experience of countries similarly situated. From these lessons, the Philippines could gain both a clearer understanding of how mistakes were earlier committed and how they could be avoided, as well as a higher proficiency in reading and anticipating the trends that shape international affairs. Indeed, in a world that is perceptively getting smaller each day, it would unquestionably profit the Philippines to be a better student of international law and world affairs. An even greater awareness of global conditions would lead to the making of more enlightened policies and better crafted strategies which would ultimately inure to the country's benefit. Just as strong cases may be lost by the prosecution's mishandling, the Philippines may have been a victim of some of its own misguided policies. Perhaps the time has come for us to stop blaming others for our country's ills and to start helping ourselves to find better solutions through our own efforts.

ANCESTRAL DOMAIN RIGHTS: ISSUES, RESPONSES, AND RECOMMENDATIONS

CERILO RICO S. ABELARDO*

The right of tribal Filipinos to their ancestral domains and ancestral lands has been recognized by the Supreme Court since 1909 in Cariño v. Insular Government, *when, speaking through Justice Holmes, it ruled that ancestral lands never formed part of the public domain.*

Based on the Regalian Doctrine, however, the State considers itself the sole source of authority in the classification and disposition of public lands. Now entrenched in the Constitution, the Regalian Doctrine has been invoked by the government, time and again, to justify the taking of ancestral lands for development purposes.

The present national law on land ownership, which prohibits the alienation and occupation of forest lands, is founded on the Regalian Doctrine. Under the present law, tribal Filipinos may not acquire any rights over their ancestral lands, since these lands are mostly forest lands. The existence of tribal Filipinos, however, is profoundly integrated with the land, which constitutes their primary economic and cultural base. Thus, the loss, of ancestral lands means the loss of an entire cultural heritage.

Fortunately, the present Constitution recognizes the rights of tribal Filipinos to their ancestral domains. This paper proposes that this innovation in the Constitution carved out an exception to the coverage of the Regalian Doctrine. The unequivocal recognition by the Constitution of the rights of tribal Filipinos to their ancestral domains can only have one reasonable implication: ancestral lands do not form part of the lands of the public domain.

INTRODUCTION

A. Short Profile of Tribal Filipinos

Tribal Filipinos have been known by various names by different governments in the country for over 450 years. The Spanish colonial government called them "feroces" and "infieles." The North American colonial administration identified them as savages, illiterates, and non-Christians. The present Philippine Republic refers to them as national cultural minorities, national

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eventually driven many tribal Filipinos to work as underpaid miners, plantation workers, and logging concession laborers of giant corporations which have taken over their ancestral lands. Some of them have even taken to the urban areas to beg for a living. This marginalization of the tribal Filipinos is easily traced to the gradual loss of their economic base, their ancestral lands and domains, to those who can invoke the national laws on land ownership and utilization.

B. Purpose and Relevance of the Study

The tribal Filipinos are citizens with constitutionally-protected rights. Although they constitute the so-called cultural minorities, they have every right to ask for what is due them under the fundamental law of the nation. The only thing that they ask for is to be allowed to live their own distinct cultural heritages in accordance with their customs and traditions. It just so happens that their way of life is profoundly integrated with their ancestral lands and domains, which comprise their economic and cultural base. The loss of these ancestral lands and ancestral domains means the loss of an entire cultural heritage. For the tribal Filipinos, the land is their life.

The Philippine mainstream society, however, has failed to grasp the essence of the indigenous way of life. This is not surprising, for on one hand, the mainstream society functions under a Western-oriented culture that regards land as a mere commodity that can be traded or a natural resource that can be exploited for monetary gain. The indigenous way of life, on the other hand, is founded upon ancient customs and traditions which are intimately tied to the direct cultivation and utilization of land resources. Since it is the mainstream society which wields political power, the laws that it formulated on the use and allocation of scarce resources like land reflected its own concept of the land under a Western framework called the Regalian doctrine. These laws predictably worked against the way of life of the tribal Filipinos by failing to appreciate their special relationship with their ancestral lands.

This study will attempt to dissect the highly complicated issues regarding the problem on Ancestral Domain rights, with the endview of justifying the customary tenurial rights of tribal Filipinos to their ancestral lands. It is unavoidable that this legal study delve on the socio-historical dimensions of the problem to situate the issues in a fair perspective. Although the approach is to isolate key issues affecting ancestral domain rights, it must be borne in mind that the issues involved are tightly intertwined such that one part cannot be properly understood without relating it to the whole.

The problem on Ancestral Domain rights is a national problem that requires national participation for its resolution. It is a problem that can no longer be ignored by the nation since conflicts, often violent, on the use of scarce natural resources have escalated due to the inequitable allocation policies of the government. If the State through the government is indeed serious about forging national unity for progress and development, then it must address all major components of the peace process that it currently negotiates with partisan sectors. The problem on ancestral domain rights is one such major component, being impressed with real and immediate consequences on the lives of at least ten percent of the country's population.

