I. INTRODUCTION

A. Background

"Every type of society, of belief or institution, every way of life, constitutes a ready-made experiment the preparation of which has taken thousands of years and as such is irreplaceable. When a community disappears, a door closes forever, locking away knowledge which is unique."

- Claude Levi-Strauss

The Philippines is noted for its diversity of cultures, the richness of its traditions and the color of its past. Considering the wide range from which Indigenous Filipinos or communities come — a distance from Batanes Island in the north, to the Sulu Islands of the south — one can already imagine the variety of lives and cultures our people have. Yet one can not ignore the *caveat* of Mr. Claude Levi-Strauss especially in this day and age.

Indigenous peoples have been the subject of much encroachment and intrusion. From the time of foreign colonizers, they have shown a history of resistance to "non-indigenous catalysts." Thus, while the rest of the country fell under the Spanish and American rule, most indigenous peoples successfully lived in isolation, preserving intact their culture and lifeways.[1]

The 1960s saw the beginning of development aggression — tribal communities being besieged by transnational corporations engaged in mining, logging, agro-industrial farming and other export-oriented activities. Perhaps, with the collusion of the government, their once successful isolation had to give way. This marked the beginning of an alarming decadence in indigenous cultures. Thus:

> Traditional customs and artifacts have found their way in commercial areas and foreign places. These materials of ethnic nature have been considered sacred and highly respected by the elders due to their specific function in important rituals and activities . . .[2]

Dances and rituals that were once performed by them to invoke their gods and goddesses and spirits have become merely tourist attractions and entertainment.[3] The sum effect—for a culture based on communal land use and ownership in a situation dominated by private ownership—is cultural genocide.[4]

1 *The Bleak Situation of Tribal Filipinos*, SUNDAY JOURNAL 14 (27 Nov. 1988) [hereinafter The Bleak Situation].

2 Carmelita de Silva, *A Glimpse of the Indigenous Cultural Minorities of the Philippines*, LIFE TODAY 12 (1 February 1989).

3 *Id.*

4 *The Bleak Situation*, *supra* note 1.

Today, different problems beset these cultural communities. At the forefront is the terrifying problem of extinction. Indigenous culture has been prostituted due to the intervention of those who claimed to be "more civilized" but who, in fact, have no appreciation of how it is to be a part of an ethnic group. Much of these problems were caused by their displacement from their ancestral lands.

It was against this background that our present Constitution recognized the indigenous peoples' rights to ancestral lands and domain, and enacted various provisions relating to the preservation of their culture. More particularly, Article XIV, Section 17 vowed to "recognize, respect and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions and institutions." Moreover, recognizing that theirs is a peculiar, almost sacred relationship with the land, from which all culture, all past, all present, all future - all life - is held, Article II, Section 22, of the Constitution ordained that "The State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development." Furthermore, Article XII, Section 5, states:

> 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.
>
> The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.

Sec. 412(c) of the Local Government Code of 1991 gave legislative fiat to customary methods of dispute settlement. The law recognized that its preservation was necessary to the preservation of indigenous cultures.

B. An Attempt at a Definition

Indigenous Cultural Communities of the Philippines have been known as Tribal Filipinos,[5] National Minorities, and Ethnic Minorities.[6] "The Spanish colonial government called them *feroces* and *infieles*. The North American colonial administration identified them as "savages, illiterates and non-Christians."[7] In 1919, the Supreme Court[8] referred to the Manguianes (Mangyans), an ethnic group, as "signifying savage, mountaineer, pagan and negro."

"Tribal Filipinos," a term coined by the Catholic Tribal Filipino Apostolates, suffers from an air of anthropological imprecision and connotes "primitivism," or backwardness.

"Ethnic minority" refers to those in the Philippine population who kept their ancestral identity despite Spanish and American colonization in the Philippines. The term 'minority' is however criticized by Leonen, *et. al.* as numerically inaccurate. It is argued that while the Ifugaos may number as the Batanguenos, the latter are not considered 'minorities'.

Cirilo Abelardo, *Ancestral Domain Rights: Issues, Responses and Recommendations*, 38 ATENEO L.J. 87 (December 1993).

Rubi v. Provincial Board of Mindoro, 39 Phil. 660 (1919).

The present Constitution uses "Indigenous Cultural Communities." The term is criticized as limiting and ignores the fact that indigenous peoples are a political, economical, social and spiritual community as well.[9]

For the purposes of this thesis, however, the term indigenous peoples (used interchangeably with Indigenous Cultural Community) shall be used to mean "... a homogenous society identified by self-ascription by others, who have continually lived as a community in a communally bounded and defined territory, sharing common bonds of language, customs, traditions and other distinctive cultural traits, and who through resistance to political, social and cultural inroads of colonization, became historically differentiated from the majority of Filipinos ...."[10]

C. Purpose and Relevance of the Study

This thesis aims *first*, to make an analysis of the two possible avenues for securing the recognition of the indigenous peoples' right to own their ancestral land, *i.e.*, the *Cariño*[11] doctrine on *native title* and the *Manahan Amendment to the Public Land Act*,[12] and show that under any of these two avenues, there is an incontestable right to recognize indigenous ancestral domain rights and ancestral land ownership, and to allow registration thereof. *Second*, this thesis also aims to make a survey of various utilization and tenurial instruments covering forestal areas or areas otherwise occupied by indigenous peoples as expressions of governmental policies and show that these instruments are inadequate responses to the demands of the indigenous peoples regarding their ancestral domain.

Third, conceding that ancestral domains are private property, this thesis aims to show that there is a need to determine specifically which parts of the domain are held individually, by kin or clan, or by a community. This is to afford proper registration of the respective lands to proper parties.

Fourth, this thesis also aims to show that the present concerns regarding environmental protection and preservation constitute valid reasons for the exercise of police power for the purpose of regulating ancestral domain resource management and limiting ancestral land conveyance or transfer.

[9] Augusto B. Gatmaytan, *Land, Life and Law: The Continuing Struggle of the Indigenous Peoples*, 3 HUMAN RIGHTS FORUM, No. 1, 1993, at 27.

[10] House Bill No. 33 (10th Congress, 2nd Regular Session), § 3(a).

[11] The Doctrine proceeds from the Supreme Court pronouncement in *Cariño v. Insular Government*, 4 Phil. 935, 1909, that "when as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest, and never to have been public land."

[12] The Manahan Amendment (RA No. 3872) inserted § 48(C) to CA No. 141 allowed members of national cultural communities who have been in open, continuous, exclusive and notorious possession and occupation of lands of the public domain suitable to agriculture, *whether disposable or not*, for at least 30 years to have a judicial confirmation of their title.

Thus, it is submitted that the recognition of indigenous ownership of ancestral lands with full rights of ownership, limited merely in terms of ancestral domain resource management and subsequent alienation to non-indigenous peoples, is the most equitable means of according the indigenous peoples their primordial right to their ancestral land and at the same time fulfilling the Constitutional mandates on indigenous peoples and environment.

D. Limitations of the Study

This thesis focuses mainly on the problem of ancestral land and ancestral domain rights through an analysis of the *Cariño* decision and the application of the *Manahan Law*. Moreover, reference to environmental concerns will be made with respect to property rights regulation within the ancestral domain. Occasional references to other laws like the Forestry Code and the Public Land Act are made whenever necessary and proper. This thesis does not intend to make a survey and analysis of all land laws and related natural resources laws which affect the rights of the indigenous person with respect to his ancestral domain claim.

E. Methodology

A consideration of socio-historical factors, when proper, would be made. Field work,[13] on-site interview and survey, complemented by a survey of past literature from both governmental (like the Natural Resources Management Program Policy Studies-DENR) and Non-Governmental Organizations shall be the main methods of data gathering.

II. THE INDIGENOUS FILIPINO

A. The Emergence of the "Cultural Minorities"

> Sir, before we were cultural minorities ....[14] The expression surprised many people present, and indeed, seemed meaningless to some. Anthropologists and tourists have made us so aware of the difference between the so called minorities and the rest of the Filipino people that we regard them almost as a separate species — and it never occurs to us there may have been a day when they were not cultural minorities.[15]

[13] The proponent worked as a legal intern for Tanggapang Panligal ng Katutubong Pilipino (PANLIPI) - Palawan for around five weeks and had occasion to meet with the Tagbanua and Batak Tribes of Palawan.

[14] The above statement was made by an Igorot student in an open forum of the Baguio Religious Acculturation Conference held on December 1973.

[15] W. H. Scott, *The Creation of a Cultural Minority*, CRACKS IN THE PARCHMENT CURTAIN, 1982 (month and page number of publication unavailable).

One may well recall the banner used by the New Society under the late President Ferdinand E. Marcos for nation-building and national consciousness as *"Isang Lahi, Isang Bansa, Isang Tadhana"* (One Race, One Nation, One Destiny) and *"Isang Bansa, Isang Diwa"* (One Nation, One Mind). The New Society called them cultural communities and the programs of nation-building, of course, brought them a certain degree of prominence. Nonetheless, even during those times and long before, they "scarcely appear(ed) in the pageant of history presented in the Philippine school system because they have lived outside Spanish control . . . ."[16] The main knowledge of them sprang from tourist reports and anthropological studies some of which had depicted them simply as outcasts, brigands or even savages. These studies have the effect of making the Filipinos aware of the differences between or even the superiority of the majority culture over that of the minority. The studies, however, did not inquire as to why the differences came about "and therefore do not contribute to understanding why some Filipinos still dance the dances their ancestors danced but others do not."[17]

W. H. Scott[18] asserts that it is possible to discern the rise of the cultural concept in the mind of the Spanish observers — a concept akin to what is now known as cultural minorities. It is a concept born of the responses to the historic processes of the Spanish conquest by cross and sword.

Scott gives an account and analysis of his experience with the Isneg people of Apayao in the North Luzon mountains. Spanish and contemporary sources consider mountains impenetrable barriers to communication — even conquest. It is generally accepted that this impenetrability is the reason for the existence of cultural communities in the area.

> So far as we can tell, this people was divided into three language groups at the time of the Spanish advent. Those in the lower Cagayan Valley spoke Ibanag, those in the Central Plain along the south China sea, Ilocano, and those in the mountains in between, Isneg. None of these groups were united; none had kings or common governments and *none was either a majority or minority.* They were all composed of independent baranganic communities whose relations with each other, whether of the same language or different, varied from isolation to cooperation or conflict according to circumstances.[19] (emphasis supplied)

The Spanish colonial pressure caused the Ilocanos and Ibanag to submit to the Spanish dominion. The Isneg, however, remained isolated in the mountainous regions of the Gran Cordillera. As the years of occupation passed, the Ilocanos and Ibanag gave up more and more of their culture to assimilate into their colonial master's

[16] *Id.*

[17] *Id.*

[18] Scott has written substantial literature on Philippine Indigenous Culture and is cited in legal literature. He was a professor of History in the University of the Philippines for ten years. He holds a B.A. from Yale, an M.A. from Columbia, and a Ph.D. from the University of Sto. Tomas. Among his scholarly works are: *Prehispanic Source Materials for the Study of Philippine History, The Discovery of the Igorots, Ilocano Responses to American Aggression 1900-1901 and Filipinos in China Before 1500.*

[19] Scott, *supra* note 15.

culture. More and more, they became more like each other (and like that of the Hispanized population) and less like their ancestors. Thus, by the close of the 19th century, this divergence had created a real Filipino majority— those who shared the same king— the Spanish king. Those who did not were simply lumped as cultural minorities. Thus, *minority* emerged as a distinction among Filipinos as to whether or not they submitted themselves to the Spanish Crown.

The irony is readily apparent. Those who changed most became today's most favored Filipinos. And those who changed least, the "guardians of Filipino culture, are legally defined as uncivilized, backward people with barbarous practices and a low order of intelligence."[20] Thus, the cultural minority was created where none had existed. The cultural minority was born.

B. Brief Statistical Profile

The indigenous peoples of the country consists of about 110[21] major ethnolinguistic groups with a population of about 12 million.[22] They inhabit at least 61 out of 77 provinces nationwide. It is estimated that they comprise about 31% of the Philippine population.[23]

Records show that around 50 different tribes have been found in the North. Yet, it is admitted, that some tribes have neither been identified nor listed. An estimate of around six million ethnic people from Regions I, II and III are identified. Indigenous peoples reported from Regions IV to XII are projected to number about 12 million.[24]

[20] Owen J. Lynch, Jr., *Native Title, Private Right and Tribal land Law: An Introductory Survey,* 57 PHIL. L. J. 268 (1982).

[21] Joey Austria, *The Indigenous Peoples and Ancestral Domains,* 2 ENERGY FORUM 1, February 1996, at 2. Mr. Joey Austria is the Chief of the Indigenous Community Affairs Division, Special Concerns Office, of the DENR. The Philippine Agenda reports that the Indigenous Peoples are divided into more than 400 ethnolinguistic groups nationwide. *See* Joel Sayo, *Who Are Our Ethnic Minorities?* PHIL. AGENDA, October 1, 1988, at 4-5.

[22] PHILIPPINE AGENDA (1 October 1988) reports it at about 6.5 million.

[23] Carmelita de Silva, *A Glimpse of the Indigenous Cultural Minorities of the Philippines,* LIFE TODAY, February 1, 1989, at 12. The PHILIPPINE AGENDA, reports it at 14% in 1988.

[24] *Id.*

The *MEMORIA*,[25] an ethnological and anthropological study, classified the indigenous peoples into three (3) major groups by descent: the Negritos,[26] the Malayans,[27] and the Indonesians.[28]

C. Indigenous Peoples and International Human Rights

The issue of indigenous peoples and ancestral domain rights is a human rights issue.

> Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights, without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.[29]

The fight for the rights of the indigenous peoples, even in the international level, has always been a fight for their land and self-determination. It is understandable that land has always been their primary concern. For, how can a culture develop, how can it be preserved outside the very environment which sustains it? Theirs has been a struggle of generations, for land, their life.

> Our principal and fundamental struggle is for the land, our territory and natural resources .... Our defence for the land and natural resources is for the cultural and human survival of our children. For us, the first thing is to secure our land which belongs to us by right, because we are the true owners of the land and natural resources. *We indigenous peoples know that without land there can be no education, there can be no health and there can be no life.*[30] (emphasis supplied)

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[25] The *Memoria* was written by Fr. Jose Ma. Ruiz, O.P. and prepared for the General Exposition on the Philippine Islands in Madrid in 1887. It is unfortunate however that the censors did not allow the sale of the *Memoria* although it was an official publication. It apparently contained severe criticism of the Public Administration of the Colonial Government. *See* LIFE TODAY, *supra* note 23 at 13.

[26] The Negrito groups constitute a complex population. There are two major branches: the *Mamanwa* and the others composed of groups with other sub-groups as the *Agta, Alta, Ata Ati, Atta, Ayta* and *Batak*. The *Mamanwa* are located in northeastern Mindanao. The other sub-groups are scattered throughout Palawan to northern Luzon. Their outward appearance display kinky hair and dark pigmentation. They are excellent hunters and gatherers using bow and arrow. They also practice horticulture in small patches.

[27] The *Memoria* sub-classifies Indigenous Peoples belonging to the Malayan group as either: *mestizo* of Negritos, *mestizo* of Chinese or *mestizo* of Arabian and Indonesian. Among those belonging to the first group are the *Ilongots* of the South Caraballos and Casiguran, Baler (Aurora Province), the *Manguianes* (Mangyans) of Mindoro Island, the *Apayaos* of the Central and Northern Luzon, and the *Tagbanua* of the Calamianes and Palawan Islands.

[28] Among the tribes under this are the *Mandayas*, the *B'laans*, the *Subanos*, the *Tiruray*, the *Kalaganes and* the *Manobos*. The Manobos are perhaps the most complex of the ethnic groups in the Philippines in terms of the relationship and names of the various sub-groups which belong to this family. Mention has been made that there are about 82 sub-groups which comprise the *Manobo*. The *Manobos* practice multi-cropping and intercropping including rice and corn. Settlements are generally kin-oriented nuclear groups located near their swidden farms.

[29] Proclamation of Tehran, May 13, 1968.

