertation at the Yale Law School entitled "Invisible Peoples: A History of Philippine Land Law." Please see the Legal Bases of Philippine Colonial Sovereignty: An Inquiry, 62 P.L.J. 279 [1987]; Land Rights, Land Laws and Land Usurpation: The Spanish Era (1568-1898), 63 P.L.J. 82 [1988]; The Colonial Dichotomy: Attraction and Disenfranchisement, 63 P.L.J. 112; Invisible Peoples and a Hidden Agenda: The Origins of Contemporary Philippine Land Laws (1900-1913), 63 P.L.J. 249.

[148] "Native title" is a common law recognition of pre-existing aboriginal land interests in Australia-- Maureen Tehan, Customary Title, Heritage Protection, and Property Rights in Australia: Emerging Patterns of Land Use in the Post-Mabo Era, 7 Pacific Rim Law & Policy Journal, No. 3, p. 765 [June 1998].

[149] Lynch, Native Titles, *supra*, Note 164, p. 293.

[150] 39 Phil. 660 [1919].

[151] *Id.* at 712-713.

[152] *Id.* at 694.

[153] *Id.* at 700.

[154] 42 C.J.S., Indians, Sec. 29 [1944 ed.].

[155] There are 3 kinds of Indian reservations: (a) those created by treaties prior to 1871; (b) those created by acts of Congress since 1871; and (c) those made by Executive Orders where the President has set apart public lands for the use of the Indians in order to keep them within a certain territory-- 42 C.J.S., Indians, Sec. 29 citing *Sioux Tribe of Indians v. U.S.* 94 Ct. Cl. 150, 170, certiorari granted 62 S. Ct. 631, 315 U.S. 790, 86 L. Ed. 1194, affirmed 62 S. Ct. 1095, 316 U.S. 317, 86 L. Ed. 1501. **It is observed that the first two kinds may include lands possessed by aboriginal title. The last kind covers Indian reservations proper.**

Until 1871, Indian tribes were recognized by the United States as possessing the attributes of nations to the extent that treaties were made with them. In that year, however, Congress, by statute, declared its intention thereafter to make the Indian tribes amenable directly to the power and authority of the United States by the immediate exercise of its legislative power over them, instead of by treaty. Since then, Indian affairs have been regulated by acts of Congress and by contracts with the Indian tribes practically amounting to treaties-- 41 Am Jur 2d, *Indians*, Sec. 55 [1995 ed].

[156] 42 C.J.S. Indians, Sec. 28 [1944 ed.].

[157] *Ibid.*; see also *U.S. v. Santa Fe Pac. R. Co.*, Ariz., 62 S. Ct. 248, 314 U.S. 339, 86 L. Ed. 260 [1941].

[158] *Ibid.*

[159] 8 Wheat 543, 5 L. Ed. 681 [1823].

[160] *Id.* at 680.

[161] *Id.* at 689.

[162] *Id.* at 696; see also 41 ALR Fed 425, Annotation: Proof and Extinguishment of Aboriginal Title to Indian Lands, Sec. 2[a] [1979].

[163] *Buttz v. Northern Pac.R. Co., Dak.*, 7 S. Ct. 100, 119 U.S. 55, 30 L. Ed. 330, 335 [1886].

[164] *Lynch, Native Title, supra*, at 293-294; Cohen, Original Indian Title, 32 Minn. L.R. 48-49 [1947].

[165] 6 Pet 515, 8 L.Ed. 483 [1832].

[166] *Id.* at 499.

[167] *Id.* at 500.

[168] *Id.* at 501.

[169] The title of the government to Indian lands, the naked fee, is a sovereign title, the government having no landlord from whom it holds the fee-- *Shoshone Tribe of Indians of Wind River Reservation in Wyoming v. U.S.*, 85 Ct. Cl. 331, *certiorari* granted *U.S. v. Shoshone Tribe of Indians*, 58 S. Ct. 609, 303 U.S. 629, 82 L. Ed. 1090, affirmed 58 S. Ct. 794, 304 U.S. 111, 82 L. Ed. 1213, 1218-1219 [1938].