C. Scope and Limitations of the Study

Former Congressman William Claver, a well-respected advocate of ancestral domain rights from the Province of Ifugao, has always maintained that ancestral domain rights and political autonomy or self-rule are inseparable. The reason is that all aspects in the life of tribal Communities form one integrated lifestyle founded on the breadth, height, width, and depth of the ancestral domain. Thus, it is inconceivable to recognize the right of tribal Filipinos to their ancestral domains without recognizing as well their right to self-rule or political autonomy. This paper, however, will only delve on the tenurial rights of tribal Filipinos to their ancestral lands. The author admits that he does not have the competence to integrate the issue on political autonomy into the discussion on tenurial rights. The author, however, believes that the unequivocal recognition by the government of the rights of tribal Filipinos will be the first crucial step towards the peaceful settlement of the ancestral domain problem.

Likewise, the struggle of the Muslim communities or the *Bangsa Moro* to gain political autonomy will not at all be discussed in this paper. The *Bangsa Moro* issue is another component in the national peace process which calls for a separate study. The *Bangsa Moro* peoples, while considered as indigenous Filipinos, are culturally, politically, and economically distinct from the tribal Filipinos due to the function of Islam, which permeates the life of every Muslim Filipino.

This paper is only about the rights of tribal Filipinos to their ancestral domains.

I. IDENTIFYING THE ISSUES

A. Development Aggression

Mt. Apo,[7] the Philippines' tallest mountain straddling the provinces of Davao, North Cotabato, and Davao del Sur in Mindanao, is home to about 460,000 *lumad*[8] peoples. Six *lumad* tribes, namely, the Manobo, Ubo, Bagobo, Ata, K'lagan, and Tagakaolo, have always considered the mountain as their ancestral territory[9] since time immemorial.[10] These *lumad* peoples who are

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[7] Rising 2,945 meters above sea level, the mountain was declared as a National Park in 1936. It was also included in the United Nations List of National Parks in 1982. The park has an official area of 72,814 hectares.

[8] *Supra* note 2.

[9] The *lumads* around Mt. Apo call the mountain Apo Sandawa believing that it is the dwelling place of their supreme god Apo Sandawa. The natives believe that the mountain, being the body of their god, is the origin and source of all lands and rivers in Mindanao.

[10] TABAK, *supra* note 4, at 40.

mostly swidden farmers, hunters, and forest products gatherers depend on the resources of the mountain for subsistence. Their swidden farms,[11] hunting grounds, worship, and burial sites can all be found in the mountain.

Trouble began haunting the tribes when the government through the Philippine National Oil Company (PNOC)[12] started to bore geothermal wells into Mt. Apo to depths which approximate the height of the mountain itself. Fearing that the government operations may work serious environmental problems on their Mt. Apo Sandawa, the *lumad* tribes opposed the government project of tapping geothermal power from the mountain. By dint of state power and executive backing, the energy project pushed through. Undaunted, the lumad elders and chieftains forged a ***dayandi***[13] and vowed to defend their sacred mountain to the last drop of their blood.

The fate of the Mt. Apo *lumads* in the wake of government development offensive is an experience common to many other tribal Filipinos. From 1974 up to the early 1980s, the Kalingas and the Bontoks in the Cordillera region of Northern Luzon staged concerted and militant mass actions directed against the Chico Dam project of the National Power Corporation (NPC). Around 100,000 Igorots[14] were bound to be displaced by the damming project which would inundate much of their ancestral lands.[15] The situation was reminiscent of the dislocation of hundreds of Ibaloi families upon the construction of the Ambuklao and Binga Dams in the 1950s.[16] In 1974, at the height of the Chico Dam controversy, a team of government engineers came to a Kalinga *ili*[17] to dialogue with the Kalinga chieftains. The visitors who were with heavy military escort taunted the Kalinga representatives and demanded from them

[11] Swidden farming is an indigenous method of shifting cultivation locally known as *kaingin* farming.

[12] In 1983, the Forestry Department denied PNOC's application for clearance to explore Mt. Apo National Park for geothermal development purposes. In 1987, the PNOC managed to secure a government clearance and began drilling the mountain. In 1988, the Department of Environment and Natural Resources (DENR) stopped PNOC's operation in the area for being illegal. In 1992, the DENR approved the construction of geothermal plants within the park. *See supra* note 4, at 40-44.

[13] A *dayandi* is a lumad ritual similar to a blood compact. On April 13, 1989, nine lumad groups consisting of over 1,500 Mt. Apo natives converged at the site of Apo 1-D geothermal well. The leaders slaughtered chicken and wiped their hands with its blood. They then drew blood from their fingertips, mixed the blood with wine and drank from the same mixture to seal the *dayandi*. *See supra* note 4, at 46-47.

[14] "Igorot" is a generic term referring to a member of any of the Ifugao, Bontok, Kalinga, Kankana-ey, Yapayao, Ibaloi, Tinggian, and Isneg tribes of the Cordillera Region in Northern Luzon. The term was first used by the early Spanish conquistadores to refer to the fierce mountain people of the north who refused to recognize Spanish sovereignty.

[15] UGNAYANG PANG-AGHAM TAO, HUMAN RIGHTS AND ANCESTRAL LANDS: A SOURCE BOOK 42 (1983) [hereinafter cited as SOURCEBOOK] *citing* Cordillera Speech at the 3rd National ECTF Convention in Cebu City, November 1980.