[30] J. Urnavi, *Statement on behalf of the International Working Group for Indigenous Affairs, 1985 cited in* SPECIAL RAPPORTEUR E/CN.4/Sub.2/1994/9 (6 July 1994).

All "peoples" have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.[31] This was lifted from the 1948 Universal Declaration of Human Rights. It is submitted that the term "people" refers to the "total population of a state and not to ethnic, religious, or linguistic minorities living within the territorial boundaries of a state."[32] It appears that the exclusion of the ethnic minorities (or the term nation as an ethnic concept) sprang from the general understanding of the universality of human rights: that all men were created equal. On the other hand, a recognition of majority-minority rights would imply a rejection of the premise of universality. Thus, it would appear that ethnicity was not generally regarded as an issue of human rights at the start.

Notably, when the Universal Declaration of Human Rights was being drafted by the Human Rights Commission in 1946-1948, chairperson E. Roosevelt was quoted as saying: "Minority rights (is) a purely European matter which has no relevance to human rights in general."[33] This, of course, is not the case, for despite the "universality" of human rights, the minorities did exist and were prejudiced elsewhere. Be that as it may, the Universal Declaration of Human Rights did not deal with culture except in a general and abstract way.

It is contended, however, that the term "people" would include "nation" in an effort to include ethnicity and justify the absence of provisions dealing with culture. Thus, the International Court of Justice (hereinafter referred to as ICJ) proposed the following considerations as embodiment of the term "people": common history, racial or ethnic bonds, cultural or linguistic, religious, ideological bonds, common territory or geographical locations, common economic base, and sufficient number of inhabitants.[34]

The elements enumerated by the ICJ are no different from the objective definition of "nation" as comprised of language, territory, ethnicity, religion and common culture — effectively barring certain groups as lacking a definite territory, sufficient population or even common culture.[35] It is suggested, on the other hand, that it is the subjective force — the determined goal of one people to live as one, bound collectively by a common history, language, institution . . . that determines a nation.[36]

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[31] *The International Bill of Human Rights*, U.N. Doc. (1988).

[32] Rizal G. Buendia, *Ethnic Identity, Self-Determination and Human Rights: Majoritarian Democracy Re-examined*, 2 KASARINLAN 8, 1993.

[33] *Id., citing* Rodolfo Stavenhagan, *The Problem of Cultural Rights*, 16 ECONOMIC REVIEW 58, 1991 (moth of publication unavailable).

[34] *Id., citing* Indian Law Resource Center, *Indian Rights Human Rights: A Handbook for Indians*, INTERNATIONAL HUMAN RIGHTS COMPLAINT PROCEDURE 14, 1984 (month of publication unavailable).

[35] *See* BOYD C. SHAFER, FACES OF NATIONALISM 17-20 (1972).

[36] *See* HANS KOHN, THE IDEA OF NATIONALISM 15 (1961).

Nevertheless, the United Nations has not appreciated nor recognized a different meaning of "nation" apart from those of the post-colonial period and of "people" other than merely those that comprise a majority of the State.[37]

There are two forms of self-determination which have gained international recognition. The first type applies to societies and nation-states whose populations are ruled by a minority which embodies an apartheid philosophy. The second pertains to people of a state living under foreign domination.[38] These two concepts are apparently inapplicable to us.

A third concept, which has not yet been recognized , are the new forms of post-colonial self-determination involving sub-state regional identities or regional minorities (internal colonialism). However, as shown above, the vagueness of the concepts "people" and "nation" has made the applicability of certain international documents doubtful. Apparently, the United Nations has yet to recognize the realities of "internal colonialism."[39]

1. RECENT DEVELOPMENTS

The non-recognition of internal colonialism does not, however, preclude the United Nations from upholding certain rights of ethnic minorities. Article 27 of the International Covenant on Civil and Political Rights of 1966 provides:

> In those States in which ethnic, religious or linguistic minorities exist, *persons belonging to* such minorities *shall not be denied* the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. (emphasis supplied)

It must be noted that the provision states "persons belonging to" and not the group itself. The effect is to de-emphasize the fact that certain indigenous peoples' rights were not necessarily individual. Thus, the focus of Article 27 would be the persons belonging to, or members of the group rather than the community itself. Moreover, while Article 27 recognizes certain rights of the indigenous person, it does so in the negative, instead of a positive assertion of the indigenous peoples' right of self-governance.

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[37] Buendia, *supra* note 32.

[38] DAVID B. KNIGHT, SELF-DETERMINATION FOR INDIGENOUS PEOPLES: THE CONTEXT OF CHANGE IN NATIONALISM, SELF-DETERMINATION AND POLITICAL GEOGRAPHY 120 (1988).
Buendia cites Dov Ronan [THE QUEST FOR SELF-DETERMINATION (1979)] to postulate five (5) forms of self-determination:
1. Nineteenth century German and Italian nationalism;
2. Marxist class struggle;
3. Minorities' self-determination associated with the ideas of Woodrow Wilson and John Stuart Mill;
4. Anti-Colonialism; and
5. Ethnic self-determination.

[39] Buendia, *supra* note 32, *citing* Michael Hechter, INTERNAL COLONIALISM: THE CELTIC FRINGE IN BRITISH NATIONAL DEVELOPMENT 1536-1966 (1979).

In 1971, the Sub-Commission started a "Study of the Problem of Discrimination Against Indigenous Population." In 1982, the Sub-Commission established the Permanent Working Group on Indigenous Peoples (WGIP) to review the condition of indigenous peoples and to evolve standards for their rights and protection. The WGIP, thus, became the first structure principally dealing with indigenous peoples.

In 1985, a Draft Declaration on the Rights of Indigenous Peoples (UDIR) was drafted by Indigenous Non-Governmental Organizations and was submitted to the WGIP as a working text. One of its relevant provisions states:

> Operative Paragraph 7
>
> Indigenous peoples have the collective and individual right to be protected from cultural genocide, including the protection and redress for:
>
> (a) Any act which has the aim or effect of depriving them of their integrity as distinct societies, or of their cultural or ethnic characteristics or identities;
>
> (b) Any form of forced assimilation or integration by imposition of other cultures or way of life;
>
> (c) Dispossession of their lands, territories or resources; and
>
> (d) Any propaganda directed against them.[40]

Noteworthy is the fact that the paragraph affirms both the collective and individual rights of the indigenous peoples unlike that of Article 27 of the Universal Declaration of Human Rights which focuses on individuals. There is, however, no mention in subparagraph 7(c) whether or not the lands referred to are lands held as ancestral lands or otherwise. Be that as it may, indigenous rights, in the international level, are in the offing. Thus, the 1994 *Special Rapporteur*[41] considered the issues of indigenous peoples rights and environment so important that it warranted attention in its final report.

It is contended, however, that even if the United Nations should endorse the Draft Declaration, it is not an assurance that it shall provide an impetus for the solution of the problems which beset the world's indigenous peoples. Thus:

> contemporary history has taught us that universal documents and international bodies can be powerless in the enforcement of idealistic programmes and visions. It remains for the individual indigenous people of each region, each statement (sic), to forcefully assert the demands that flow out of the desire for self-determination.[42]

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[40] Draft Declaration on the Rights of Indigenous Peoples (UN Doc. E/CN.4/Sub.2/1992/33).

[41] Economic and Social Council, Committee on Human Rights: Sub-commission Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1994/9, (6 July 1994). [hereinafter UN Special Rapporteur].

[42] ED MARANAN, SURVIVAL AGAINST DEVELOPMENT 105 (year of publication unavailable).

While there is much to be desired in having a world-consensus for the protection and preservation of indigenous peoples' rights, there is much to be done in the fight for the advancement and recognition of indigenous rights in the Philippines. A survey of colonial and post-colonial policies and attitudes towards indigenous peoples would show a most needed evaluation of current laws and policies affecting Philippine indigenous peoples.

D. The Status of Indigenous Peoples in Philippine Law

1. CONCEPTUAL FRAMEWORK

An understanding of the present attitudes and post colonial policies regarding the country's indigenous peoples would require a glimpse into the Spanish colonial framework, which appeared to have been the main cause for ethnic insensitivity, if not prejudice.

Filipinos were widely termed as *indios* during the Spanish regime. This term, however, was the same term used to designate all indigenes throughout the Spanish empire. Spain persisted in referring to all native peoples within their empire as *los indios*.[43] The first European imagery of *los indios* was lifted from the chronicles of Columbus, who, in a widely published letter in 1493, described the cannibalistic Caribbean Arawaks.[44] Spain, on the other hand, used the twin criteria of Christianity and civilization to describe the indigenes. Using this twin criteria, Spain found the Indians in the Americas as wanting in letters, laws, government, clothing, arts, trade, agriculture, morals and religion.[45] These perceived inadequacies appear to be the common Spanish perception of all *indios*, including the Philippine indigenes.

Thus, in the Manila Synod debates of 1582, both the friars and colonists agreed that the *indios* needed guardians. They just fought and argued on who shall be the guardian.[46] This resulted in a double-edged paternalism[47] - that is, they had the duty to protect and respect native rights, but at the same time, no native can bring suit against a Spaniard who violated his rights, unless another Spaniard sues in his (native's) behalf.

[43] Owen J. Lynch, *The Philippine Colonial Dichotomy: Attraction and Disenfranchisement*, 63 PHIL. L. J. (Jun 1988), *citing* R. Berkhofer, *The White Man's Indian: Images of the American Indian From Columbus to the Present* 5 (1979). Spain also employed the phrase *naturales de la tierra* (natives of the land).

[44] *Id.* at 43.

[45] *Id.*

[46] *Id., citing* Phelan, *Some Ideological Aspects of the Conquest of the Philippines*, THE AMERICAS: A QUARTERLY REVIEW OF OUTER-AMERICAN CULTURAL HISTORY (1957).

[47] *Id., citing* THE HISPANIZATION OF THE PHILIPPINES: SPANISH AIM AND FILIPINO RESPONSES 121 (1959).

> (W)hen one party to a suit was a Spaniard, or when a native was in any way injured in his rights by a Spaniard, the suit was prosecuted under the direction of the *Protector de los Indios* (Protector of the Indies), of the *encomendero*, or the local curate, according to the requirements of each case. In this manner, Spanish prestige was preserved inasmuch as it was no longer an Indian who asked for the punishment of one belonging to a superior race, but a Spaniard who took up the Indian's cause and conducted the suit against another Spaniard.[48]

The term *los indios* was also conveniently used to differentiate between those who submitted themselves to Spanish rule (hispanized) and those who did not, or the *binyag* or *hindi binyag* (baptized or not baptized). The Spaniards' descriptions of indigenous cultures were universally negative. Spanish clergymen and officials not only believed in the superiority of the Hispanic culture, but were even convinced that the "pre-Hispanic cultures were manifestation of the devil."[49] The colonial mind-set virtually excluded any positive consideration of indigenous perspectives and cultures. The empowerment of the *ilustrado* collaborators was greatly enhanced by the disdain over the indigenous populations. The *ilustrados* continually harped and boasted that there was a great difference between them and the common run of people.[50] Thus, what emerged was a form of sub-colonialism occurring between the *ilustrados* and the hispanized populations, against the unhispanized, primitive Filipinos.

An official Christian/non-Christian dichotomy, therefore, ensued and was ingrained in the minds of the colonial elite. Worcester commented that the Christian Filipinos were "absolutely without sympathy for the non-Christian peoples and have never voluntarily done anything for them, but on the contrary have shamelessly exploited them whenever opportunity has offered."[51]

It was under this concept of sub-colonialism that colonial and post-colonial laws and policies were made affecting the indigenous peoples.

2. LAWS, POLICIES, AND JURISPRUDENCE

Spanish colonial policies and legislation treated the Filipinos as immature wards and minors;[52] not for a moment did they doubt the Filipinos' inability to govern themselves, as was seen during the Manila Synod.

[48] *Id., citing* Pardo de Tavera, *History*, in 1 CENSUS OF THE PHILIPPINE ISLANDS 335 (1903).

[49] J. SCHUMACHER, THE PROPAGANDISTS' RECONSTRUCTION OF THE PHILIPPINE PAST: PERCEPTION OF THE PAST IN SOUTHEAST ASIA 265 (1979).

[50] Letter from William Howard Taft to A. C. Thompson, *cited by* Lynch, *supra* note 43.

[51] D. WORCESTER, 2 THE PHILIPPINES PAST AND PRESENT 644 (1914) *cited by* Lynch, *supra* note 43.

[52] Lynch, *supra* note 43.

The Synod began its deliberations by declaring that the Castillian monarchs "do not occupy the Philippines by right of inheritance or through a just war."[53] It appeared that the Synod participants justified Spanish usurpation on the basis of the indigenous peoples' supposed cultural inferiority.

This concept of the indigenous peoples being culturally inferior would be manifested in the colonists' governmental policies of assimilation and integration. This would be carried on even to present-day policies. The guardian-ward relationship would even bear much on jurisprudence. Thus, in *People v. Cayat*,[54] the Supreme Court justified Act 1639[55] as a valid exercise of police power:

> Act 1639, as above stated, is designed to promote peace and order in the non-Christian tribes so as to remove all obstacles to their moral and intellectual growth, and eventually, *to hasten their equalization and unification with the rest of their Christian brothers. Its ultimate purpose can be no other that to unify the Filipino people with a view to a greater Philippines.*[56] (emphasis supplied)

In fact, as early as 1551, the Spanish Government had assumed a stable position in keeping the indigenes in concentrations or the so called *reducciones*[57] in an attempt to accord them the spiritual and temporal benefits of civilized life. Spain regarded it as its sacred duty of conscience and *humanity* to civilize the unfortunate people living in the obscurity of ignorance, and to accord them the moral and material advantages of community life.[58]

This policy continued even during the American period. President McKinley's instruction to the Philippine Commission, dated April 7, 1900 stated that:

> The commission should adopt the same course followed by Congress in permitting the tribes of our North American Indians to maintain their tribal organization and government, and under which many of those tribes are now living in peace and contentment, surrounded by a civilization to which they are unable or unwilling to conform.[59]

The government appeared to have been constantly burdened by the problem of whether or not to leave the indigenous peoples alone or to guide them to the path of civilization. History would show that the colonial governments evidently opted for

[53] J. Aragon, *The Controversy over Justification of Spanish Rule in the Philippines, cited by* Lynch, *supra* note 43.

[54] 68 Phil 12 (1939).

[55] Act 1639 is an act prohibiting members of non-Christian tribes from intoxication by liquors other than native or indigenous wines or liquors.

[56] People v. Cayat, 68 Phil 12 (1939).

[57] The process... to convert pagan people to a civilized way of life exemplified by the life of the Harpsburry Empire. *See* S. Candelaria, *The Development of Legal Protection for the Indigenous Population and Religious Minority Under Philippine Law*, PHIL. HUMAN RIGHTS MONITOR, Feb. 1990, *citing* Scott.

[58] Decree of the Governor-General of the Philippine Islands, January 14,1887; *see* People v. Cayat, 68 Phil. 12 (1939).

[59] People v. Cayat, 68 Phil 12 (1939).

the latter. The same policy of *reducciones* was one of the justifications in *Rubi v. Provincial Board of Mindoro*[60] to keep the *Manguianes* in prescribed townships or reservations to make efforts to civilize them more effective.

Moreover, in *People v. Mori*,[61] the Supreme Court held that the fact that the appellants were non-Christians entitled them to a special treatment under Sec. 106 of the Administrative Code of the Department of Mindanao and Sulu.

It would thus appear that the government did take seriously its "guardianship over an immature child." What is ironic, however, is that it was the same government which disenfranchised the indigenous peoples of their most prized possession — their land.