[170] *Buttz v. Northern Pac. R. Co., Dak.*, at 30 L. Ed. 330, 335; *Beecher v. Wetherby, Wis.*, 95 U.S. 517, 24 L. Ed. 440, 441 [1877]; see also 42 C.J.S., *Indians*, Sec. 28 [1944 ed.].

[171] Annotation, *Proof and Extinguishment of Aboriginal title to Indian Lands*, 41 ALR Fed 425, Sec. 2 [b] [1979]-- hereinafter cited as *Aboriginal Title to Indian Lands*.

[172] *Ibid.*; see also *Tee Hit Ton Indians v. U.S.*, 348 U.S. 272, 99 L. Ed. 314, 320, 75 S. Ct. 313 [1955], reh den 348 U.S. 965, 99 L. Ed. 753, 75 S. Ct. 521.

[173] *Ibid.*; *Tee Hit Ton Indians v. U.S.*, at 99 L. Ed. 320.

[174] *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 39 L. Ed. 2d 73, 94 S Ct. 772 [1974]; *U.S. v. Alcea Bank of Tillamooks*, 329 U.S. 40, 91 L. Ed. 29, 67 S. Ct. 167 [1946].

[175] For compensation under the Indian Claims Commission Act, the proof of aboriginal title rests on actual, exclusive and continuous use and occupancy for a long time prior to the loss of the property. (The Indian Claims Commission Act awards compensation to Indians whose aboriginal titles were extinguished by the government through military conquest, creation of a reservation, forced confinement of Indians and removal of Indians from certain portions of the land an the designation of Indian land into forest preserve, grazing district, etc.) -- *Aboriginal Title to Indian*

Lands, supra, at Secs. 2[a], 3[a], pp. 431, 433, 437.

[176] *Aboriginal Title to Indian Lands, supra*, at Sec. 2[b], p. 435.

[177] 41 Am Jr 2d, *Indians*, Sec. 59 [1995 ed.].

[178] An allotment of Indian land contains restrictions on alienation of the land. These restrictions extend to a devise of the land by will-- *Missouri, K. & T.R. Co. v. U.S.*, 235 U.S. 37, 59 L. Ed. 116, 35 S. Ct. 6 [1914]; A railroad land grant that falls within Indian land is null and void-- *Northern P. R. Co. v. U.S.*, 227 U.S. 355, 57 L.Ed. 544, 33 S. Ct. 368 [1913]; Portions of Indian land necessary for a railroad right of way were, by the terms of the treaty, declared "public land," implying that land beyond the right of way was private-- *Kindred v. Union P.R. Co.*, 225 U.S. 582, 56 L. Ed. 1216, 32 S. Ct. 780 [1912]; see also 41 Am Jur 2d, *Indians*, Sec. 58 [1995 ed].

[179] *Aboriginal Title to Indian Lands, supra*, at Sec. 2[a], p. 433.

[180] 42 C.J.S. *Indians*, Sec. 29 [1944 ed.]

[181] *Ibid.*

[182] North American Indians have made much progress in establishing a relationship with the national government and developing their own laws. Some have their own government-recognized constitutions. Usually the recognition of Indian tribes depends on whether the tribe has a reservation. North American tribes have reached such an advanced stage that the main issues today evolve around complex jurisdictional and litigation matters. Tribes have acquired the status of sovereign nations within another nation, possessing the right to change and grow-- Jose Paulo Kastrup, *The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective*, Texas International Law Journal, vol. 32: 97, 104 [1997].

[183] Lynch, *Native Title, supra*, at 293.

[184] Dante Gatmaytan, *Ancestral Domain Recognition in the Philippines: Trends in Jurisprudence and Legislation*, 5 Phil. Nat. Res. L.J. No. 1, pp. 43, 40 [Aug. 1992]; see also *Tee Hit Ton Indians v. U.S.*, *supra*, at 320.