[16] *Victims of Development in Benguet*, SANDUGO, First Quarter 1983, at 24-28 reprinted in SOURCEBOOK, *supra* note 15, at 45.

[17] An *ili* is a Kalinga village.

paper titles proving ownership to the disputed lands.[18] A Tinggian chieftain by the name of Macli-ing Dulag[19] stepped forward and spoke:

> You ask if we own the land. And mock us. "Where is your paper title?" When we query the meaning of your words you answer with taunting arrogance. "Where are the documents to prove your title?" Title. Documents. Proof(of ownership). Such arrogance of owning the land. When you shall be owned by it. How can you own that which will outlive you? Only the race owns the land because only the race lives forever.xxx[20]

As for the Ibaloi families who were forced to leave their fields that formed part of the 355-hectare agricultural land in Tuba, Benguet, their woes have been immortalized by the unfinished mountain-size stone bust of former President Marcos, which now squats on Ibaloi ancestral lands.[21]

The Manobos of Bukidnon down south in Mindanao also have a sad story to tell in their encounter with the Bukidnon Sugar Industries Company (BUSCO) during the infamous PANAMIN[22] era. Pursuant to a national policy in mid-1974 to increase sugar production, a new sugar mill was set up in Bukidnon in 1976 by a consortium of government, private, and overseas holding entities. The dark side of the sugar mill project lay in how it was carried out. In 1975, BUSCO tractors bulldozed Manobo lands in Barrio Paitan to clear the area for the mill-site.[23] Elements of the now defunct Philippine Constabulary (PC) were also there to demolish the huts of the natives. PANAMIN, the government agency then tasked to look after the welfare of the non-Muslim hilltribes did nothing to protect the rights of the dislocated natives. It turned out that BUSCO and PANAMIN were all in the same bulldozer, so to speak.

Several other cases may be cited to illustrate how tribal Filipinos are dispossessed of their ancestral lands in the name of national development. There was the National Development Company (NDC), which was authorized by law in 1979 to take around 40,550 hectares of land that later became the

[18] P. Miraflor-Parpan, *Do Natives Need Title? Reflections on Native Title in Relation to Kalinga*, SANDUGO Fourth Quarter 1983, condensed in SOURCEBOOK, *supra* note 15, at 150.

[19] Macli-ing Dulag was the acknowledged leader of the Kalinga and Bontok tribal communities in opposing the Chico River Dam Project. He was murdered in April 1980 at the height of military operations being conducted in the Cordillera region. The lone suspect for his murder was a certain Lt. Adalem.

[20] SOURCEBOOK, *supra* note 15.

[21] *Id.* at 46.

[22] PANAMIN stands for Presidential Assistant for National Minorities. In 1967, President Marcos appointed Manuel "Manda" Elizalde, Jr. as Presidential Adviser on National Minorities. Manda was elevated to cabinet rank in 1968. In 1975, Marcos abolished the Commission on National Integration (CNI) and replaced it with PANAMIN. The agency became infamous for employing non-Muslim tribal Filipinos in counter-insurgency operations. PANAMIN also figured in many cases of ancestral landgrabbing involving people close to Marcos.

[23] ICL RESEARCH TEAM, A REPORT ON TRIBAL MINORITIES IN MINDANAO, 41-50.

infamous NDC-Guthrie plantation in Agusan del Sur.[24] A good part of the land taken were occupied by the Agusan natives.[25] To quell any opposition from those who would be displaced by the project, NDC-Guthrie employed the services of a notorious paramilitary group called "The Lost Command,"[26] which was then terrorizing the island of Mindanao.

Lately, there was also the Laiban or Kaliwa Dam Project pursued by the administration of former President Aquino through the Metropolitan Manila and Sewerage System (MWSS).[27] The Kaliwa River Basin Project will flood seven barrios of Tanay in the Province of Rizal, affecting some 1,600 families of Dumagats, Remontados, Cordillera indigenous peoples, and some lowlanders.

At this point, a pattern emerges. Whenever and wherever the government pursues development projects involving the so-called lands of the public domain,[28] tribal Filipinos are dispossesed of their ancestral lands. It is not a coincidence that all those dislocated indigenous populations always stake a claim of prior possession and ownership on lands taken by the government. These tribal Filipinos have been working the land since time immemorial. The issue on ancestral domain is painfully and unecessarily protracted primarily because the government, since the colonial administration days, has continually refused to acknowledge that a great portion of the public domain had always been occupied by indigenous communities.[29]

B. Clash of Concepts on Land Ownership

The issue on ancestral domain[30] revolves around land ownership. Land is a primary economic resource. Land is also scarce. This scarcity of land calls for systems or rules on how the resource will be exploited and distributed in order to facilitate transactions, and to peacefully settle conflicting interests. These systems or rules are called laws.

[24] SOURCEBOOK, *supra* note 15, at 11-20. Presidential Decree No. 1648 exempted NDC from the operation of the constitutional limit on private land acquisition.

[25] *Id.* at 13. About 3,000 people would be dispossessed of their lands within the first small area to be developed as plantation.