3. ATTRACTION AND DISENFRANCHISEMENT

The colonial regime initially recognized two types of private ownership rights: those held pursuant to customary criteria, and those of the Crown (*terrenos realengos*). Customary rights were predicated on possession and usage. Crown lands, on the other hand, comprised all lands not occupied by the natives. Private estates were also established by royal grants. Various laws were promulgated to guaranty customary law rights many of which applied to non-Christians.[62]

In his instructions to Legaspi, King Philip II emphasized that while land can be divided among the colonizers, they (colonizers) shall not take or occupy any private property of the Indians. Thirty years thereafter, Philip would reiterate his instructions:

> Let not lands be given with prejudice to the Indians and those given should be returned to their owners.
>
> We command that the habitations and lands that are given to the Spaniards be without prejudice and offense to the Indians and those given with prejudice and offense are to be returned to those to whom the right belongs.[63]

In fact, the indigenous concept of ownership by occupation and cultivation was recognized early on by the *Laws of the Indies* which governed Spanish possessions in

[60] 39 Phil 660 (1939).

[61] 55 SCRA 382, 404, *citing* People v. Main, 51 Phil 933 (1924) and Lumiguis v. People, 19 SCRA 842 (1967). This case however has been refined by People v. Macatanda, 109 SCRA 35 (1981). The Court said that membership in a cultural minority does not *per se* imply being an uncivilized or semi-civilized state of the offender to qualify as a mitigating circumstance for lack of instruction.

[62] Owen J. Lynch, Jr., *Land Rights, Land Laws and Land Usurpation: The Spanish Era (1565-1898)*, 63 PHIL. L. J. 82, 85 (year of publication unavailable).

[63] *Id.*, *citing* BLAIR AND ROBERTSONS and the *Laws of the Indies*.

the Philippines and elsewhere. *Lynch*[64] would assert that between the periods of 1523 to 1646, at least twenty-one (21) laws were enacted making clear that distribution of land rights to loyal Spanish subjects was not to impair native land holdings.

The Royal Decree of October 15, 1754 stated that "justified long and continuous possession" by the natives qualified them for the title to their cultivated land, and, should they not be able to show title, proof of ancient possession shall be deemed as valid title.[65]

Nevertheless, even with the seeming deference for native landholding, subsequent decrees, laws and colonial policies would effect a legal disenfranchisement. It began with the Royal Decree of June 25, 1880. Under this Decree, all persons in possession of real properties were deemed owners provided they have occupied and possessed the lands in good faith since 1870. This provided for a voluntary registration of ownership. Thus, was born the concept of "paper-titles" which was understandably alien to the indigenous culture. It was only around 1894, when the "Maura Law" was passed, however, when systematic land grabbing of ancestral lands commenced.

The Royal Decree of February 13, 1894 or the "Maura Law" provided in its preamble the purpose for which it was passed, "to insure to the natives, in the future whenever it may be possible, the necessary land for cultivation, in accordance with traditional usages." Article 4 of the "Maura Law," however, betrayed a different purpose. Thus:

> The title to all agricultural lands which were capable of adjustment under the Royal Decree of 1880, but the adjustment of which has not been sought at the time of promulgation of this Decree ... will revert to the State. Any claim to such lands by those who might have applied for adjustment of the same but have not done so at the time of the above-mentioned date, will not avail themselves in any way or at any time.[66]

The effect was evident. All those who had not registered their customary claims have consequently lost them. Thus, the indigenous population, most of whom were unhispanized, illiterate and unaware of the colonists' political systems and framework, became instant squatters in the lands they occupied. Unregistered land under the Maura Law became the State's property and it did not matter whether the *indios* possessed and cultivated the same. What mattered only was the fact of registration.

[64] Owen J. Lynch, Jr., *Tribal Land Law*, 57 PHIL. L. J. at 274 (1982) [hereinafter Lynch, *Tribal Land Law*]. *See also Laws of the Indies*, Book 2, Title 1, Laws 4 (1555) and 5 (1529); Book 4, Title 2, Laws 6 (1621), 8 (1523), and 10; Book 4, Title 12, Laws 5 (1532), 7 (1588), 9 (1594), 14 (1578), 16 (1531), 17 (1546), 18 (1642), and 19 (1646); Book 6, Title 1, Laws 1 (1580), 15 (1574), 23 (1609), 27 (1571), 30 (1546) and 32 (1580); Book 6, Title 3, Laws 9 (1580) and 26 (1528).

Lynch was a visiting professor in the College of Law, University of the Philippines. He is a Graduate Fellow, Yale University Law School. He has written substantial legal literature of Philippine land laws and indigenous peoples as part of his doctoral dissertation to be submitted to the Yale University Law School.

[65] *Id.*

[66] *Id.*

Thus, in a most brutish affront to the dignity of our indigenous peoples, the paper was upheld over the person, the title over actual cultivation and possession.

Lynch would assert that the Maura Law demonstrated the colonial regime's insensitivity to the plight of the masses. The Maura Law theoretically empowered the colonial regime to deny, for the first time ever, legal recognition of customary property rights. The immediate legal effect was to disenfranchise several million rural farmers[67] — and indigenous communities. Thus:

> To the great majority of peasants, accustomed to unwritten rules of land tenure, the land law was too involved, the idea of a (documented) land title, too was strange. . . The comparatively few people who acquired legal titles were mostly persons belonging to the *cacique* group, and these often laid claim to more land than they actually had a right to. Thus in many cases peasants who had felt secure in their possession of their land and had not known or cared about (documentary) titles were suddenly confronted with the fact that a wealthy person, with the law behind him, was claiming their land. These peasants were then driven from it or forced to become tenants.[68]

In 1903, the Philippine Commission enacted Act No. 926, the first of the Public Land Acts. The Act provided for the various dispositions of parts of the public domain by homestead and free patents, sale, lease and judicial confirmation of imperfect titles, pursuant to the Philippine Bill of 1902. The Organic Act, on the other hand, expressly authorized the Philippine Commission to issue patents and to convey to any native of the Islands title over public lands actually occupied by such native for at least the past ten years.

The first Philippine Public Land Act conclusively presumed a native who was able to prove continuous prior possession of public agricultural lands since 1893 to have performed all the conditions essential to government grant. It must be noted, however, that although the Public Land Act applied to all public lands, its scope was limited to *agricultural lands* "which have been officially delimited and classified and when practicable, surveyed and which have not... in any manner become private property."[69] The second Public Land Act (Act No. 2874 of 1919) and the third Public Land Act (C. A. No. 141 of 1936) ran in the same vein and did not recognize indigenous claim to ancestral land (at least until a momentary period during the effectivity of the Manahan amendment). The clear implication was that the lands occupied by the indigenous peoples, pursuant to an ancestral domain claim were not registrable.

Thus, it came to pass that while indigenous cultural communities adhered to their customary modes of land use and ownership, the non-indigenous subscribed to the western legal system of land titling and registration. Two persons may claim ownership over a certain parcel of land under two different bases: the indigene by virtue of his native, customary right over the land, and the non-indigene by virtue of his paper-title; and in the case of supposed inalienable and non-disposable lands of

[67] *Id.*

[68] *Id., citing* K. Pelzer and D. Sturtevant.

[69] Commonwealth Act No. 141 (1936) (as amended), § 8.

the public domain, the indigene by virtue of his pre-conquest right, and the State, by arrogating unto itself ownership of all natural resources under the doctrine of *Jura Regalia*. Conflict was therefore inevitable.

III. THE PROBLEM OF ANCESTRAL LAND AND ANCESTRAL DOMAIN RIGHTS

The Ancestral Lands[70] and Ancestral Domain[71] rights issues are not just matters of giving a piece of land to a person or to a group of persons. The issues involve the recognition and protection of a relationship between land and people, expressed as a way of life springing from a long history of shared, communal experience and intimate intercourse with the land. Thus, the demand of the indigenous peoples is properly a demand for the recognition of the Ancestral Domain Rights and not just Lands. Land for them is life. Take away their land and you take away their culture, their bond, their tradition, their history — their life. Land, therefore, bears more than just a social function. To borrow Chief Seattle's description of the indigenous person's relation to the land:

> My people venerate each corner of this land, each shining pine needle, each sandy beach, each wreath of mist in the dark woods, each glade, each humming insect; in the thought and practice of my people, all these things are sacred. The sap rising in the tree carries the memory of the red man.[72]

In the conflict of legal perspectives between pre-conquest title and the State's claim to all natural resources, what prevailed was that anchored in the Regalian Doctrine.

A. The Regalian Doctrine

The Doctrine is a legal fiction based on the belief that in 1521, when Ferdinand Magellan planted the Spanish flag on Mactan Island, he simultaneously declared the Spanish King's ownership of all the still unexplored and politically undefined archipelago. Contrary to this prevailing belief, however, neither the Pope, the Spanish King, nor Magellan purported to usurp unilaterally all of the customary property rights, or even the sovereign rights, of the natives.[73] It appeared that all that Magellan was after were trade rights.[74] Some writers would in fact argue that the Spanish colonial authority did not extend the implementation of this theory to its "possessions"

[70] As understood among organized Indigenous Communities and advocates, Ancestral Lands cover only surface rights to land and do not include the natural resources found in these areas. *See Struggle Against Developmental Aggression: Tribal Filipinos and Ancestral Domain* (1990).

[71] A broader term, includes the land and the resources found therein and the right to make traditional fishing, hunting, cutting and gathering of forest products.

[72] Special Rapporteur, *supra* note 41.

[73] Owen J. Lynch, Jr., *The Legal Bases of Philippine Colonial Sovereignty: An Inquiry*, at 85 [hereinafter Lynch, *The Legal Bases*].

[74] *Id.*, *citing* A. Pigafetta, 33 BLAIR AND ROBERTSONS 109.

in the Far East, i.e., the Philippines, but actually recognized legal ownership by indigenous communities.[75]

Nonetheless, it was clear that by 1898, the Spanish colonial government had institutionalized the concept of the Crown, owning all lands not registered or titled in the name of private parties.[76]

As a result of the application of the Regalian Doctrine, the claims of indigenous cultural communities to their ancestral domain became contingent on the generosity of the colonial sovereign expressed through royal grants. The American colonial or insular government more or less adopted the same position.[77] The only significant difference was the substitution of the State for the Crown.

The doctrine is well-entrenched in our jurisprudence. Perhaps one of the gravest expressions of the doctrine when applied to indigenous peoples is in the 1972 case of *Lee Hong Hok v. David*.[78] The Supreme Court ruled in this case that the State exercises the universal feudal concept of *Jura Regalia* in the *dominium* sense, i.e., that the State's authority to exercise rights over the lands of the archipelago does not only spring from its possession as sovereign (*imperium*), but by its presumed ownership (*dominium*) of the entire Philippine territory. Moreover, the Supreme Court seemed to accept only as proofs of prior occupation, composition titles from the Spanish government or by possessory information or by any other means for land acquisition, failing in which the land remained public.[79]

The 1935 Constitution enshrined the Regalian Doctrine and institutionalized a framework of land classification.

> All agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy and other natural resources of the Philippines belong to the State, ... Natural resources, with the exception of public agricultural land, shall not be alienated.[80]

Unfortunately, the 1973 and the 1987[81] Constitutions retained basically the same provision. This meant that forestal and mineral lands, even if they have been occupied

Legal Rights Center Briefing Paper on Law and Ancestral Domains (unpublished), at 1. *See* Gaio Aragon, *The Controversy over Justification of Spanish Rule in the Philippines*, in STUDIES OF PHILIPPINE CHURCH HISTORY (H. ANDERSON ed., 1969) (page of publication unavailable).

Royal Decree of August 13, 1898.

See Philippine Bill of 1902, §§ 13, 15 and 18.

48 SCRA 372 (1972).

Lee Hong Hok v. David, 48 SCRA 379. *See also* Atty. Roan I. Libarios, *Ancestral Domain and the Crisis of Justice in the National Legal System* in HORIZONS (July 1988).

1935 PHIL CONST. art. XIII, § 1.

PHIL CONST. art. XII, § 2 provides:

> 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. ...

since time immemorial by indigenous communities, were part of the public domain — inalienable and non-disposable. On the basis of this prevailing legal perspective, such lands can never be subject to private ownership. Worse, land classification, proceeding from the application of the Regalian Doctrine, presented serious problems for the indigenous peoples.

1. LAND CLASSIFICATION

The present Constitution classifies lands of the public domain to agricultural, forest or timber, mineral lands and national parks. Agricultural land, on the other hand, may be further classified by law according to the uses to which they may be devoted. Alienable lands of the public domain shall be limited to agricultural lands.[82]

The Royal Decree of 1881 was the first official attempt to classify disposable public land. At the outset, however, the Spanish colonizers never considered ancestral lands as part of the public domain.[83] In *Mapa v. Insular Government*,[84] the Supreme Court ruled that the "public lands which are not timber or mineral lands are necessarily agricultural public lands, whether they are used as nipa swamps, manglares, fisheries or ordinary farm lands." Ten (10) years later, *Ramos v. Director of Lands*[85] expanded the definition and said that the "presumption should be, in lieu of contrary proof, that land is agricultural in nature."

During the ensuing years, however, Lynch[86] posits that contrary to *Mapa* and *Ramos*, the Bureau of Forestry began to presume that lands were to be classified as agricultural only when the Director of Forestry did not consider them to be forest. The effect was evident. The inversion of the *Mapa* and *Ramos* presumptions placed the burden of proving the lands to be agricultural on the applicants for registration. Thus, began the pro-forest presumptions reinforced by a number of Supreme Court decisions.[87] The failure of the applicant to overcome the burden meant a failure of his attempt to register.

The definition of forest land had the most serious impact on the character of ancestral lands. Presidential Decree No. 705 (1975) also known as the Revised Forestry Code, defined forestal lands as:

> No land of the public domain eighteen per cent (18%) in slope or over shall be classified as alienable and disposable, nor any forest land fifty per cent (50%) in slope or over, as grazing land.

[82] PHIL. CONST. art. XII, § 3.

[83] *See* notes 62-69 and accompanying text.

[84] 10 Phil. 175, 182 (1908).

[85] 39 Phil. 175 (1918).

[86] Lynch, *Tribal Land Laws*, *supra* note 64.

[87] Surez v. Reyes, 7 SCRA 461 (1963); Republic v. de la Cruz, 67 SCRA 221 (1975) Director of Lands v. Abanzado, 65 SCRA 5 (1975).

> Lands eighteen per cent (18%) in slope or over which have already been declared as alienable and disposable shall be reverted to the classification of forest lands by the Department Head to form part of the forest reserves, unless they are already covered by existing titles or approved public law applicants, or actually occupied openly, continuously, adversely and publicly for a period of not less than thirty (30) years as of the effectivity of this Code where the occupant is qualified for a free patent under the Public Land Act . . . .[88]

It is admitted that most, if not all, of our indigenous peoples today live in the uplands falling under the definition of forest land. The evident effect was to bar such lands from being alienable and disposable and, therefore, beyond any possibility of indigenous peoples acquiring ownership over such lands.

The rationale, it appeared, was that approximately 42% of the nation's total land area was above 18% in slope, thus, reserving at least 42% of the Philippine land area to the State.[89]

The criteria present a dramatic departure from previous standards which gave primary consideration to current local factors rather than nationalized standards. Traditionally, classification was based on bio-physical factors present in a given area.[90] The 18% slope rule has been increasingly challenged:

> Viewed from the context of present technologies and development planning and needs, segregation based on the Forestry Code does not provide adequate criteria for determining how lands can be economically exploited without endangering the eco-system while at the same time maintaining their production over a sustained period of time.[91]

This definition, moreover, has no clear ecological, agronomic, economic or even cultural basis.[92] The absurdity of the sweeping 18% slope rule is highlighted by the fact that while the Philippines has a total of 15,882,271 hectares of forestal lands, only an estimated 800,000 hectares of these actually have primary forests and while another 5,210,000 hectares have secondary or some form of tree cover, the rest (around 10,000,000 hectares) are tree-less forest lands.[93]

[88] Revised Forestry Code, P. D. No. 704, § 15 (1975).

[89] Lynch, *supra* note 64.

[90] Owen J. Lynch, Jr., *Freedom From Injustice*, 1TROPICAL FORESTS (1986) (month of publication unavailable) [hereinafter Lynch, *Freedom*].

[91] Concepcion, A Position Paper on Identification and Evaluation of Prime Agricultural Lands 3 (1981).

[92] WORLD BANK, PHILIPPINES: ENVIRONMENT AND NATURAL RESOURCE MANAGEMENT STUDY (1989) cited by Gatmaytan, *Land, Life and Law: The Continuing Struggle of the Indigenous Peoples* (Issue Paper 93-06, LRC-KSK), *supra* note 9.