[185] *Ibid.*

[186] D. Gatmaytan, *supra*, citing Churchill, *The Earth is Our Mother: Struggles for American Indian Land and Liberation in the Contemporary United States*, *The State of Native America: Genocide, Colonization and Resistance* 139 (M. Jaimes 1992); and Indian Law Resource Center, *United States Denial of Indian Property Rights: A Study in Lawless Power and Racial Discrimination*, *Rethinking Indian Law* 15 (National Lawyers Guild, Committee on Native American Struggles 1982).

[187] *Id.*, Note 28, stating that some earlier decisions of the U.S. Supreme Court have held that Congress is subject to the strictures of the Constitution in dealing with Indians. When an Indian property is taken for non-Indian use, the U.S. government is liable for payment of compensation, and an uncompensated taking may be enjoined. F. Cohen, *Handbook of Federal Indian Law*

217 [1982], citing *Shoshone Tribe v. U.S.* 299 U.S. 476 [1937]; *Choate v. Trapp*, 224 U.S. 665 [1912]; and *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 [1919].

[188] See Discussion, *infra*, Part IV (c) (2).

[189] *Susi v. Razon*, 48 Phil. 424 [1925]; *Herico v. Dar*, 95 SCRA 437 [1980].

[190] *Ibid.*

[191] *Director of Lands v. Intermediate Appellate Court*, 146 SCRA 509 [1986]; *Director of Lands v. Buyco*, 216 SCRA 78 [1992]; *Republic v. Court of Appeals and Lapina*, 235 SCRA 567 [1994].

[192] 75 Phil. 890 [1946].

[193] *Id.* at 892.

[194] Sec. 48 [b], C.A. 141.

[195] Sec. 48 [c], C.A. 141, as amended. This provision was added in 1964 by R.A. 3872.

[196] Section 12, IPRA.

[197] "Time immemorial" refers "to a period of time when as far back as memory can go, certain ICCs/lps are known to have occupied, possessed in the concept of owner, and utilized a defined territory devolved to them, by operation of customary law or inherited from their ancestors, in accordance with their customs and traditions." (Sec. 3 [p], IPRA).

[198] Section 2, C.A. 141.

[199] Section 8, C.A. 141.

[200] The classification of ancestral lands 18% in slope or over as alienable in the IPRA is an exception to Section 15, P.D. 705, the Revised Forestry Code.

[201] Charles MacDonald, *Indigenous Peoples of the Philippines: Between Segregation and Integration*, *Indigenous Peoples of Asia, supra*, at pp. 345, 350.

[202] Section 5, Article XII, 1987 Constitution.

[203] Words in bold were amendments introduced by R.A. 3872 in 1964.

[204] Words in bold were amendments introduced by R.A. 3872 on June 18, 1964. On January 25, 1977, however, Sec. 48 [b] and 48 [c] were further amended by P.D. 1073 stating that these provisions on cultural minorities apply **only to alienable and disposable lands of the public domain**-- Please see *Republic v. CA and Paran*, 201 SCRA 1, 10-11 [1991].

[205] *Jus utendi, jus fruendi*.

[206] *Jus abutendi*.

[207] *Jus disponendi*.

[208] *Jus vindicandi*. Please see Tolentino, Civil Code, vol. II, pp. 45-46 [1992]; see also Tolentino, vol. I, pp. 12-14.

[209] Sec. 55, IPRA provides:

"Sec. 55. *Communal rights*.-- Subject to Section 56 hereof, areas within the ancestral domains, whether delineated or not, shall be presumed to be communally held: provided, That communal rights under this Act shall **not** be construed as co-ownership as provided in Republic Act No. 386, otherwise known as the New Civil Code."

[210] *Ibid*.

[211] Article 494, Civil Code.

[212] Antonio M. La Vina, *Arguments for Communal Title, Part II*, 2 Phil. Nat. Res. L. J. 23 [Dec. 1989].

[213] Section 11, Corporation Code.

[214] Sections 60-72, Corporation Code.