[26] A heavily armed band of some 200 ex-soldiers loosely under the command of Colonel Carlos Lademora. It was originally constituted by the government to fight insurgents.

[27] TABAK, *supra* note 4, at 11-24. The Kaliwa Dam Project formed part of the many components of the grandiose "Lungsod Silangan" project of the former First Lady Imelda Marcos.

[28] Lands of the public domain are government lands which are thrown open to private appropriation and settlement by homestead and other similar general laws. *See Montano v. Insular Government*, 12 Phil. 283, at 285 (1909).

[29] Around 7.5 million Filipinos are found within public lands. Some 4.5 million of them are members of indigenous cultural communities. They are what Lynch, Jr. calls "the invisible peoples." *See*, O.J. Lynch, Jr., *Native Title, Private Right and Tribal Land Law*, 57 Phil. L.J. at 272.; O.J. Lynch,Jr., *Invisible Peoples and a Hidden Agenda: the Origin of Contemporaneous Philippine Land Laws (1909-1913)*, 63 Phil. L.J. 247, at 255-256.

[30] To be discussed in greater detail in Chapter III of this thesis.

Laws may be written or unwritten. Most societies today are governed by written laws agreed upon by a forum representing the majority will of a given population. There are also societies which still adhere to a system of unwritten laws called customary laws. The indigenous cultural communities are such societies that still practice oral traditions as a way of life.

The Ifugaos, for instance, distinguish by tradition two kinds of property. "The one class he calls *ma-ibuy*, that for whose transfer by sale an *ibuy* ceremony is necessary; and the other, *adi ma-ibuy*, that for whose transfer an *ibuy* ceremony is not necessary."[31] Ifugao custom says that when the seller and the purchaser eat together at the *ibuy* feast, the transfer of ownership is complete and irrevocable.[32] "If one were to buy a field without performing the *ibuy* ceremony, the presumption would be held that the field had passed into hands as a *balal*."[33] Studies show that the *ibuy* system of selling property, particularly the *balal*,[34] works well among the Ifugaos.

The Tirurays in southwestern Mindanao peacefully settle their conflicts and formally seal their agreements and other social transactions like marriage in a setting called *tiyawan*, presided over by a moral leader called the *kefeduwan*.[35] "Traditional Tirurays are, of course, illiterate; no written records exist of *tiyawan* transactions. But detailed records do exist in the memory of any participating *kefeduwan*."[36]

Among the Kalingas of Northern Luzon, adverse parties within the *ili* are not allowed to confront each other not only to minimize tensions that can lead to more serious feuds between clans, but also to hasten the conflict settlement process.[37] The conflict is settled by the *papangat* whose decision binds all the parties. "The *papangat* as the elder members of the community and the most knowledgeable on unwritten Kalinga custom laws are presumed to be in the best position to ascertain the truth and resolve conflicting claims."[38] Disputes between Kalinga villages are settled by the highly-respected village

[31] R.F. BARTON, IFUGAO LAW 32 (1969).

[32] *Id.* at 42.

[33] *Id.*

[34] *Id.* at 38. The *balal* is like a pawn or mortgage. When an Ifugao borrows money from another and gives his rice field into the hands of his creditor as a security on debt, the rice field becomes a *balal*. The creditor possesses the plants and harvests in the rice field until the debt is repaid. The creditor may work the land, but he cannot sell it. He can, however, transfer the field as a *balal* in the hands of another after securing the permission of the owner. This system assures the prompt redemption of the field.

[35] *See* STUART A. SCHLEGEL, TRADITIONAL TIRURAY LAW AND MORALITY 58 (1970).

[36] *Id.* at 59. A strong memory is the most spectacular of *kefeduwan* attributes. The *kefeduwan* can recite the precise composition of a brideprice settlement including the physical description, size, characteristic, and number of articles twenty or thirty years after the settlement was accomplished.

[37] Ma. Lourdes Aranal-Sereno and Roan Libarios, *The Interface Between National Law and Kalinga Land Law*, 58 Phil. L.J. 420, at 442 (1983). [hereinafter cited as Aranal-Sereno]

[38] *Id.* at 443.

elders along bilateral peace pacts or *pagta ti pudon*. The *pagta* (provisions) in the existing *pudon* (peacepact) define the boundaries of each Kalinga tribe.[39]

Customary laws have governed the Ifugaos, Tirurays, Kalingas, and other tribal Filipinos well since time immemorial. The validity, therefore, of customary laws in regulating community life should be considered as a settled issue. Real controversy begins when customary laws of tribal communities in a nation clash with the written laws of the majority population on issues that matter to both groups, like the age-old problem on the ownership and exploitation of land.

By historical accident, Philippine society found itself governed by two sets of laws: the national written law and the customary unwritten tribal law. The Western-oriented national written law was a by-product of long years of subjugation of the archipelago by Western colonial powers, namely—Spain and the United States of America. Majority of the people in the islands succumbed to the systems imposed by the colonizers, hence the predominance of Western-oriented laws in Philippine society.[40] Those who resisted colonial influence and adhered to indigenous customs and traditions became what are now called indigenous cultural communities or tribal Filipinos.