[93] 1991 Forestry Statistics.

When Presidential Decree No. 410 was enacted in 1974, many concerned Filipinos hoped that it would alleviate the increasingly severe problem of ancestral land security (or insecurity). The Decree covered 27 provinces excluding the Panay and Negros provinces, as well as Abra, Benguet, Quezon and the Ambos Camarines. The Decree's apparent purpose was:

> to give greater substance to these social justice programs and the endeavors to bring forth equality for all the citizens of this Republic, it is required that landless Muslims and members of other cultural minority groups shall be given the same opportunity to own the lands occupied and cultivated by them, which lands were likewise occupied and cultivated by their ancestors.[94]

Like the ill-famed Maura Law of 1894, however, the Decree suffered from a number of anti-indigenous rights provisions. *First*, the disposition of unappropriated lands of the public domain was limited to agricultural lands,[95] effectively excluding those areas reserved for public and quasi-public purposes. The Ministry of Natural Resources, on the other hand, by implementing order excluded forest reserves, watersheds, national parks, wildlife sanctuaries, national historic sites, and other forest areas essential for scenic, recreation, fish or wildlife purposes.[96] *Second*, the Decree defined ancestral lands as "lands of the public domain..." thus giving the impression that ancestral lands are legally inexistent apart from State concession. The indigenous peoples, on the other hand, claim land ownership by virtue of a pre-conquest title upheld in the case of *Cariño v. Insular Government* (212 US 449). Premised on ancestral lands being non-agricultural and part of the public domain, the Decree effectively deprived possible registration of ancestral lands. It must be recalled that by 1975, the Revised Forestry Code already ordained the 18% slope rule bringing most of the lands occupied by the indigenous peoples within the classification of forest lands.

A *third* point is that the Decree and its Implementing Order required a cumbersome and expensive procedure for titling. The implementing order created additional bureaucratic roadblocks. It required investigations, two (2) surveys, a census and the formation of a farmer's cooperative. Thus, the applicant must be a member of a farmer's cooperative. No wonder, then, that eight (8) years after its promulgation, no tribal Filipino had acquired title pursuant to this Ancestral Land Decree.

Lastly, like the Maura Law, the Decree contained an extinguishment clause. Section 8 of the Decree provided:

> Occupants of ancestral lands as defined under this Decree are hereby given a period of ten (10) years from the date of approval hereof within which to file applications to perfect their title to the lands occupied by them, otherwise, they shall lose their preferential rights thereto and the land shall be declared open for allocation to other deserving applicants.

[94] Presidential Decree No. 410, Declaring Ancestral Lands Occupied and Cultivated by National Cultural Communities as Alienable and Disposable, and for other Purposes (WHEREAS clauses).

[95] P.D. No. 410, § 1.

[96] MNR Gen. Adm. Order No. 1 (1974).

Suffice it to say, for obvious reasons, not one ancestral land owner has acquired a Land Occupancy Certificate since the Decree was promulgated in 1974.[97] Maybe they were never meant to.

Perhaps, to address the plight of many indigenous peoples who became squatters on their own land by the assertion of the Regalian Doctrine, the government embarked on programs to provide land tenure for the indigenous peoples. It must be stated at the outset that none of these tenurial instruments recognize indigenous ownership of ancestral lands.

B. Present Responses to Tenurial Security

Following the Regalian Doctrine, no public land in the Philippines can be acquired by private persons without a State grant, concession or award. This was particularly the premise of C. A. No. 141. "Land for the Landless" was the basic principle underlying our land laws. Other purposes were to promote the distribution of agricultural lands of the public domain to landless tenants and farm workers, to encourage migration to sparsely populated areas from thickly congested ones, pursuant to the policy of the government to promote the level of production, employment and living standards of the people.[98] With respect to indigenous peoples, the State has always focused on social forestry,[99] rather than providing a more secure tenure on land or recognizing their native title under the *Cariño* decision. Among the government responses to tenurial security are:

Homestead Settlement. The object of the homestead is to encourage residence upon and the cultivation and improvement of agricultural lands of the public domain.[100] Moreover, the Supreme Court[101] also stated that another reason would be that a homesteader would have a place to live in with his family so that he may become a happy citizen and a useful member of our society. Under Section 12, C. A. No. 141, a Filipino citizen, over 18 years of age, or a head of a family who does not own more than 24 hectares of land in the Philippines, may enter a homestead not exceeding 24 hectares of *agricultural land* of the public domain. The homestead patent may be brought under the operation of the Torrens system. The homestead patent, when so registered, is a veritable Torrens title and has its force and effect.[102]

[97] Lynch, *Freedom supra* note 90.

[98] Ma. Vicenta P. De Guzman, *Land/Resource Tenure Legal and Policy Framework*, NATURAL RESOURCES MANAGEMENT PROGRAM (NRMP) POLICY STUDIES (June 1992).

[99] Gatmaytan, *Land, Life and Law, supra* note 9.

[100] Roque v. Director of Lands, 72 SCRA 1 (1976).

[101] Jocson v. Soriano, 45 Phil. 375 (1923).

[102] Director of Lands v. CA, 17 SCRA 71 (1966); Cabacug v. Lao, 36 SCRA 92 (1970); Lopez v. CA, 169 SCRA 271 (1989).

Ownership of homestead is also subject to a number of restrictions under Section 118, C. A. No. 141.[103] With respect to any non-Christian Filipino who has not yet applied for a homestead, Section 21 provides that he may apply for permit to occupy a tract of land not exceeding four hectares within certain reservations purposely made for them. Within six months after receipt of the permit, he must enter into cultivation of the land, else, the permit may be canceled. The permit is good for one year. At the expiration of the permit or at any time prior thereto, he may apply for a homestead including the land covered by the permit.

It must be stressed that this particular mode covers only *agricultural* land. Thus, effectively barring members of the indigenous peoples from obtaining any title with respect to lands actually occupied by them within a forest or mineral zone. If at all, the mode becomes relevant only, as an inducement for members of indigenous communities to leave their ancestral lands. With respect to Section 21, it must be noted that the availability of this permit is premised on the existence of a reservation purposely made for them. The inadequacy of this system becomes apparent when we consider that there are about 110 major ethnolinguistic groups scattered throughout 61 out of 77 provinces nationwide, and that from 1900, only 68 reservations have been proclaimed.[104]

Sales Patent. Any Filipino citizen of lawful age, or not of lawful age but is the head of the family, may purchase a maximum of 24 hectares of any tract of public *agricultural land*. The right is denied to juridical persons or associations pursuant to the constitutional prohibition.[105] Aliens are likewise prohibited from acquiring such public lands.[106]

The procedure for acquisition of land is through bidding. The successful bidder should, within six months from the issuance of the order of award, begin cultivation of the land and should have, within five years from the award and until final payment is made, broken and cultivated at least one-fifth of the land awarded. Section 30, C. A. No. 141 also provides for reversion of the land in case the purchaser has abandoned the land for at least one year or has failed in the requirements of the law. In such a case, all payments made shall be forfeited in favor of the State.

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[103] Said section provides that such lands shall not be subject to encumbrance or alienation for a period of five years from the approval of the application, subject only to well-defined exceptions. Moreover, no alienation, transfer or conveyance of any homestead after five years and before twenty-five years from the issuance of title shall be valid without the approval of the Secretary of the Department of Environment and Natural Resources. Such approval shall be denied unless on constitutional and legal grounds. [*See also* Agustino v. CA, 170 SCRA 620 (1989)].

[104]

PERIOD:	NO. OF CIVIL RESERVATIONS ISSUED:	
1900 - 1912	2	
1913 - 1920	7	
1926 - 1939	38	*Source: NRMP Policy Studies
1940 - 1944	1	Land/Resource Tenure
1945 - 1971	6	Legal and Policy Framework
1972 - 1985	9	June 1992
1986 - 1991	5	

[105] Republic v. CA, 114 SCRA 799 (1989).

[106] Levy v. Ledesma, 69 Phil. 49 (1939).

The possessory right of an applicant-bidder over the public land is recognized. The occupation and cultivation of public lands confer on the settler a preferential right in the acquisition of the land. Those who have made valuable improvements are not regarded as trespassers; but on the contrary, the cultivation and occupation of lands with a view of purchasing the same confer a preferential right in favor of the settler over the others for the acquisition of such lands.[107] While this would seem to favor the indigenous occupant, it must be recalled that again, the sales patent is limited to agricultural lands of the public domain. Moreover, as this is a purchase, the award of which depends on the proper bid, the whole system altogether makes it difficult, if not prohibitive for the indigenous person to obtain a sales patent. It can hardly be imagined that an indigenous person would have to pay anything when the land is properly theirs by pre-conquest title and has been paid for by their blood and that of their ancestors.

Lease of Public Agricultural Lands. Under the Constitution,[108] any Filipino citizen may lease a maximum of 500 hectares of public agricultural land. The right to lease shall be awarded to the highest bidder in an auction called for that purpose. The annual rental shall not be less than 3% of the appraised value of the land. All improvements as a rule accrue to the State at the expiration of the lease agreement. As in the case of sales patents, it is a condition that the lessee enter into and cultivate the land within five years after the approval of the lease.[109]

As this is a mere lease of public agricultural land, it can hardly meet the legal demand of indigenous cultural communities for security of land tenure over lands claimed by them as part of their ancestral domain.

Administrative Legalization or Free Patent. Under Section 44 of C. A. No. 141,[110] a natural born citizen of the Philippines who is not an owner of more than 24 hectares and who, since July 4, 1945 or prior thereto, has continuously occupied and cultivated the land, by himself or through his predecessors-in-interest, or has paid real estate tax thereon, unless the land be occupied, is entitled to a free patent or gratuitous grant of said land. R. A. No. 3872 amended said section to insert a provision particularly governing members of national cultural minorities. The amendment allowed the granting of free patents over lands suitable for agriculture, whether disposable or not, not exceeding twenty hectares, provided that at the time of application, he is not the owner of any real property secured nor disposable under the Public Land Law. The requirement is again continuous occupation since July 4, 1945.

In 25 January 1977, P. D. No. 1073 superseded R. A. No. 3872 and limited its application only to alienable and disposable lands of the public domain. The application for a free patent is not a matter of right but only a privilege granted by

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[107] De Guzman, *supra* note 98, at 23.

[108] PHIL CONST. art. XII, § 3; *see also* Tagum Doctors v. Apsay, 165 SCRA 154 (1988).

[109] De Guzman, *supra* note 98, at 24.

[110] *As amended* by R. A. No. 782.

statute. Hence, P. D. No. 1073 had not only set the limit as to filing of applications, i.e., until 31 December 1987,[111] but also as to what lands are covered by the grant.

Judicial Legalization of Imperfect Title. This particular mode is governed by Section 48 of C. A. No. 141. As will be discussed in the succeeding chapter, the lapse of the statutory period *ipso jure* converts the land to private property. The proceedings for confirmation are mere formalities, the absence of which or that of the certificate in no way vitiates the sufficiency of title. Of interest here is the amendment introduced by R. A. No. 3872 which made members of national cultural minorities capable of securing registration and title to the lands they occupy irrespective of its actual classification. Thus, *Republic v. Court of Appeals*[112] held that the definite resolution of the issue as to whether or not the subject parcel of land was still forestal was unnecessary as the applicable provision would be Section 48(c) of C.A. No. 141. The Court unhesitatingly applied the provision *whether disposable or not* to forest and mineral lands. The only requirement is that the members of the national cultural community have been, by themselves, or through their predecessors-in-interest, in open continuous, exclusive and notorious possession of the land under a *bona fide* claim of ownership for at least thirty years.

It is the proponent's position that before the enactment of P. D. No. 1073, and during the effectivity of the original tenor of R. A. No. 3872, the lapse of the statutory period converted the land to private land and vested in the indigenous peoples ownership over the same. It is also submitted that the only effect of P. D. No. 1073 was to deny any opportunity for registration, the absence of which in no way vitiates the sufficiency of title in accordance with applicable jurisprudence. It appears that the only limitation now is as to the land area covered, which is no more than 144 hectares as provided for by R. A. No 6236 and P.D. No. 1073.

Civil Reservations for Public or Semi-Public Uses. Law and jurisprudence have traditionally depicted indigenous Filipinos as not having advanced sufficiently in civilization, and therefore justified their impositions on the basis of *parens patriae*. Thus, as a means to protect indigenous communities from supposed civilized intrusion, civil reservations were incorporated into the Public Land Law. Under this system, title to the land remained with the government and the communities' continued use thereof is dependent upon compliance with certain conditions. Said lands shall also revert to the State should it be found that the land is not being used for the purpose for which it was intended.[113] This particular mode of land tenure becomes more relevant when we consider Section 21 of C. A. No. 141 on application for homestead. Under this section, indigenous Filipinos may apply for a homestead not exceeding four hectares.

[111] R. A. No. 6940 (June 1990) has extended the period up to the year 2000.

[112] 201 SCRA 1 (1991); *see* discussion, *infra*.

[113] De Guzman, *supra* note 98, at 36.

It would appear that for so long as the reservation was used according to its purpose, the indigenous peoples would be secure in their land. When *PAFID* conducted their field study between 1986 and 1987 and among their respondents were the *Aeta* of the Civil Reservation in Kakilingan, San Marcelino, Zambales, they were proven wrong. Thus:

> It is presumed that because their land is a reservation, their tenure would be assured and they would be free to use the land as they see fit but this assumption had been proven wrong, because the Reservation status did not prevent enterprising rich lowlanders from using Aeta land for their own selfish purposes. These people made it appear that the Aeta gave them permission to use the land by means of lease, and planted sugar cane.[114]

This very same concern was gathered by the proponent when he visited Calibangbangan Island, Province of Palawan, home to a group of Tagbanua (or *Tagbanuang-Calaminanes* as they would sometimes refer to themselves). The Island was proclaimed as a Tribal Reservation by virtue of Executive Order No. 15 (19 February 1917). The *Tagbanua* has complained of a steady influx and even intrusion of enterprising, non-indigenous members, particularly Ilocanos, who have come to settle with them. It appears that these migrant-settlers have more or less control of capital and employment in the area to the prejudice of the native population. In fact, as early as 1982, *Lynch*[115] reported that lands within many tribal reservations have been occupied and even titled to Christian Filipinos. This illegal encroachment, he added, has been extensively documented at the Paitan, Oriental Mindoro and Pili, Camarines Sur reservations.

The insecurity of tenure proceeds not only from these external factors, but also, from the very concept of reservation, itself. Title is held by the State, ownership therefore is retained by the government. Their stay and continued occupation, therefore, is at best, only by virtue of State generosity and there is practically no legal impediment if the State decides to change its mind.

Free Title. C. A. No. 691, as amended by Act No. 63, provides for the free disposition of lots of 24 hectares each of *agricultural* lands and 1,600 sqm. each of residential land of the public domain to any citizen of the Philippines who is more than 18 years of age and who does not own 24 hectares of land or has not availed of the benefits of any free disposition of any public land, since the occupation of the Philippines by the United States. Preference is given to those who are indigents as well as those who have any dependents to support.[116]

[114] *Command Title: A Valid Option for Land Tenure for Tribal Filipinos*, PHILIPPINE ASSOCIATION FOR INTER-CULTURAL DEVELOPMENT (PAFID) (1993).

[115] Lynch, *citing Mangyans and their Land Problems*, Development Academy of the Philippines, Mindoro Cultural Communities Project (1974); Petitions by Assemblyman Camara to the Office of the President.

[116] EDILBERTO NOBLEJAS, LAND TITLES AND DEEDS 398 (1992); *see also* De Guzman, *supra* note 98, at 28.

This mode suffers from the same inapplicability to ancestral lands which fall, most of the time, in non-agricultural lands of the public domain. Moreover, there appears to be a bias in favor of individual, private ownership. While this is not at all objectionable, such bias is fraught with dangers against the preservation of a cohesive, strong indigenous culture.