[215] Section 117, Corporation Code. Please see also La Vina, *Arguments for Communal Title, Part II, supra*, at 23.

[216] Section 5, par. 2, Article XII, 1987 Constitution.

[217] Customary law is recognized by the Local Government Code of 1991 in solving disputes among members of the indigenous communities, viz:

"Sec. 412 (c) *Conciliation among members of indigenous cultural communities*.-- The customs and traditions of indigenous cultural communities shall be applied in settling disputes between members of the cultural communities."

[218] Law writes custom into contract-Hongkong & Shanghai Bank v. Peters, 16 Phil. 284 [1910].

The Civil Code provides:

"Art. 11. Customs which are contrary to law, public order or public policy shall not be countenanced."

"Art. 12. A custom must be proved as a fact, according to the rules of evidence."

[219] Article 78 on marriages between Mohammedans or pagans who live in the non-Christian

provinces-- this is now Art. 33 of the Family Code; Art. 118, now Art. 74 of the Family Code on property relations between spouses; Art. 577 on the usufructuary of woodland; Art. 657 on easement of right of way for passage of livestock; Arts. 678, 1315, 1376, 1522, 1564 and 1577. Please see Aquino, Civil Code, vol. 1, p. 25.

[220] *Castle Bros. v. Gutierrez Hermanos*, 11 Phil. 629 [1908]; *In Re: Firm Name of Ozaeta Romulo*, 92 SCRA 1 [1979]; *Yao Kee v. Sy-Gonzales*, 167 SCRA 736 [1988]; Please see Aquino, Civil Code, vol. 1, p. 26 for a list of other cases.

[221] This situation is analogous to the Muslim code or the Code of Muslim Personal Laws (P.D. 1083) which took effect on February 4, 1977 despite the effectivity of the Civil Code and the Family Code. P.D. 1083 governs persons, family relations and succession among Muslims, the adjudication and settlement of disputes, the organization of the Shari'a courts, etc.

[222] Mariflor P. Pagusara, *The Kalinga Ili: Cultural-Ecological Reflections on Indigenous Theora and Praxis of Man-Nature Relationship*, Dakami Ya Nan Dagami, p. 36, Papers and Proceedings of the 1st Cordillera Muti-Sectoral Land Congress, 11-14 March 1983, Cordillera Consultative Committee [1984].

[223] Section 2, Article XII.

[224] A "co-production agreement" is defined as one wherein the government provides input to the mining operation other than the mineral resource-- Section 26 (b), R.A. 7942, the Philippine Mining Act of 1995.

[225] A "joint venture agreement" is one where a joint-venture company is organized by the government and the contractor with both parties having equity shares, and the government entitled to a share in the gross output-- Section 26 (c), R.A. 7942.

[226] A mineral "production-sharing agreement" is one where the government grants to the contractor the exclusive right to conduct mining operations within a contract area and shares in the gross output. The contractor provides the financing, technology, management and personnel necessary for the implementation of the agreement-- Section 26 (a), R.A. 7942.

[227] Section 26, R.A. 7942.

[228] Section 3 [d], People's Small-Scale Mining Act of 1991 (R.A. 7076) provides:

"Sec. 3 [d] 'Small-scale mining contract' refers to co-production, joint venture or mineral production sharing agreement between the State and a small-scale mining contractor for the small-scale utilization of a plot of mineral land."

[229] Section 3 [b], R.A. 7076.

[230] NCIP Administrative Order No. 1, Series of 1998.

[231] *In Republic v. Court of Appeals*, 160 SCRA 228, 239 [1988], Cruz, J., *ponente*, it was declared

that if a person is the owner of a piece of agricultural land on which minerals are discovered, his ownership of such land does not give him the right to extract or utilize the said minerals without the permission of the State to which such minerals belong-- also cited in H. de Leon, Phil. Constitutional Law, Principles and Cases, vol. 2, pp. 800-801 [1999].

[232] See Ground I, Grounds to Issue Writ of Prohibition, Petition, p. 14.