The heart of the ancestral domain problem lies in the conflict between customary law and the national law on the ownership and use of land.[41]

The national law governing lands of the public domain was founded upon the Western legal fiction called "Regalian Doctrine."[42] This feudal theory, also known as *Jura Regalia*, was first introduced by the Spaniards into the country through the Laws of the Indies and the Royal Cedulas. Later, it was adopted by the North American colonizers through the Public Land Acts and the judiciary in administering the country. Eventually, the doctrine became entrenched in the Constitution.

An unpublished 1921 decision of the Supreme Court defined the Regalian Doctrine in this manner:[43]

> The regalian theory may be defined as the prerogative of the king, or the right which the king claims, in the property of private persons. The doctrine had its origin in the autocratic government of kings, and has been perpetuated in other kingdoms and other forms of autocratic government through the same influence. Its origin antedates any organized system of general taxation by which the people are required to pay all expenses of the government. It has its origin in the fact that kings were obliged to personally furnish the sinews of war and funds for the general administration of the government, in order that they, in times of stress, might adequately protect their dignity and their realm. The rich minerals of the realm, being real and tangible treasures, were at once set aside as the patrimony of the king by virtue of this prerogative.

Spain in its conquests invoked this universal feudal theory and asserted that all conquered lands are held from the crown. Law 14, Title 12, Book 4 of the *Recopilacion de Leyes de Indias* opens with the following: "We having acquired full sovereignty over the Indies, and all lands, territories, and possessions not heretofore ceded away by our royal predecessors, or by us, or in our name, still pertaining to the royal crown and patrimony xxx".[44] Thus, the Regalian Doctrine formed the basis of major Spanish land laws in the Philippines like the Royal Cedula of October 15, 1754, the Royal Cedula of June 25, 1880, the Spanish Mortgage Law of 1893, and the Maura Law which all provided for the adjustment, registration, and acquisition of lands by virtue of government grants.

After Spain ceded the Philippines to the United States in the Treaty of Paris on December 10, 1898 for a consideration of US$20 million, the North American colonial government pursued the Spanish policy of requiring settlers on public lands to obtain deeds from the government.[45] At this point, it was not clear how the Regalian Doctrine was adopted by the new colonial rulers. It could be gleaned, however, from the laws passed during the American colonial period like the Land Registration Act, the Cadastral Act, and the Public Land Acts that the State, through the government, has solely asssumed the authority to classify and dispose of lands of the public domain. The government, as authorized by the Philippine Bill of 1902,[46] set up throughout the islands land registration courts which would adjudicate land claims. It was the judiciary which nurtured the regalian theory until it took roots in the national legal system. The Supreme Court finally declared in *Lee Hong Hok v. David*[47] that the Constitution has adopted the concept of *jura regalia*, the ownership, however, being vested in the State as such rather than its head. The same court also proclaimed in *Republic v. CA*[48] that "the State as *persona*

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[39] *Id.*

[40] *See* articles written by Owen J. Lynch, Jr.: *Land Rights, Land Laws, and Land Usurpation: The Spanish Era (1565 - 1898)*, 63 Phil. L.J. 82 (1988); *Invisible Peoples and a Hidden Agenda: The Origin of Contemporary Philippine Land Laws (1900 - 1913)*, 63 Phil. L.J. 248 (1988); *The Philippine Colonial Dichotomy: Attraction and Disenfranchisement*, 63 Phil. L.J. 112 (1988).

[41] Aranal-Sereno, *supra* note 37.

[42] The prevailing perspective in Europe during the age of overseas expeditions (14th century) was the *Jura Regalia*. Under Spanish law at that time, there was no provision allowing Spanish expeditions to claim for the Crown inhabited territories. The *Partidas* only gave the legal right over any newly discovered land to whoever inhabited it first. *See* Owen J. Lynch,Jr., *The Legal Bases of Philippine Colonial Sovereignty*, 62 Phil. L.J. 279 (1987); Antoinette G. Royo, *Regalian Doctrine: Whither the Vested Rights?*, 1 Phil. Natural Resources Law Journal, December 1988, at 1-8.

[43] *Lawrence v. Gaduno*, G.R. No. 10942, cited in *A Report on an Integrated Sociological and Legal Research, Appendix A*, unpublished report by Philippine Association for Intercultural Development, Inc. (PAFID), November 1988.

[44] *Valenton v. Murciano*, 3 Phil. 537, at 542 (1904). [English translation supplied by the Court.]

[45] *Id.* at 553.

[46] An Act Temporarily to Provide for the Administration of the Civil Government in the Philippine Islands, and for Other Purposes.

[47] 48 SCRA 373, at 377 (1972).

[48] 89 SCRA 648, at 656 (1979).

in law is the juridical entity, which is the source of any asserted right to ownership of land."[49]

Elevated into constitutional status, the Regalian Doctrine now projects its scope in this grand manner:

> All lands of the public domain, waters, mineral, 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.[50]

Now that the State is constitutionally ordained as the source of all land grants in the country, it becomes all the more obligated to guarantee the validity and indefeasibility of the grants it issues. State power becomes illusory when the State cannot enforce its authority. Hence, the State guaranteed the validity of its land grants through an effective system of land registration.