The Certificate of Ancestral Domain Claim (CADC). The forerunner of the CADC was the Certificate of Ancestral Lands Claim (CALC). Pursuant to the constitutional mandate of ensuring protection for the indigenous peoples, the DENR promulgated on January 1990, Special Order No. 31. This special order created the Special Task Force on acceptance, identification, evaluation and delineation of ancestral land claims in the Cordillera Administrative Region. Department Circular No. 3 (30 April 1990) was issued defining and providing for the procedure by which acceptance, identification, evaluation and delineation of ancestral land claims can be pursued. Following the Cordillera model, the DENR issued Special Order No. 1016 (7 November 1991) extending its application to Palawan. Those claims by indigenous communities which were sufficiently documented and proven are validated by the issuance of a Certificate of Ancestral Land Claim. Among the salient features of the agreement under the CALC are:

> 1. The DENR recognizes the right of the indigenous cultural communities to their ancestral domains.
>
> 2. The indigenous cultural community is vested with the exclusive right to possess, develop and benefit from the natural resources found within the ancestral domain.
>
> 3. The traditional customs and indigenous laws shall govern property relations within the ancestral domains.
>
> 4. The indigenous community shall have the right to harvest trees and other non-timber forest products within the territory, provided these are not violative of existing laws. The indigenous cultural community shall be responsible for protecting the area including the preservation of wildlife and other natural resources and the power to prevent anyone from violating the law.[117]

Unlike the subsequent Department Administrative Order (DAO) No. 2 (January 15, 1993), the CALC did not give indigenous cultural communities management and control of the ancestral domain claim.

DAO 2's main policy statement is to preserve and maintain the integrity of the ancestral domains and ensure recognition of the customs and traditions of the

[117] Ma. Vicenta P. De Guzman, *A Review of the Applicability of Current DENR Tenurial Instruments to Issues Related to Ancestral Domains*, NRMP POLICY STUDIES (March 1993).

indigenous cultural communities pursuant to the Constitutional mandate for the recognition and protection of indigenous communities.[118]

It is in a lot of respects similar to the CALC. It is argued that by far, DAO 2 is today's main tenurial instrument available to indigenous peoples. It has so far gained a high level of acceptance among indigenous communities, NGO's, policy makers and field implementors such that it has found its way as a Flagship Program of the Social Reform Agenda of the Ramos Administration.[119] Among its salient features are:

> 1. The non-renewal of contracts, leases and permits within ancestral domains, upon its expiration unless upon prior written consent of the indigenous cultural community concerned.[120]
>
> 2. Implementation of government projects and programs under the DENR are likewise subject to the prior written consent of a majority of its recognized leaders. And should the community consent, they shall be given ample opportunity to participate in the planning, implementation and maintenance of the program.[121]
>
> 3. No permit, license or contract shall be extended to any person not a member of the community or a *bona fide* claimant therein for the purpose of exploiting the natural resources therein unless upon prior written consent of the community collectively, after public hearings and consultations with them.[122]
>
> 4. The community enjoys control and supervision over the management of the ancestral domain to give them an opportunity to implement ecologically sound indigenous land-use systems and environmental protection.[123]

However, notwithstanding this growing popularity and beneficial features, DAO 2 could not be regarded as a panacea of tenurial stability for the indigenous peoples. Gatmaytan[124] advances a number of comments and criticisms.

First, DAO 2, while making a policy statement of recognition of ancestral domain contradicts itself by reiterating that the lands covered by the CADC are public and forest lands.[125] Herein lies the conflict once more. The subject lands are either public lands, or private lands of the indigenous peoples.

[118] DAO 2, art. I, § 1.

[119] Domingo I. Nahayangan, *Land/Resource Tenure: Accomplishments and Strategy*, NRMP POLICY STUDIES (March 1995).

[120] DAO 2, art. IV, § 2.

[121] DAO 2, art. IV, § 3.

[122] DAO 2, art. IV, § 4.

[123] DAO 2, art. VI, § 1.

[124] Gatmaytan, *Land, Life and Law, supra* note 9, at 11. Gatmaytan is recognized as a leading expert in the field of indigenous rights. He is the Director of the Direct Legal Services of the Legal Rights and Natural Resources Center - KSK/Friends of the Earth - Philippines.

[125] *See* Preamble of DAO 2.

Second, while its policy statement in its opening provision speaks of a recognition of the indigenous peoples' right to their ancestral domains, the whole program is nothing more than an identification and delineation of "claims". Thus, there is no categorical undertaking on the part of the government to recognize ownership by indigenous cultural communities.

A third issue is raised by *Nahayangan*[126] in that it may be quite difficult to expect the indigenous cultural community claimants to prepare a management plan for their ancestral domain owing to their low literacy rate. It may be recalled that the utilization, supervision and control rights given to indigenous cultural communities are premised on the preparation of the Ancestral Domain Management Plan.

While the proponent concedes that CADC remains the most beneficial instrument that the government conceded so far, its tenure, unless terminated on ground of national interest, being perpetual, it does not advance the cause of the indigenous peoples for full recognition of ownership over their ancestral domains.

> It is hoped that this next step will be taken soon. Anything less would be a cruel hoax which gives Indigenous Peoples false hopes, deceiving them with the illusion that the government is addressing the issue, while in fact it wallows in its inspired ignorance.[127]

This next step is a full recognition of private ownership by the indigenous peoples over their ancestral lands and domain. The succeeding chapter would show that there are sufficient bases in law to finally recognize indigenous ownership.

IV. BASES FOR INDIGENOUS RIGHTS TO ANCESTRAL DOMAIN

A. The Concept of Native Title

Like the national laws and executive policies, the courts have failed to accord adequate recognition and protection to ancestral land claims. An exception perhaps, and those of related cases, is *Cariño v. Insular Government*.[128]

The case involved a petition filed by Mateo Cariño, an *Ibaloi*, before the Land Registration Court asking that he be registered as the owner of a 146-hectare land used for swidden agriculture and pasture located in Benguet. Cariño presented no documentary evidence except a *titulo de informacion posesoria* obtained in 1901. His

[126] Domingo Nahayangan, *A Report on the Pilot Implementation of DAO No. 2 and S.O. 25, Series of 1993*, NRMP POLICY STUDIES (March 1995). Nahayangan has done and written extensive policy studies on upland tenurial instruments vis-a-vis the indigenous peoples for the Natural Resources Management Program (NRMP).

[127] Gatmaytan, *Land, Life and Law*, *supra* note 9.

[128] 41 Phil. 935 (1909).

claim was based on an allegation that his ancestors have used and occupied the land since time immemorial. Cariño asserted that he inherited the land from his father in accordance with Igorot custom.

The petition was opposed by the government, but was, nonetheless, granted by the Land Registration Court. On appeal, the Court of First Instance of Benguet reversed the decision. This reversal was affirmed by the Philippine Supreme Court in 1906.[129] The Philippine Supreme Court through Justice Charles Willard based the decision on Article 4 of the Maura Law which purported to sever the rights of occupants who failed to register their lands as of 1894 and have the lands titled.

Fortunately, the decision reached the United States Supreme Court by a writ of error. Cariño claimed that if the Philippine Supreme Court decision was affirmed,

> the whole Igoot nation may be driven as 'lawless squatters' from land which their fathers held before Spanish explorers set out in quest of the Indies. So unjust and startling a result cannot be reached without a reversion to legal notions of property and social order incompatible with any stage of civilization above barbarism.[130]

The United States Supreme Court agreed and reversed the Philippine Supreme Court. The Court, speaking through Justice Oliver Wendell Holmes ruled that :

> [e]very presumption is and ought to be against the government in a case like the present. . . *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.*[131] (underscoring supplied)

The view advanced in *Cariño* was reiterated in *Oh Cho v. Director of Lands*.[132] In affirming the idea that ancestral domain do not form part of the public domain, the Court stated that:

> All lands that were not acquired from the Government either by purchase or by grant belong to the public domain. *An exception to the rule would be any land that should have been in the possession of an occupant and of his predecessors in interest since time immemorial, for such possession would justify the presumption that the land had never been part of the public domain or that it had been private property even before the Spanish conquest.*[133] (emphasis supplied)

[129] 7 Phil. 132 (1906).

[130] Petitioner's Brief, cited by Lynch, *The Legal Bases*, *supra* note 73.

[131] Cariño v. Insular Government 41 Phil 935 (1909).

[132] 75 Phil. 890 (1946).

[133] Oh Cho v. Director at Lands, 75 Phil. 890 (1946).

Unfortunately, the *Cariño* and *Oh Cho* decisions have failed to gain uniform application by our Supreme Court. Worse, the doctrine has been applied in a manner which offends its true significance. Thus, in 1972, the Supreme Court in *Lee Hong Hok v. David*[134] used the *Cariño* decision to support its assertion that the Spanish Regalian Doctrine continues to be in full force and effect in the Philippines and is exercise in its *dominium* sense - i.e., the State's authority over the lands of the archipelago does not spring only from its actual possession thereof, but also from its presumed ownership as sovereign.[135]

In 1986, *Cariño* was again invoked in the case of *Director of Lands v. IAC, Acme Plywood and Veneer Co.*[136] The *Acme* decision, like that of *Susi v. Razon*[137] and *Herico v. Dar*,[138] upheld the *Cariño* ruling in so far as it asserted that long-term occupation vested possessors title or right to a grant, and registration is but a formality which does not affect the sufficiency of title. The *Acme* ruling, however, radically deviated from that of *Cariño* in that while *Cariño* is based on long time, pre-conquest occupation, *Acme* bases indigenous rights on legislative grace, that is, compliance with the minimum statutory period.

Cariño remains a landmark decision and by far the most potent and persuasive weapon used by indigenous rights advocates in securing government recognition of ancestral domain rights. It established an important judicial precedent that Igorots (and those tribal groups with comparable customs and long associations), have a constitutionally protected, pre-conquest claim to ancestral lands. Unfortunately, the present state of jurisprudence on the matter makes it difficult, if not impossible, to have a definitive and uniform adherence to the doctrine.

B. The Manahan Amendment to the Public Land Act

It would appear from the foregoing discussion that there is an incontestable basis in law to concede that ancestral domains never formed part of the public domain and ante-dated any assertion of the State to apply the Regalian Doctrine. Nevertheless, even within the framework of the Regalian Doctrine, there is yet another avenue by which indigenous peoples may gain recognition of ancestral domain rights. Unlike *Cariño*, however, ancestral domain rights claim under the Manahan Amendment is not premised on pre-conquest, native title but on the lapse of certain statutory periods.

The unabated loss of ancestral land prompted Senator Manuel P. Manahan, the Chairman of the Senate Committee on National Minorities, to write in 1964:

[134] 48 SCRA 372 (1972).

[135] Lee Hong Hok v. David 98 SCRA 372, 377 (1972).

[136] 146 SCRA 509 (1986).

[137] 48 Phil. 424 (1925).

[138] 95 SCRA 437 (1980).

> Because of the aggressiveness of our more enterprising Christian brothers in . . . places inhabited by members of the national Cultural Minorities, there has been an exodus of the poor and less fortunate non-Christians from their ancestral homes . . . to the fastness of the wilderness where they have settled in peace on portions of agricultural lands, unfortunately, in most cases, within the forest zones. Because of the grant of pasture leases and permits to the aggressive Christians, these National Cultural Minorities who have settled in the forest zone . . . have been harassed and jailed.[139]

To address the problem, Senator Manahan successfully sponsored amendments to the Public Land Act. Section 2 of Republic Act No. 3872 (1964) amended Section 48 of the Public Land Act (Com. Act. No. 141) to add a sub-paragraph "c" as follows:

> (c) Members of the national cultural minorities who by themselves or through their predecessors-in-interest have been in open, continuous, exclusive and notorious possession and occupation of lands of the public domain suitable to agriculture, whether disposable or not, under a *bona fide* claim of ownership for at least 30 years shall be entitled to the rights granted in sub-section (b) hereof.[140]

According to this provision, the actual land classification is immaterial. The provision merely makes reference to lands *suitable to agriculture, whether disposable or not*. It must be recalled that alienable and disposable lands of the public domain were limited to agricultural lands. Thus, the import of the provision was to consider ancestral lands as to include non-alienable lands of the public domain, such as forests and mineral lands. This would appear to allow indigenous peoples to apply for registration of ancestral lands although they are classified as forestal.

There was a concern over the constitutionality of the amendment with respect to the provision *whether disposable or not*, for at this time, Art XII, Sec. 1 of the 1935 Constitution limited alienable lands to agricultural lands. The Director of Lands therefore referred the matter *in consulta* to the Secretary of Justice. Without ruling on the constitutionality, the Secretary opined that by complying with the amended provisions, tribal occupants shall enjoy preferential rights to acquire the land after its release and classification as alienable and disposable.[141] It must be observed that the right, being merely preferential, and subject to prior release and classification of said lands as alienable and disposable, the Opinion rendered the clear provisions of R. A. No. 3872 of no legal significance. The 1991 case of *Republic v. Court of Appeals*[142] would, however, lend valuable insight as to the application of the *Manahan Amendment*. Be that as it may, up until this case, no uniform case pronouncement can be had.

[139] S. B. No. 416, 5th Congress, 2nd Session (May 23, 1963), Explanatory Note.

[140] Com. Act No. 141, § 48(c).

[141] Secretary of Justice Opinion, July 26, 1966, *cited by* Lynch, *The Legal Bases*, *supra* note 73.

[142] 201 SCRA 1 (1991).

Thus, quite to the contrary, the Supreme Court in a number of decisions[143] had interpreted the provision, particularly that of *lands of the public domain suitable to agriculture, whether disposable or not*, to refer only to lands that were classified as agricultural, but not yet declared as such. The effect was again to bar the indigenous communities from obtaining paper titles for their lands despite the clear wording of R.A. No. 3872.

Gatmaytan[144] posits the view that a survey of related jurisprudence would only confuse the issue. First, there appears to be an entire line of jurisprudence[145] which holds the view that open, continuous, exclusive and notorious possession or occupation of land since time immemorial or even for at least 30 years vests upon the occupant or possessor ownership over the area, being conclusively presumed to have complied with the requirements of the law.

On the other hand, there is equally a line of cases[146] which holds that where the area held is forestal or otherwise not classified as agricultural or alienable and disposable, then, occupation, no matter how long can not give rise to ownership against the State.

A possible third line of interpretation of the application of the *Manahan Amendment* is that between 1964, the enactment of R. A. No. 3872 — which allowed indigenous peoples to secure title to their lands irrespective of classification — and 1977, when Pres. Decree No. 1073[147] was passed, which cancelled the right given under Section 48(c) of C. A. No. 141, the indigenous communities may so title their lands. This position is derived from a reading of *Republic v. CA*.

C. The 1991 Case of Republic v. Court of Appeals

The case involved an application for registration of a parcel of land situated in Beckel, La Trinidad, Benguet containing an area of 34,178 sqm. covered by Survey Plan Psu-105218. The application appeared to have been filed on 13 February 1970. The applicants, Paulina Paran, Elisa Paran Maitim and Sina Paran claim to have acquired their title thru their father Dayotao Paran and by actual, physical, exclusive

[143] Director of Forestry v. Villareal, 170 SCRA 598 (1989); Republic v. Court of Appeals, 154 SCRA 476 (1987).

[144] Augusto B. Gatmaytan, *Land, Life and Law, The Continuing Struggle of the Indigenous Peoples* (Issue Paper 93-06), Legal Rights and Natural Resources Center-Kasama sa Kalikasan, *supra* note 9.

[145] *See* Republic v. CA, 208 SCRA 428 (1992); Tottoc v. IAC, 180 SCRA 383 (1989); and Dir. of Lands v. IAC, 146 SCRA 509 (1986). These cases appear to build on the doctrine laid down in Cariño.

[146] *See* Director of Forest Administration v. Fernandez, 192 SCRA 121 (1990); Republic v. IAC, 186 SCRA 88 (1990); Director of Lands v. CA, 129 SCRA 689 (1984); Heirs of Armategui v. Dir. of Forestry, 126 SCRA 69 (1983).