[233] Section 7 (b) is subject to Section 56 of the same law which provides:

"Sec. 56. *Existing Property Rights Regimes*.-- Property rights within the ancestral domains already existing and/or vested upon effectivity of this Act, shall be recognized and respected."

The law took effect 15 days upon publication in the O.G. or in any 2 newspapers of general circulation (Sec. 84, IPRA). The IPRA was published in the Chronicle and Malaya on Nov. 7, 1997.

[234] Section 9 of the IPRA also gives the ICCs/IPs the ff. responsibilities over their ancestral domains:

(a) *Maintain Ecological Balance*-- To preserve, restore, and maintain a balanced ecology in the ancestral domain by protecting the flora and fauna, watershed areas, and other reserves;

(b) *Restore Denuded Areas*.-- To actively initiate, undertake and participate in the reforestation of denuded areas and other development programs and projects subject to just and reasonable remuneration;

(c) *Observe Laws*.-- To observe and comply with the provisions of this Act and the rules and regulations for its effective implementation."

Section 58 of the same law also mandates that ancestral domains or portions thereof, which are found to be necessary for critical watersheds, mangroves, wildlife sanctuaries, wilderness, protected areas, forest cover, or reforestation as determined by appropriate agencies with the full participation of the ICCs/IPs concerned shall be maintained, managed and developed for such purposes. The ICCs/IPs concerned shall be given the responsibility to maintain, develop, protect and conserve such areas with the full and effective assistance of government agencies.

[235] Hector S. de Leon, Textbook on the New Philippine Constitution pp. 473-474 [1987] citing the 1986 UP Law Constitution Project, The National Economy and Patrimony, p. 11.

[236] Under the Small-Scale Mining Act of 1991, "small-scale mining" refers to "mining activities which rely heavily on manual labor using simple implements and methods and do not use explosives or heavy mining equipment"-- Section 3 [b], R.A. 7076.

[237] See *infra.*, pp. 77-79?.

[238] Andrew Gray, The Indigenous Movement in Asia, Indigenous Peoples of Asia, ed. By Barnes, Gray and Kingsbury, pub. By Ass'n. for Asian Studies, at 35, 42 [1995].

[239] E.g. International Indian Treaty Council, World Council of IPs.

[240] Gray, The Indigenous Movement in Asia, *supra*, at 44, citing the International Work Group for Indigenous Affairs, 1988.

[241] Jose Paulo Kastrup, The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective, 32 Texas International Law Journal 97, 102 [1997].

[242] Benedict Kingsbury, "Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy, The American Journal of International Law, vol. 92: 414, 429 [1998].

[243] The World Bank supported the Chico Dam project. Due to the Kalingas' opposition, the WB pulled out of the project but the conflict between the Philippine government and the natives endured long after-- Marcus Colchester, Indigenous Peoples' Rights and Sustainable Resource Use in South and Southeast Asia, Indigenous Peoples of Asia, *supra*, pp. 59, 71-72.

[244] Kingsbury, *supra*, at 417.

[245] Section 22, Article II, 1987 Constitution.

[246] Interpellation of Senator Flavio on S.B. No. 1728, Deliberation on Second Reading, November 20, 1996, p. 20.

[247] Guide to R.A. 8371, Coalition for IPs Rights and Ancestral Domains, the International Labor Organization, and the ILO-Balance- Asia Dep't, p. 3 [1999].

[248] Also referred to as the "Indigenous and Tribal Peoples Convention, 1989."

[249] See Introduction to ILO Convention No. 169, par. 4.

[250] *Id.*, pars. 5 and 6.

[251] Perfecto V. Fernandez, Towards a Definition of National Policy on Recognition of Ethnic Law within the Philippine Legal Order, 55 P.L.J. 383, 385 [1980].

[252] Samuel K. Tan, A History of the Philippines, Manila Studies Association, Inc. and the Phil. National Historical Society, Inc., p. 6 [1997].

[253] Fernandez, *supra*, at 385, 391.