During the Spanish regime, there was no effective system of land registration. Thus, the succeeding colonial rulers, through the Philippine Commission, passed the Land Registration Act of 1903.[51] This land registration law or Act No. 496 brought all lands in the Philippines under the operation of the Torrens system.

Formulated by Sir Robert Torrens of South Australia, the Torrens system quiets all claims to a parcel of land by the issuance by the State of an indefeasible and imprescriptible proof of title called the Torrens Title to successful claimants of the land. With the advent of the age of a modern and effective system of land registration,[52] concepts of land were radically altered. "The system, with the State guaranteeing indefeasibility as stated in the Torrens certificate highly facilitates land negotiations. The effect of this is the transformation of real estate into an industry."[53] Western-oriented laws have turned land into a mere commodity which can be traded by the mere exchange of paper titles. This concept of land passing hands like goods on sale in the market is diametrically opposed to the customary law of tribal Filipinos regarding land.

Customary law on land is founded upon the traditional belief that no one owns the land except the gods and the spirits, and that those who work

[49] *Id., citing Republic v. Marcos*, 52 SCRA 238 (1973).

[50] PHILIPPINE CONST. art. XII, sec. 2. The 1935 Constitution and the 1973 Constitution also contained similar provisions.

[51] Act No. 496 as originally passed was almost a verbatim copy of the Land Registration Law of Massachusetts. *See* Hilarion U. Jarencio, *Philippine Legal History* 36-37.

[52] The present system of land registration was embodied in P.D. No. 1529 or The Property Registration Decree of 1978. It amended Act No. 496 to further streamline the registration proceedings. Presidential Decree No. 892 (1976) had earlier discontinued the use of Spanish titles as evidence in land registration proceedings. *cf. Director of Lands v. Rivas*, 141 SCRA 329 (1986).

[53] Aranal-Sereno, *supra* note 37, at 433.

the land are its mere stewards.[54] In a consultation conducted in Mindanao by the Roman Catholic Church, representatives from eleven Mindanao *lumad* tribes were asked the question: *What is your concept of land, its ownership, and its use?* Their answers have been summarized as follows:

> According to the tribal participants, land is a blessing from God and is, therefore, sacred. It is the source of life of the people, like a mother that nurtures her child. Consequently... land is life.
>
> Land is also seen as a symbol of identity. It symbolizes their historical identity because they see it as an ancestral heritage that is to be defended and preserved for all future generations. It symbolizes their tribal identity because it stands for their unity, and if the land is lost, the tribe too, shall be lost.
>
> Ownership of the land is seen as vested upon the community as a whole. The right to ownership is acquired through ancestral occupation and active production. To them, it is not right for anybody to sell the land because it does not belong to only one generation, but should be preserved for all generations.[55]

Customary law has a strong preference for communal ownership, which could either be ownership by a group of individuals or families who are related by blood or by marriage,[56] or ownership by residents of the same locality who may not be related by blood or by marriage. The term "communal ownership" is distinct from the civil code concept of co-ownership and the corporation law's notion of corporate ownership. The system of communal ownership under customary law draws its meaning from the subsistence and highly collectivized mode of economic production.[57] The Kalingas, for instance, who are engaged in team occupation like hunting, foraging for forest products, and swidden farming found it natural that forest areas, swidden farms,[58] orchards, pasture and burial grounds should be communally-owned.[59] For the Kalingas, everybody shares a common right to a common economic base. Thus, as a rule, rights and obligations to the land are shared in common.[60]

[54] *See* Ponciano L. Bennagen, *Indigenous Attitudes Toward Land and Natural Resources of Tribal Filipinos*, 31 NATIONAL COUNCIL OF CHURCHES IN THE PHILIPPINES NEWSLETTER, Oct.- Dec. 1991, at 4-9; B.R. Rodil, *Ancestral Domain: A Central Issue in the Lumad Struggle for Self-determination*, MINDANAO FOCUS No. 24.

[55] Ponciano L. Bennagen, *Indigenous Attitudes Toward a Land and Natural Resources of Tribal Filipinos*, 31 NATIONAL COUNCIL OF CHURCHES IN THE PHILIPPINES NEWSLETTER, Oct.- Dec. 1991, at 5.

[56] *See* June Prill-Brett, *Bontok Land Tenure* (University of the Philippines Law Library, mimeographed.)

[57] Aranal-Sereno, *supra* note 37, at 440.

[58] *Id.* at 441. "In the case of swidden farms, the rule is slightly modified. The right to use and cultivate the land is subject to the prior right of an individual who previously exerted labor in clearing the area. One who has invested labor has the right to exclude others from using the swidden farm. While this right is established through prior use, it is maintained through constant usage."

[59] *Id.* at 440.

[60] *Id.* at 441.