[147] P.D. No. 1073 (25 January 1977) amended §§ 48 (b) and (c) of C.A. No. 141 to limit their application:

"The provisions of Sections 48 (b) and Section 48 (c), Chapter VIII of the Public Land Act are hereby amended in the sense that these provisions shall apply only to alienable and disposable lands of the public domain which have been in open, continous, exclussive and notorios possession and position by the applicant himself or thru his predecessors-in-interest, under a bonafide claim of aquisition of ownership, since June 2, 1945."

and open possession thereof since time immemorial. The Office of the Solicitor General, on behalf of the Director of Lands, filed an Opposition claiming that: (1) the applicants had no registrable title, (2) the land sought to be registered was part of the public domain belonging to the State, and (3) the application was filed after the expiration of the period provided for in R. A. No. 2061, hence the registration court cannot acquire jurisdiction over the case.

The Office of the Provincial Fiscal of Baguio and Benguet, on the other hand, filed a Motion to Dismiss on the sole ground that the application was filed beyond 31 December 1968, the extended period provided for in R. A. No. 2061. It later filed another Opposition on behalf of the Director of Forestry claiming that the parcel of land subject of the application is within the Central Cordillera Forest Reserve covered by Proclamation No. 217 dated 16 February 1929. On 7 August 1974, the land registration court rendered a decision with the following dispositive portion:

> In view thereof, finding the applicants and their predecessors-in-interest to have been open, continuous and notorious possession of the aforesaid land as bona fide owner[s] thereof for more than 30 years, their title hereto (sic) is hereby confirmed. Let an order issue for the issuance of the decree after the finality of this decision in the names of Paulina Paran, widow; Elisa Paran Maitim, married to Beles Paran; Sina Paran, widow; all of legal age, Filipino citizens and residents of Beckel, La Trinidad, Benguet, in equal undivided shares.
>
> It is so ordered.[148]

The Supreme Court first ruled that private respondents (applicants) were not barred by prescription from having their title confirmed. The Court noted the series of amendatory laws[149] to C. A. No. 141 extending the periods for registration. In this case, the application was filed in 1970, beyond the period allowed by R. A. No. 2061 but the Court considered the provisions of R. A. No. 6236, approved in 1971, to have validated applications filed in the interim. Thus:

> The fact that a succession of statutes had simply extended the original time period, rather than established a series of discrete periods of time with specific beginning dates and ending dates, show a clear legislative intent to avoid *interregna* which would have generated doubts and difficult questions of law.[150]

[148] P. D. No. 1073 (25 January 1977), amended § 48 (b) and (c) of C. A. No. 141 to limit their application:

"The provisions of Section 48(b) and Section 48(c), Chapter VIII of the Public Land Act are hereby amended in the sense that these provisions shall apply only to alienable and disposable lands of the public domain which have been in open, continuous, exclusive and notorious possession and occupation by the applicant himself or thru his predecessors-in-interest, under a *bona fide* claim of acquisition of ownership, since June 2, 1945."

[149] Republic v. CA, 201 SCRA 1 (1991).

[150] *See* C. A. No. 292, extending the original period of 31 December 1938 to 31 December 1941; R.A. No. 107, extending the period to 31 December 1957; R. A. No. 2061, extending the period to 31 December 1968; R. A. No. 6236, extending the period to 31 December 1976; and P. D. No. 1073, extending the period to 31 December 1987.

The Supreme Court then passed upon the claim of the subject parcel of land being part of the Central Cordillera Forest Reserve. There was enough evidence to sustain the view that the parcel of land was indeed within the coverage of Proclamation No. 217. Private respondents-applicants did not dispute this fact. They contended, however, and the lower court sustained the contention, that the land was subsequently released from the forest reservation, evidenced by a certification by the Chief of Land Classification of the Bureau of Forestry. The Supreme Court, however, found the evidence on record to be unsatisfactory and insufficient to show that the land was actually released form the forest reservation. It held that once a parcel of land is shown to have been included within a forest reservation duly established by Executive Proclamation, a presumption arises that the parcel of land continues to be part of such reservation, until clear and convincing evidence of subsequent withdrawal therefrom or de-classification is shown.[151] It considered the certification of the Chief of Land Classification to be not such evidence. The Court, however, stated that a definite resolution of such issue was unnecessary, thus:

> Under the view we take of this case, however, the definite resolution of this question becomes unnecessary.
>
> The applicants in the instant case are natives of Benguet and members of the Ibaloi tribe. They are members of a cultural minority whose application for registration of land should be considered as falling under Section 48(c) of C. A. No. 141.
>
> . . . .
>
> Section 48(c), quoted above did not form part of the original text of C. A. No. 141; it was added on 18 June 1964 by R. A. No. 3872. It is clear to the Court that the addition of subsection (c) was intended to create a distinction between applications for judicial confirmation of imperfect titles by *members of national cultural minorities* and applications by *other qualified persons in general. Members of cultural minorities may apply for confirmation of their title to lands of the public domain, whether disposable or not; they may therefore apply for public lands even though such lands are legally forest lands or mineral lands of the public domain, so long as such lands are in fact suitable for agriculture.* The rest of the community, however, "Christians" or members of mainstream society may apply only in respect of "agricultural lands of the public domain" which would of course exclude lands embraced within forest reservations or mineral land reservations.[152] (emphasis supplied)

With respect to the effect of P. D. No. 1073 upon the application of the original tenor of Section 48(c) as provided by R. A. No. 3872, the Court had this to say:

> It is important to note that private respondents' application for judicial confirmation of their imperfect title was filed in 1970 and that the land registration court rendered its decision confirming their long-continued possession of the lands here involved in 1974, that is, during the time when Section 48(c) was in legal effect. Private respondents' imperfect title was, in other words, perfected or vested by the completion of the required period of possession prior to the issuance of P. D. No. 1073. Private respondents' right in respect of the land they had possessed for thirty (30) years could not be divested by P. D. No. 1073."[153]

[151] Republic v. CA, 201 SCRA 1 (1991).

[152] *Id.* at 9.

Three things therefore emerge from the decision of the Court in the aforecited case. *First*, that applications for registration of land under Section 48 of C. A. No. 141 filed after the lapse of the given period and even before the effectivity of the amendatory law extending such period, but within such extended period, is validated by the enactment of such subsequent law providing the extension. *Second*, that R. A. No. 3872 applied to lands suitable for agriculture irrespective of their classification, including forest and mineral lands. Moreover, the Court held that,

> The Regalian doctrine which forms the basis of our land laws and, in fact, all laws governing natural resources is a revered and long standing principle. *It must, however, be applied together with the constitutional provisions on social justice and land reform and must be interpreted in a way as to avoid manifest unfairness and injustice.*[154]

Thus, it would appear that the social justice provisions of the Constitution, especially with respect to the rights of the indigenous peoples to their ancestral lands, and other laws pertaining thereto, may be taken as an exception even to the constitutional application of the Regalian Doctrine.[155] *Third*, that until the enactment of P. D. No. 1073, members of indigenous communities may seek registration of lands claimed by them since immemorial occupation whether the same be forestal or mineral.

It must be noted that the third point deals merely with the possibility of registration. It does not in any way deny ownership which has vested. In fact, the Court states that *"Private respondents' imperfect title has, in other words, perfected or vested by the completion of the required period of possession prior to the issuance of P. D. No. 1073."*[156] It is submitted that the jurisprudence applying Sec 48(b) of C.A. No. 141 with respect to the non-necessity of a certificate being issued is likewise applicable in cases involving lands occupied by indigenous communities under R. A. No. 3872.

> As interpreted in several cases when the conditions as specified in the foregoing provision are complied with, the possessor is deemed to have acquired, *by operation of law*, a right to a grant, without the necessity of a certificate of title being issued. The land, therefore ceases to be of the public domain and beyond the authority of the Director of Lands to dispose of. The application for confirmation is a mere formality, the lack of which does not affect legal sufficiency of title as would be evidenced by the patent and the Torrens title to be issued upon the strength of said patent.[157]

[153] *Id.* at 10-11.

[154] *Id.* at 12-13.

[155] *Id. citing* Director of Lands v. Funtillar, 142 SCRA 57 (1986).

[156] It must be recalled that at the time R. A. No. 3872 was enacted, and at the time of the filing of the application for registration, until the Supreme Court decided the case, the Constitution limited alienable and disposable lands of the public domain to agricultural lands.

[157] Republic v. CA, 201 SCRA 1 (1991).

In 1986, the Supreme Court would reiterate the doctrine in *Director of Lands v. Intermediate Appellate Court*[158] and expound on the nature of the proceedings for confirmation of title:

> The proceedings would not *originally* convert the land from public to private land, but only confirm such a conversion already affected by operation of law from the moment the required period of possession became complete. As well put in *Cariño*, . . . (T)here are indications that registration was expected from all, but none sufficient to show that, for want of it, ownership actually gained would be lost. the effect of the proof, wherever made, was not to confer title, but simply to establish it, as already conferred by the decree, if not by earlier law.[159]

It is, therefore, submitted that the indigenous communities, occupying lands of the public domain, irrespective of classification, have attained a vested right and ownership over the lands they claim to have possessed since time immemorial under R.A. No. 3872. Furthermore, it is submitted that the only effect of P. D. No. 1073 was to deny the possibility of registration, the want of it in no way affects the sufficiency of title.

The foregoing discussion would show that either under the concept of native title as enunciated in *Cariño*, or under the operation of the Manahan Amendment, as applied by *Republic v. CA*, there are incontestable bases for the indigenous peoples' claim for ownership over their ancestral domain. The justness of their demand, thus, appears. The full recognition of private ownership rights is, however, not as simple. It is necessary, therefore, to highlight some implications of treating ancestral lands simply as private lands.

D. Implications of Private Ownership

Ancestral Lands were never part of the public domain. They are and have always been private lands pursuant to pre-Spanish conquest occupation and title. Though crude, this appears to be an accepted formulation of the concept of native title. Under Art. 428 of the Civil Code, "The owner has the right to enjoy and dispose of a thing, without other limitations than those established by law." The provision highlights two of the rights of an owner: the right to use (*jus utendi*), and the right to dispose (*jus disponendi*). There are four other rights of an owner under Roman Law: the right to abuse or consume (*jus abutendi*), the right to possess (*jus possidendi*), the right to the fruits (*jus fruendi*), and the right to recover or vindicate rights (*jus vendicandi*).

1. ON OWNERSHIP

The first question that becomes apparent with respect to *Cariño's* application to indigenous peoples is that: "Who exercises these rights?" *Cariño* does not, in a categorical manner, answer this question. Mateo Cariño was applying for registration

[158] Herico v. Dar, 95 SCRA 437, 443-444 (1980), *citing* Susi v. Razon, 48 Phil 424 (1925); Mesina v. Vda. de Sonza, 108 SCRA 251 (1960).

[159] Director of Lands v. IAC, 146 SCRA 509 (1986).

of a parcel of land inherited by him from his father. It appears, therefore, that the application was under the context of private, individual claim. *Lynch* would, however, explain that Cariño's attorneys and the American Justices were not anthropologists. He asserts that this may explain why there is no mention nor reference to communal ownership.[160] The failure of *Cariño* to make reference or to clarify under what concept an indigenous community holds title has very notable effects.

Ownership, to the indigenous peoples, necessarily connotes control of the natural resources found therein. Thus, the *Kalinga* considers himself owner not simply of his homelot and terraces but also of his tree farm. He has priority rights to his swidden plot, having beneficial rights thereto. As regards communal or village territories, he has inchoate rights to hunt, fish and gather forest products.[161] On the other hand, the *Agta* traditionally conceive land as territories where each family-unit has the right to hunt, fish, or cut and gather forest products.[162] Evidently, the concept of ownership already differ. The *Agta* claims as a family-unit, while the *Kalinga* as individual. Furthermore, the *Kalinga* has some defined notion of what obtains individually over which he may assert his right alone and those which he exercises over certain areas in community with others. It is accepted, however, that though there may be local variations, land is generally claimed by families, settlements, or whole communities and so held without prejudice to private rights and preferences.

Not only do communities differ on ownership units as to individual, family or community units, but also on the types of property owned in common or individually. Take the *Kalinga*, for example. Its system of land ownership is basically communal. Inherent in this concept is the idea that everybody shares a common right to the land. Communal ownership governs the forest areas, swidden farms, tree farms or orchards, pasture and burial grounds. Fruits arising from the cultivation of swidden farms, however, exclusively belong to the cultivator. The residential lots and the terraced rice farms, on the other hand, are governed by a limited system of individual ownership.[163]

Some indigenous communities, on the other hand, designate areas within the traditional territories that are to be considered private where access to resources therein and the fruits of the land are available only to individual, his family or kin, or clan. These consist mostly of residential lots and individual swidden farms. The *Bontocs*, however, differ from the *Kalinga* in that the corporate tree farms are individually owned by the *Bontocs*. Among the *Mansaka*, the abaca plantations are individually owned.[164]

[160] *Id.* at 520.

[161] Lynch, *Native Title*, supra note 20.

[162] Briefing Paper on *Law and Ancestral Domains* (unpublished), Legal Rights Center, 10 (hereinafter Briefing Paper). *See also* Mariflor Parpan Pagusara, *"The Kalinga Ili: Cultural-Ecological Reflections on Indigenous Theoria and Practice on Man-Nature relationship*, in DAKAMI DAKAMI YA NAN DAGAMI (Cordillera Consultative Committee, 1984).

[163] Briefing paper, *supra* note 162, *citing* THE AGTA OF NORTH EASTERN LUZON: RECENT STUDIES (P. Bion Griffin and Agnes Estioko-Griffin, ed., 1985).

[164] Ma. Lourdes Aranal-Sereno and Roan Libarios, *The Interface Between National Law and Kalinga Land Law*, 58 PHIL. L. J. 420, 440-441 (1983).

Thus, it is now inaccurate to assume that among indigenous cultural communities, there is no concept of land ownership other than communal. *Policy Studies*[165] show that the established practice among indigenous communities is a combination of communal , family, clan and individual land rights.

If *Cariño* was to be applied as authority to allow registration of ancestral lands as individually titled lands, then the fears expressed by *Parpan-Pagusara*[166] would have come true. She asserts that "native title is a bemused, if not a spurious legal concept, a legal incongruity, outclassed only by constitutional authoritarianism." She believes that native title is a part of a neo-colonial conspiracy to foist individual ownership on tribal and Muslim Filipinos. *Lynch* agrees with her fear that promoting the idea of individual ownership would hasten the already rapid rate of cultural disintegration. Individual ownership would be more vulnerable to entrepreneurs and other promoters of export-oriented development interested in acquiring legal right to ancestral land.[167] *Lynch* would, however, assert that *Parpan-Pagusara* operates under the limited belief that native title is necessarily individual. He asserts that among *Igorots*, and other tribal groups- as well as in pre-conquest societies- communal customs determine rights to land. The proponent concedes that the concept of ancestral domain and native title is not necessarily individual, nor is it always communal.

However, as observed earlier, there is nothing in *Cariño* which makes reference to communal ownership. Indeed, the Court even used the term, "individuals", in holding, "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." In fact, although it may be assumed and conceded that a whole community occupied vast tracks of land including that parcel subject of Mateo Cariño's petition, his basis for the 146 hectares was inheritance, a personal, individual transmission of right.

The *Manahan Amendment*, on the other hand, does not give a categorical answer to this concern. R.A. No. 3872, in inserting Sec. 48(c) to C. A. No. 141, used the term 'members'. It may be argued that the use of the plural form would seem to allow application by a whole community. It must be remembered, however, that our land laws appear to be biased in favor of individual ownership. In analyzing Sec. 14 of the Property Registration Decree, it is asserted that the use of the term "those" may be construed to refer to communities, as well. *La Vina* argued that only tradition dictated that it be construed to mean only individuals. Furthermore, an analysis of the provisions did not disclose an intent to prohibit communal ownership.[168] This argument may be analogously applied to assert that the *Manahan Amendment* allowed application by communities.

[165] Ma. Vicenta P. De Guzman, *A Review of the Applicability of Current DENR Tenurial Instruments to Issues Related to Ancestral Domains*, NRMP POLICY STUDIES (March 1993).

[166] Domingo Nahayangan, *Improved Procedures for the Identification, Delineation and Recognition of Ancestral Land and Domain Claims Nationwide*, NRMP POLICY STUDIES (January 1993) [hereinafter Nahayangan].

[167] *Cited* by *Lynch* in Reaction to Mariflor Parpan Pagusara's Reflections on Native Title, (unpublished).

[168] *See* Presidential Decree No. 1529 (1978).

It is clear, therefore, that there must be a registration procedure which allows registration of lands within the ancestral domain in favor of individuals, clan or communities.[169]

2. ON DISPOSITION, TRANSFER AND ALIENATION

Another concern that will arise from treating the lands within the ancestral domain simply as private would be in the area of land disposition. *Ma. Lourdes Aranal-Sereno* and *Roan Libarios* provide valuable insight into the effects of land alienation:

> The system has also been responsible for the disintegration of a number of communal villages. A person who is familiar with the Torrens System, registers ancestral, communal land as his own. He fears no opposition since he presumes that villagers are 'ignorant' of such registration laws.[170]

Let us take the example of the *Kalingas*. Under the *Kalinga* Land Law, communal ownership governs the forest areas, swidden farms, tree farms or orchards, pasture and burial grounds. Rights over these areas are shared in common. The *Kalingas* recognize a limited sense of private ownership and residential lots. Strict restrictions, however, attend the exercise of rights over these lands.[171] Without the determination, recognition and legislation on individual, family or kin or communal title, what would prevent a member from alienating a portion of the supposed ancestral land otherwise held in common? *Cariño* appears to suffer from an absence of this safeguard. We can, therefore, have here a situation of indigenous or ethnic land-grabbing, to the detriment of the whole community.

The foregoing concern is real. In the case of *Director of Lands v. IAC and Acme Plywood and Veneer Co.*,[172] the Supreme Court validated the right of two members of the *Dumagat* tribe to sell 48 hectares of ancestral land to a corporation. It is conceded that this decision has positive signals at least with respect to the rights of indigenous peoples over lands claimed as part of ancestral domains. However, by so validating, it is possible that the Supreme Court sanctioned a deprivation of a part of the land held in common by the community. *La Viña, et. al.* assert that it is difficult to think that the *Dumagat* had a system of land use and ownership other than communal. This is because the *Dumagat*, until recently, have been nomadic communities of hunters and gatherers.[173] Thus, a clear case of *ethnic landgrabbing*.

[169] Antonio M. La Viña, *Arguments for Communal Title*, PHIL. NATURAL RESOURCES LAW JOURNAL 24 (volume number and year of publication unavailable). Atty. La Vina is a Professor of Indigenous Law, College of Law, University of the Philippines. He is also the Director of Research and Policy Development of the Legal Rights and Natural Resources Center.

[170] The proponent humbly admits the inadequacy of a definitive, even a uniform, understanding of communal title. Some literature simply define it in the negative that it is not necessarily akin to or the same as co-ownership.

[171] Aranal-Sereno, *supra* note 164. These authors have written substantial literature on Kalinga culture.

[172] *Id.*

[173] *See* On Cho v. Director of Lands, 75 Phil. 890 (1946).

The possibility of unregulated alienation premised on ancestral lands being private *ab initio* is worsened by the fact that today, most if not all ancestral lands are classified under forest lands, or located in critical environment areas. Thus, we can have patches of forests or critical watersheds leased or even sold to non-indigenous or enterprising persons especially for eco-tourism.

Lynch would, however, assert that these communal customs which regulate and determine rights to land reflect historical patterns of usage. They benefit tribal communities - and could benefit lowland communities as well- in that *communal ownership serves as a restraint on alienation*. True, Since the indigenous peoples form a sacred bond with the land, and since perpetual possession is the perspective of succession, the actual possessors must ensure that the domain remains productive for the sake of their own children, and their children's children.[174] The indigenous peoples perpetrate this system of protection by limiting, as a rule, transfer of their property to members of the community. Thus, in the case of the *Kalinga*:

> The right to enjoy the benefits under the two systems of ownership is determined by an individual's relationship to the community. Unless he is a member of the particular tribe, he cannot claim any right to any portion of the *ili*."[175] The only exception is when he marries a village member, in which case he becomes subject to all the rights and obligations imposed by the community, including traditional land-use systems.

Be that as it may, still, the case of the *Dumagats* involved *Acme* serves as a *caveat* that not even communal ownership or customary land ownership serve as an assurance that the ancestral land shall be preserved in the community. The *Philippine Association for Inter-Cultural Development* (PAFID) conducted studies and fieldwork between October 1986 and May 1987 with certain indigenous groups and noted the following responses to what they can do with the land:

[174] Antonio Gabriel La Viña and Prima Liza Tumbocon, Recognition of Communal Title: A Legal Imperative (1989) (unpublished).

[175] Donna Gasgonia, *Tenurial Instruments, Associated Legislation and Administrative Procedures Incorporating Features of Traditional Tenure and Land Use Systems*, NRMP POLICY STUDIES (March 1993).

It must be noted that the Manobo gave 100% negative answers to all the questions. While this is the case, *PAFID* reports that there has been a prevalence of selling and mortgaging of land to enterprising Ilocanos and Visayans in the area. Therefore, while land ownership and use among indigenous peoples are regulated by time honored customs, like communal ownership, it is no assurance that certain members of the group will not alienate the same to the detriment of the whole community. This is without yet considering the dangers attending the sale of a land within a critical environmental area to a non-indigenous person who is not at all acquainted with conservatory and ecologically-sound indigenous practices on land-use. This particular aspect shall be discussed in the subsequent chapter on land use. The danger of applying *Cariño* and treating ancestral lands as private, without more, thus become apparent.

V. INDIGENOUS LAND USE

Professor Vitit Muntarbhorn, a noted human rights advocate and a Professor of Law in Chulalongkorn University, Thailand, writes:

> (Cultural) disintegration is compounded by destruction of the ecology and habitat upon which indigenous groups depend for their physical and cultural survival. Deforestation, particularly of rain forest, and, and pollution introduced by outsiders jeopardizes the *modus vivendi* of indigenous groups. The social nexus binding members of the group to the environment is thus annihilated.[176]

The *Special Rapporteur* considered the issue of indigenous rights to their land and the concern for the environment vis-à-vis governmental development strategies of such urgency that it warranted a special attention on its final report. Reflecting on the 1990 Global Consultation on the Realization of the Right to Development, it went on to add:

> The experience of indigenous peoples and development clearly demonstrated that human rights and development are inseparable, for the abuse of the rights of indigenous peoples is principally a development issue. Forced development has deprived them of their human rights, in particular the right to life and the right to their own means of subsistence, two of the most fundamental of human rights. Indigenous peoples have been, in fact, victims of development policies which deprive them of their economic base - land and resources - and they are almost never the beneficiaries.
>
> It was underlined that the most destructive and prevalent abuses of indigenous rights are a direct consequence of development strategies that fail to respect the fundamental right of self-determination. . . participants described how indigenous peoples are routinely perceived as obstacles to development and excluded from decision-making in matters that affect them. The result has been the elimination

Aranal-Sereno, *supra* note 164.

and degradation of the indigenous land base; destruction, degradation and removal of natural resources, water, wildlife, forests and food supplies from indigenous lands either *through commercial exploitation or incompatible land use;* the degradation of the natural environment; removal of indigenous peoples from their lands; and their displacement or pre-emption from the use of their lands by outsiders.[177] (emphasis supplied)

This observation from the international level attains more local significance when the various laws and policies governing the use of forest natural resources vis-à-vis indigenous land use systems are considered.

Under present laws, only license or concession holders are allowed to use or exploit natural resources,[178] all other forest users, including indigenous peoples are considered forest destroyers, and their customary *kaingin* prohibited. Thus, Section 38 of the Revised Forestry Code states:

> In order to achieve the effective protection of the forest lands and the resources thereof from illegal entry, unlawful occupation, kaingin, fire, insect infestation, theft and other forms of forest destruction, the utilization of timber therein shall not be allowed except through license agreements under which the holders thereof shall have the exclusive privilege to cut all the allowable harvestable timber in their respective concessions, and the additional right of occupation, possession, and control over the same, to the exclusion of all others . . . .

The indigenous peoples' plight is not only concerned with ancestral land, but more properly, with ancestral domain which includes not only surface rights to the land, but also the rights to hunt, fish, cut and gather forest products. However, the present system of laws, even judicial confirmation of imperfect title, provide ownership of merely the land itself. Thus, even the owner of a private land is not always allowed to cut especially if it involves premium wood species located in his land, certain permits and licenses will have to be secured from the Bureau of Forest Management. Hunting and fishing, on the other hand, are governed by proper applicable laws.[179] The implication for the indigenous peoples are evident: The sweeping prohibition threatens the very economic base upon which survival of almost all indigenous communities is premised— their socio-cultural structures, beliefs, and the environmental balance which proceeds from their land-use patterns. The prohibition threatens the very intercourse they have with the land — their life.

[177] UN Special Rapporteur, *supra* note 41 at 23.

[178] *Id.* at 23-24.

[179] *See* Revised Forestry Code, § 20 (1975).

Moreover, government proceeds from the mistaken notion that *kaingin* and other indigenous land-use patterns are destructive. *Lynch* would assert that the bias against *kaingin* is one colonially inspired, again to the prejudice of indigenous Filipinos. He submits that the practice first came under attack by Western colonialists as being the primary cause of forest destruction. These colonialists, he asserts, rarely, if at all, encountered similar farming practices in their temperate zones.[180] This widespread, colonially inspired hostility towards swidden agriculture is an oft cited justification for the refusal of the government to recognize tribal ownership of land. Quite to the contrary, a considerable body of scientific study suggest that absent any significant external influence, indigenous land-use patterns represent an enviably viable balance between community subsistence and necessities on the one hand, and environmental protection on the other.[181]

La Viña[182] outlines the reasons why indigenous communities have succeeded in keeping the ecological balance of their environment. He asserts *first* the peculiar relationship between indigenous peoples and nature, specifically with the land. For many communities, land is sacred, one given to them by God and therefore one does not trifle with it. True enough, the field studies[183] conducted by the Natural Resources Management Program (NRMP) reveal such attitude. The *Bontocs*, for example, believe that the great God *Lumawig* brought their ancestors to their land originally called *Cholya*.[184] For the *Ilongots*, on the other hand, they believe that God became very angry with man that he scattered them into tribes and each apportioned a territory.[185] The *Aeta*, suffering most from the recent displacement from Mt. Pinatubo believes that it is where *Apo Mamalyari* reigns. It is the source of *Aeta* life.[186]

Second, the very system of exploitation, *La Viña* submits, is protective of such environment. He cites *Dove* and studies showing that long-fallow forest farming is a highly sophisticated, productive use of the environment. *Lynch* would assert that *kaingin* making by traditional practitioners may be the best way to utilize the vast, marginal areas of poor soil but abundant vegetation common in the Philippines. The thin tropical topsoil are easily depleted by permanent field agriculture. But if the fallow period is long enough, "ecologically sound *kaingin* systems are not only viable but practical."[187] The experience of upland agriculture by indigenous peoples has

[180] *See* Revised Forestry Code, P. D. No. 704, § 55 (1975).

[181] Lynch, *Native Title*, *supra* note 20.

[182] Briefing Paper, *supra* note 162 at 8. *See also* Harold Conklin, *Hanunuo Agriculture* (1957); Aram Yengoyan, *Environment, Shifting Cultivation and Social Organization Among the Mandaya of Eastern Mindanao* (1964); Charles Frake, *Social Organization and Shifting Cultivation among the Sidangan Subanen* (1955); Filomeno Aguilar, *Social Forestry for Upland Development: Lessons from Four Case Studies* (1982).

[183] *See* notes 160-169 and accompanying text.

[184] De Guzman, *supra* note 98.

[185] *Id. See also* Domingo Nahayangan, *Summarized Report of Field Consultation with Bontoc Indigenous Community* De Guzman, supra note 98 (May 1992).

[186] *Id. See also* Ma. Vicenta De Guzman, *Community Consultation with Ilongot in Aurora* (July 1992).

[187] De Guzman, supra note 98. *See also* Donna Gasgonia, *Consultation with Aeta in Zambales* (April 1992).

been a product of rhythm and harmony with nature. Their pattern of cultural organization is an example of co-evolution between a social system and a bio-physical system.[188]

Third, it is finally submitted, this conservator attitude proceeds from a sense of accountability and a realization by the members of the community that the land and other resources are not theirs alone to use and exploit. Community to them includes not only the present members but the future generations. Thus, the land must be conserved and protected. Indeed, for their environment to sustain generations upon generations, the system that must evolve must necessarily be one of conservation and protection. *Mac-liing Dulag* captures this accountability for us: *"Such arrogance, claiming to own the land. How can one own something that will outlive him. Only the tribe owns the land, because the tribe lives forever."*[189] Land must necessarily be used responsibly in a manner as to benefit future generations.

On the other hand, the sad experiences, if at all, involving *kaingin*, were those of the inexperienced, migrant poor and not those made by the environmentally astute, indigenous *kaingeros*, whose swidden systems have for centuries thrived among lush, forested slopes.[190] It has also been observed that the march of migrant farmers into the upland interiors is usually followed by denudation and erosion.[191]

In Ifugao province, for example, where the land is conceded as public by its dominantly non-indigenous community inhabitants (parts of Lamut and Alfonso Lista Municipalities), there is practically no more forest to be found. Left free of any meaningful protection, the forest cover has simply disappeared. However, it is different in the rest of the province. Where indigenous Ifugao communities hold sway irrespective of government land classification, the forest still stands. In these places practically every family or clan has a share of the forest, which share (*Muyong*) is treated as private individual or indigenous corporate property. It is usually passed on from generation to generation as inheritance. Because of its "private property" status and in view of the benefits future generations would expect to derive from it, every "*Muyong*" is jealously protected and sustainably developed. Similar systems are also practiced by other indigenous communities in the Cordillera particularly among the *Bontocs* of Mt. Province and the *Tinggians* of Abra.[192] Present laws fail to make this very important distinction between migrant settlers and indigenous farmers..

An example of indigenous land-use patterns and technologies for environmental conservation is perhaps in order. Let us take the case of the *Ikalahan (Kalanguya)*, of Kalahan, Nueva Vizcaya. Among *Ikalahan* indigenous practices[193] are:

[188] Lynch, *Native Title, supra* note 20, *citing* Grandstaff, *The Development of Swidden Agriculture*, 9 DEVELOPMENT AND CHANGE 4 (1978).

[189] Lynch, *Native Title*, supra note 20, *citing* Sajise, *Some Facets of Upland Development in the Philippines*, 1 PESAM BULLETIN 1 (1981).

[190] De Guzman, *supra* note 98.

[191] Lynch, *Native Title supra* note 20.

[192] Owen J. Lynch, Jr., *The Invisible Filipinos: Indigenous and Migrant Citizens within the "Public Domain,"* 5 PHIL. LAW REGISTER 18, 22 (March 1984).

[193] Nahayangan, *supra* note 166.

1. *Inum-an*. This is the *Ikalahan* term for swidden farming. It is a seven-step process beginning with site selection to fallowing. *Ikalahan* farmers stop planting when low yields do not justify the efforts taken to dig for tubers. They allow their areas to be fallowed from ten to fifteen years depending on biological factors like soil and climate, management factors like fire and pest management, and population pressure. The local term for this practice is *kinebbah*. Scientific studies have shown that fallowing is beneficial because it restores soil fertility. Other benefits include weed growth suppression through forest re-growth, erosion control, and pest/ disease cycle disruption.

2. *Gen-gen*. This is an ancient *Ikalahan* practice which combines terracing and composting. When sweet potato vines are already old or their production of tubers declines, the *Ikalahan* women would select the stems which are still good for planting. The rest, including leaves and grasses they bury in a contour trench dug across the face of the field. The result is a series of contoured humps that look like mini terraces filled with compost which provide fertility to the soil while preventing erosion.