Although highly bent on communal ownership, customary law on land also sanctions individual ownership. "The residential lots and terrace rice farms are governed by a limited system of individual ownership. It is limited because while the individual owner has the right to use and dispose of the property, he does not possess all the rights of and exclusive and full owner as defined under our Civil Code."[61] Under Kalinga customary law, the alienation of individually-owned land is strongly discouraged except in marriage and succession and except to meet sudden financial needs due to sickness, death in the family, or loss of crops.[62] Moreover, land to be alienated should first be offered to a clan-member before any village-member can purchase it, and in no case may the land be sold to a non-member of the *ili*.[63]

In contrast, the national law favors individual ownership. The basic law governing the disposition of public lands[64] itself speaks of individual homesteads and patent titles and does not mention collective grantees. Even co-ownership, although a legitimate collective mode of ownership, is frowned upon by the Civil Code, as shown by its numerous provisions partial to partition of the co-ownership.[65] Likewise, corporate ownership under the general corporation law is heavily regulated to terminate at the happening of certain conditions or after the expiration of a certain period of time.[66] After all, individual ownership is highly compatible with the latent purpose of the national land registration law which is to facilitate the transfer of ownership of land. With these, it becomes easy to understand why the customary law system of communal ownership, while not prohibited under the national law, is not expressly recognized either. As far as the national law is concerned, perpetual tenure to the land belongs to the individual as against the enduring principle in customary law that perpetual tenure to the land usually belongs to its collective occupants.

The national land registration system has been responsible for the disintegration of some communal villages.[67] Ancestral lands often end up being individually titled through fraud or legal circumvention by those familiar

[61] *Id.* Also *see* The Civil Code of the Philippines, Republic Act 386, art. 428, par. 1 (1950). "The owner has the right to enjoy and dispose of a thing without other limitations than those established by law."

[62] Aranal-Sereno, *supra* note 37, at 442.

[63] *Id.*

[64] Commonwealth Act No. 141 (1936), as amended.

[65] *e.g.*, The Civil Code, art. 494. "No co-owner shall be obliged to remain in the co-ownership. Each co-owner may demand at anytime the partition of the thing owned in common, in so far as his share is concerned. Nevertheless, an agreement to keep the thing undivided for a certain period of time, not exceeding ten years, shall be valid xxx."

[66] *e.g.*, The Corporation Code, B.P. Blg. 68, sec. 11 (1980). "A Corporation shall exist for a period not exceeding fifty (50) years from the date of incorporation unless sooner dissolved or unless said period is extended. xxx"

[67] Aranal-Sereno, *supra* note 37, at 432.

with the Torrens system.[68] When the natives who are dispossesed of their communal lands confront the title holder, the latter calls upon the State apparatus for justification. Committed to uphold the Torrens system, the State predictably enforces the national land laws to the detriment of those who have a better right to the land by ancient occupation under customary law.[69]

It may also happen that a member of the tribe may register for himself communal lands like what Mateo Cariño, an Igorot, did in the 1909 case of *Cariño v. Insular Government*,[70] which involved 146 hectares of prime Ibaloi land. So that he could sell the land to a foreigner, Cariño sought a Torrens title to the land cultivated by his ancestors.[71] The U.S. Supreme Court upheld Cariño's individual native title without, however, deciding on the kind of property tenure he had over the land.[72]

As the individual registration of ancestral lands results into the loss of an entire economic and cultural base of the dispossesed natives, tribal Filipinos cannot be faulted for resisting by all means claims against their lands as if in defense of their very lives.

Unless and until the disjunction between the national law and the customary law on land is bridged, tribal Filipinos who comprise at least ten percent of the nation's population, will remain unjustly threatened with cultural and economic annihilation. Duly noted is the fact that government-sanctioned ancestral landgrabbing has been primarily responsible for ethnocide in the country.[73] The more alarming dimension to the problem, however, is that the magnitude and effects of ancestral land usurpation are not widely known. A national problem like the loss of an entire heritage can only be solved

[68] Civil Case No. 23-518 entitled *Bulawoy Infiel, et. al. v. Pedro Latauan, et. al.* lies pending at the RTC of Roxas, Isabela, Branch 23. In this case, a Ga'dang tribe seeks to recover a 35-hectare communal land originally registered with the Union Kalinga de Dalig. Plaintiffs Infiel, et. al. allege that the land was fraudulently partitioned and individually titled by the defendants.

[69] Aranal-Sereno, *supra* note 37, at 442.

[70] 41 Phil. 935 (1909).

[71] *See* Owen J. Lynch, Jr., *Invisible Peoples and a Hidden Agenda: the Origin of Contemporary Philippines Land Laws (1900-1913)*, 63 Phil. L.J. 248, at 288-294 (1988). [hereinafter cited as *Invisible Peoples*.] An American merchant residing in Manila paid Cariño 100 Mexican dollars as earnest money for the purchase of the land and promised to pay 5,900 Mexican dollars more after Cariño secures a Torrens title to his ancestral land.

[72] "In a paper written by the Cordillera Studies Program, it is pointed out that the Ibaloi, to which ethnolinguistic group Mateo Cariño belonged, had no concept of exclusive or alienable ownership. They did not 'own' the land as one owned a pair of shoes. Instead they considered themselves as stewards of the land from which they obtained their livelihood. During the early past of Benguet's history, however, a few *baknang* (rich) mined gold which was then exchanged for cattle. This resulted in the establishment of pasture lands. Later, to prevent the spread of rinder pest diseases, cattle owners set up fences. It was only with the erection of fences that new concept of rights to land arose." *See* M.V.F. Leonen, *On Legal Myths and Indigenous Peoples: Reexamining Cariño vs. Insular Government*, 4 Phil. Natural Resources Law Journal, Aug. 1991, at 23.