3. *Balkah*. This is a form of vegetative terracing. The term means 'belt' in the local tongue. The principal plant used for this is tiger grass. The distance between each *balkah* depends on the slope. The steeper the area, the closer the *balkah*. After four years, a semi-terrace structure appears. The main purpose of this technique is to prevent soil erosion and maintain soil fertility. But by using tiger grass, *Ikalahan* farmers have not only a mechanism for soil control, but also a long-term source of materials for softbrooms. The *Ikalahan* has another ancient tradition for riprap called *tuping*. The structure prevents the soil from going down and is built along river and road banks.

4. *Pamattey* or *Pangkal ni Bigih*. These are the local terms for homemade local "pesticides". The *Ikalahan* farmers are organic cultivators. They do not use pesticides, instead, they have mixtures of plants, *opey* (a woody vine), *lahwik* (a tree), *tuwal* (a tree), and *halingaw* (a shrub) to eliminate and repel pests and cure plant diseases. They also use ash and hot chili.

With respect to hunting and fishing, the *Ikalahan* have non-destructive methods. *Akik* is their practice of catching birds on migration paths. The practice is to catch only mature ones and the younger birds caught are set free. *Halap* is their practice of fishing which merely involves a temporary diversion of stream flow to decrease the waters by piling up stones to make the fish visible and accessible to catching by hand. This is usually confined to small areas of the river. It is admitted that there may be certain variations and differences among indigenous practices. It is the consensus, however, that these practices are as a rule, environment-friendly. These notwithstanding, *kaingin* and other indigenous practices are still lumped into one category: destructive.

The foregoing discussion presents yet another concern on private ownership rights over lands within the ancestral domain. This is in the area of environmental protection. It is admitted that most of the ancestral domain claims are within "forest zones" or other critical areas of the environment. It has been shown that there is a marked difference between indigenous land-use practices and those of the non-indigenous. While those of the indigenous peoples were shown to be sustainable and preservative, the march of non-indigenous migrants to the uplands were shown to be followed by forest destruction and denudation.

Thus, while, the possible alienation of critical areas of the environment to non-indigenous persons who do not possess the indigenous knowledge may be consistent with the rights of ownership, it may not be sound environmental policy. It is submitted, therefore, that legislation be made in this area prohibiting alienation of critical areas of the environment to non-indigenous persons. In this regard, it is submitted that the State may exercise its police power to regulate land-use within the ancestral domain and prohibit alienation of critical areas thereof to non-indigenous persons.

VI. LIMITATIONS ON THE RIGHTS OF OWNERSHIP

Two possible unwanted consequences may result from simply regarding ancestral lands as private land under the *Cariño* doctrine or even under judicial confirmation of imperfect title under the *Manahan Amendment*. The first was in the area of who exercises effective ownership over a specific property within the ancestral domain. The second pertains to non-indigenous patterns of land transfer and alienation. It is submitted that *first*, land-holding or ownership whether as an individual, as a family unit, or as a community must be strictly in accordance with the indigenous cultural community's customary usage and tradition. Proper administrative determination and documentation must necessarily be had to foreclose any possibility of having a part of the ancestral domain, otherwise held communally, titled in the name of an individual, contrary to the customary usage of the community. *Second*, as we are dealing here with critical areas of our forests and watersheds, alienation, conveyance and transfers must be regulated by the State to conform strictly to the community's traditional and customary modes of property disposition. It is submitted that police power may be invoked to effectively address this second point.

A. Property Regulation on the Basis of Police Power

Police power has been said to be the most illimitable of the State's powers. It has a far-reaching scope and among its purposes are the regulation to promote health, morals, peace, education, and good order of the people. It has also been used to regulate property rights in industry, disposition and use.[194] It may be said to be that inherent and plenary power in the State which enables it to prohibit all things hurtful to the comfort, safety and welfare of society.[195] The court in *Rubi* went on to say:

> Carried onward by the current of legislation, the judiciary rarely attempts to dam the onrushing power of legislative discretion, provided the purposes of the law do not go beyond the great principles that mean security for the public welfare or do not arbitrarily interfere with the right of the individual.[196]

[194] Lourdes Dolinen, *Enriching Upland Development Through Indigenous Knowledge Systems: The Case of Kalahan, Nueva Vizcaya*, Paper presented before the Institute of Forest Conservation, UPLB (October 1995).

[195] Rubi v. Provincial Board of Mindoro, 39 Phil. 660 (1919). *See also* United States v. Toribio, 15 Phil. 85 (1910).

[196] Rubi v. Provincial Board of Mindoro, 39 Phil. 660 (1919), *citing* Lake View v. Rose Hill Cemetery Co., 70 Ill. 191 (1873).

In the State's exercise of police power, there are two standards against which the validity of any claim to police power is determined. It is said that these standards are the very walls against which the onslaught of the waves of police power may strike, but over which it can not cross.[197]

1. LEGITIMATE PUBLIC PURPOSE

The Constitution ordains:

> "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."[198]

The protection of the environment has been a growing concern not only in the Philippines but in the international level, as well. The great number of laws and executive issuances dealing with a wide range of natural resources subjects from as general as forest exploitation, fishing, and the establishment of protected areas to as specific as the cutting and gathering of rattan betray the governmental policy to safeguard and protect our environment. The policy declaration of Republic Act No. 7586 is in point:

> Cognizant of the profound impact of man's activities on all components of the natural environment particularly the effect of increasing population, resource exploitation and industrial advancement and recognizing the critical importance of protecting and maintaining the natural biological and physical diversities of the environment. . . , it is hereby declared the policy of the State to secure for the Filipino people of present and future generations the perpetual existence of all native plants and animals through the establishment of the comprehensive system of integrated protected areas. . .as provided for in the Constitution.[199]

In fact, environmental protection was invoked by the Supreme Court to justify the *ex parte* issuance of a cease and desist order by the Pollution Adjudication Board as an exception to the 'prior hearing' requirement of due process.[200] On this basis, it is submitted that environmental protection is a legitimate public purpose on the strength of which, property rights may be restricted or regulated. At any rate, the prohibition on transfers to non-indigenous members against the indigenous cultural community's customs and tradition in no substantial manner depart from nor impinge greatly on the rights of indigenous peoples. The reason being, the customary transfer of property occurs only among kinsmen and community members. Thus, the regulation is reasonable as well.

[197] *Id.* at 708-709.

[198] PHIL. CONST. art. II, § 16.

[199] PHIL. CONST. art. II, § 2(1)

[200] Pollution Adjudication Board v. CA, 195 SCRA 112 (1991).

2. REASONABLENESS OF THE MEANS EMPLOYED AND ITS CONNECTION TO THE PUBLIC END

The prohibition on transfer of land covered or within the ancestral domain to non-indigenous persons is not foreign to the indigenous culture. Lands within traditional territories are generally inalienable outside the indigenous community to whom the traditional territory belongs. If land is to be sold, it is only to the members of the same indigenous community to whom the lands belong.[201] Indeed, rights to lands that can be individually or privately owned or possessed and fruits therefrom may be passed on through succession to one's kin. Thus, legislation on this matter would involve, if at all, minimal disruption of indigenous community life.

There is one overriding consideration in this proposition — the incapacity or unfamiliarity of non-indigenous persons to cultivate or utilize forestal lands in a manner not offensive to the environment. Thus, *Lynch* attributes the mistaken image against *kaingin* to the failure of the authorities to recognize and distinguish between *kaingin* made by inexperienced, migrant farmers which usually result in denudation and soil erosion, and those made by indigenous *kaingeros* whose swidden farming has, for centuries, allowed the forest to remain productive and their communities, thriving. Indigenous persons, on the other hand, and scientific and socio-anthropological studies have shown that their peculiar relationship with the land makes it possible for them to cultivate it in a manner that preserves and conserves it for the succeeding generations.[202]

Indeed, property rights have always been subject to State regulation by police power. Thus, *United States v. Toribio* had occasion to restate the doctrine laid down in *Com. v. Alger* (7 Cush., 53, 84) and *Com. v. Tewksbury* (11 Met., 55):

> We think it is a settled principle, growing out of the nature of well-ordered society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious . . . . Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment.[203]

It is submitted, therefore, that police power may be validly invoked to regulate the transfer, alienation and disposition of lands within the ancestral domain to further enhance and preserve indigenous culture.

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[201] De Guzman, *supra* note 98 at 13.

[202] Lynch, *Native Title supra* Note 20, *citing Adaptive Strategies and Changes in Philippine Swidden-based Societies* (Olafson, ed.).

[203] US v. Toribio, 15 Phil. 85 (1910).

VII. CONCLUSION AND RECOMMENDATIONS

A. Conclusion

The demand of the indigenous peoples is just. Both from the legal standpoint and environmental considerations, there is sufficient basis for finally recognizing their right to their ancestral domains. Either under *Cariño* or under the *Manahan Amendment*, and the view taken in this paper, there is enough legal basis for this recognition. The indigenous peoples have, therefore, an undeniable right to their ancestral domain.

Recognizing ancestral domain rights and treating the lands therein as private have raised a number of concerns. The first deals with the possibility of having lands within the ancestral domain titled in the name of an individual. This, of course, is not objectionable *per se* as indigenous land use systems have been shown to be a combination of individual, kin or clan, or communal ownership. The danger, however, arises when certain lands within the domain, which are not held individually, are titled in the name of a single person. Thus, a clear case of ethnic landgrabbing. In this regard, there is a need to determine specific land use and ownership patterns of indigenous peoples (individual, kin, communal) to preclude the possibility of communal lands being titled in favor of an individual to the prejudice of the community.

The second point deals with the possible effects of alienation of lands within the ancestral domain to non-indigenous persons. It is admitted, as Lynch would advance, that indigenous customs regulate the use and disposition of ancestral lands. It is also admitted that as a rule, indigenous customs preserve the lands within their domain among themselves for the benefit of the tribe. However, customs alone have been shown to be inadequate in regulating land dealings with non-indigenous persons. Thus, there is a need to legislate on this particular matter, i.e., land ownership rights over ancestral lands shall be in accordance with the communities' practices and traditions.

Moreover, there is also a need to prohibit land transfers to non-indigenous persons. It is submitted that an unregulated influx of non-indigenous elements to their ancestral domain is detrimental to the preservation of a more cohesive indigenous culture. This prohibition becomes more significant when what is involved is a critical area of the environment. It has been shown that indigenous cultural communities are in a position to conserve and protect the natural environment, their indigenous practices being a product of a keen and astute understanding of the land that sustains them. On the other hand, the results of farming practices of migrant farmers betray their lack of conservatory and preservatory practices. Thus, from the viewpoint of environmental protection and economic utility, they are in the best position to utilize the land, being the actual occupants thereof. In this connection, there must be a re-evaluation of the 18% slope rule on forest classification. What must particularly be determined are critical areas of the environment within the ancestral domain and prohibit their transfer to non-indigenous persons.

B. Recommendations

The conflicting issues studied in this paper, that is, the right to full ownership by the indigenous cultural communities to their ancestral domain on the one hand as private owners thereof, and the State's insistence on the Regalian Doctrine, and possibly, its hesitation on environmental grounds, on the other, as well as the urgency of providing for a more humane, just and equitable solution to both of the indigenous peoples' and State's concerns, are all of paramount importance. The following are, therefore, recommended:

On the Judiciary. In order to have a uniform ruling on the matter of ancestral domain rights, the Courts must distinguish between the proper application of the *Cariño doctrine* and applications under the Public Land Act, specifically, on judicial confirmation of imperfect titles. *Cariño* proceeds from the concept of native title, a right which ante-dates any assertion of application of the Regalian Doctrine. The Public Land Act, on the other hand, is premised on prior State ownership and the rights of indigenous peoples to their ancestral domain proceeds from the lapse of certain statutory periods.

On the Executive and Administrative Agencies. Pending the enactment of a law which will recognize and afford indigenous peoples full ownership over their ancestral domain, there must be a continuous identification and delineation of ancestral domain claims pursuant to DAO 2. This will afford indigenous peoples a certain form of security in land tenure for the time being. In this regard, it is submitted, that upon the enactment of a law addressing the ancestral domain issue, the Certificates of Ancestral Domain Claims (CADC) duly issued be admitted as evidence of the existence of a just and valid claim for ancestral domain, and as to the extent thereof.

On the Legislature. A law must be passed allowing the registration of ancestral lands pursuant to the original intendment of R.A. No 3872. Under the view taken in this thesis, the indigenous peoples have acquired an incontestable and undeniable right for registration of their lands. Moreover, under the position taken on an analysis of *Republic v. Court of Appeals*, whether the land be forestal or mineral, the lapse of the statutory period vested upon the occupants private ownership, such that the mere failure of registration does not affect the sufficiency of title.

Provided, however, that this registration and the law shall contain an express provision strictly ordaining that land-holding, ownership and utilization of lands within the ancestral domain, whether under the concept of individual, family-clan or communal rights, be in accordance with established customs and tradition of the indigenous community concerned. Sec. 33 of H. B. No.33 (10th Congress, 2nd Regular Session) provides:

> "Sec. 33. *Application of Indigenous Laws, Customs and Traditions to Govern Property Rights and Relations Over Ancestral Lands* - Property rights and relations among members of indigenous cultural communities over their ancestral lands shall be governed by their indigenous laws, customs and traditions. these property rights and relations shall include among others:

> (a) land transactions such as sale, transfers, mortgages, usufruct, land tenure, communal use, crop sharing, and other forms of land use and disposition;
>
> (b) delineation of group or individual land claims, boundary and ownership disputes, and
>
> (c) hereditary succession and partition.

In this connection, it is submitted that an administrative determination and documentation of the various land-use systems and systems of ownership be made. The reason for this is to determine exactly what is registrable in the name of an individual member of the community to preclude an enterprising member from registering a parcel of land held in common to himself. This is to avoid ethnic land-grabbing. This may appear to be an insurmountable task, but substantial inroads have already been made in this respect especially by the *Natural Resources Management Program* (NRMP). The NRMP has documented customary land-use and ownership patterns of a number of indigenous cultural communities. These determination and documentation shall be furnished the DENR or the agency designated to process registration of ancestral domains within their respective jurisdictions.

Provided further that the law shall prohibit the alienation or transfer of ownership of lands within ancestral domains which are properly forestal or environmentally critical, to non-indigenous persons or those made contrary to or against the indigenous community's customs and traditions. While admittedly, non-alienation to non-indigenous persons is not alien to indigenous cultural communities, it is submitted that a statute be enacted expressing the prohibition and providing for its effect because as shown, a member of the community may decide otherwise, to the prejudice of the whole community and its future generation. Furthermore, this is consistent with preserving the land, having it intact for the subsistence and development of the future generation of indigenes. From the viewpoint of the environment, this will ensure that no outsider, unfamiliar with the ecologically-sound and conservatory practices of the indigenous peoples, would exploit the land.

In this regard, Sec. 23[25] (H.B. No. 33) altogether allows transfer to a non-indigenous person subject only to a right of redemption within ten years. The clear import is that within ten years, or even perpetually, if it not be redeemed, certain lands within the ancestral domain or certain critical areas of the environment may be worked by an outsider, ignorant and unfamiliar with the traditional farming practices of the indigenous community. It is the position of the proponent that this is not a sufficient safeguard upon the environmental points discussed. On the other hand, limiting, as a rule, ownership of lands within the ancestral domain to members of the indigenous community would be a concrete response to the mandate of recognizing and promoting the rights of indigenous communities, and of protecting the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural well-being.

As a final note, the matter of recognizing their rights to the ancestral domain and making them secure in their tenure has attained such urgency today that a continued indifference by the government aids the already rapid and alarming cultural disintegration among these peoples. The *Statement of the Twenty-four Tribal Communities in Agusan and Surigao* tells of a sad tale:

> As a result, many of our indigenous cultural communities have disintegrated. Some, like the Mamanwas, have lost not only their territories and cultural life. They have been practically reduced into urban mendicants, roaming and begging around town and urban centers.

The road to a complete and definitive solution to all the concerns attendant of the ancestral domain issue is one fraught with difficulties, such that under the view taken in this paper, a mere invocation of private ownership would not be sufficient. Far from being insurmountable debacles, however, these concerns only highlight the richness and diversity of the Philippine culture, and that the difficulties encountered along the road are but occasions of discovery and creativity— an insight to the beauty and grandeur that is Filipino.