[73] *See* Owen J. Lynch, Jr., *The Philippine Indigenous Law Collection: An Introduction and Preliminary Bibliography*, 58 Phil.L.J. 462 (1988).

nationally. But how can one involve the great majority in tackling the ancestral land problem when it remains enmeshed in the distorted belief that indigenous culture is inferior? But by far, the biggest blow to the integrity of indigenous cultural communities is the failure of the national legal system to recognize traditional tenure to ancestral lands.

C. *Classification and Disposition of Public Lands*

The course of the ancestral domain constroversy is largely determined by the national land classification system due to the limitations imposed by the Constitution on the alienation of lands. Lands of the public domain, for instance, cannot be disposed of unless classified by the State.[74] This precondition to the valid alienation of public lands is "in consonance with the Regalian Doctrine that all lands of the public domain belong to the State, and that the State is the source of any asserted right to ownership in land and charged with the conservation of such patrimony."[75] The Constitution prohibits the alienation of lands of the public domain except those classified as public agricultural lands.[76] No one, not even Congress, can dispose of public lands classified as forest, mineral, or national park.

The power to classify public lands exclusively belongs by tradition to the Executive Department.[77] The authority to determine whether or not land is alienable and disposable is delegated by the President to the Secretary of the Department of Environment and Natural Resources, which supervises and directs the Director of Lands (now the Director of Lands Management Bureau) and the Director of Forestry (now the Director of Forest Management Bureau) in classifying public agricultural lands and forest lands, respectively.[78]

The Royal Decree of June 25, 1880 is the first official attempt to classify disposable public land in the country. Article I of the Royal Decree states:

> For the purposes of these regulations and in consonance with law 14, title 12, book 4 of the Recompilation of Laws of the Indies, the following will be regarded as royal lands: all lands whose lawful ownership is not vested in some private person, or what is the same thing, which have never passed to private ownership by virtue of cession by competent authority made either gratuitously or for a consideration.[79]

The wording of the provision clearly recognized existing private rights to land prior to the establishment of the Spanish colonial regime. The royal decree is consistent with the instructions in the earlier laws of the Indies restoring the rights of Indians to their lands.[80]

During the American colonial period, it was the Philippine Bill of 1902 which empowered the government to classify public lands according to agricultural character and productiveness, and to make rules and regulations for the disposition of public lands other than timber or mineral lands.[81] The said organic act classified public lands into agricultural, mineral, and timber lands. Since only agricultural lands were allowed to be alienated, the primary issue that hounded the courts was the definition of agricultural lands. The landmark case of *Mapa v. Insular Government*, which was decided under the first Public Land Act,[83] defined agricultural lands as lands acquired from Spain which are neither mineral nor timber lands. "The idea would appear to be to determine, by exclusion, if the lands is forestal or mineral in nature and, if not so found, to consider it to be agricultural land."[84] This exclusionary method of defining agriculutral land gave rise to the pro-forest presumption rule which means that public lands are presumed to be timber lands until said lands are certified by the Forest Bureau as more valuable for agriculture than for forest uses. The effect of the pro-forest presumption was to disenfranchise tribal Filipinos of their possessory rights to unclassified lands.

Then came *Ramos v. Director of Lands*,[85] which laid down in 1918 the pro-agricultural presumption. Plaintiff Ramos sought to register a large tract of land he purchased from the Romero spouses who had possessory information title to the land under the Maura Law. The Director of Forestry opposed the application on the ground that a part of the tract of the land in question consisted of forest lands. The trial court held for the Government and excluded the disputed area. On appeal, the Supreme Court in reversing the trial court ruled:

> [T]he presumption should be in lieu of contrary proof that land is agricultural in nature. One very apparent reason is that it is for the good of the Philippine islands to have the large public domain come under private

[74] Out of the country's total land area of 30 million hectares, 47% or 14.12 million hectares have been classified as alienable and disposable. The remaining 53% or 15.88 million hectares are forest lands. Of these forest lands, only around 5.6% or 881,000 hectares remain unclassified. *See* DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, FOREST MANAGEMENT BUREAU, 1988 PHILIPPINE FORESTRY STATISTICS.

[75] *Director of Lands v. CA*, 129 SCRA 689, at 692 (1984).

[76] PHILIPPINE CONST. art. XII sec.3. "Lands of the public domain are classified into agricultural, forest or timber, mineral lands, and national parks. Agricultural lands of the public domain 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. xxx"

[77] Owen J. Lynch, Jr., *Native Title, Private Right, and Tribal Land Law: An Introductory Survey*, 57 Phil. L.J. (1982), [hereinafter cited as *Native Title*] *cited in* SOURCEBOOK, *supra* note 15, at 182.

[78] Commonwealth Act No. 141 (1936), as amended, Secs. 3, 4, 5, and 6; Admin. Code of 1987 (E.O. No. 292) Title XIV, secs. 14 and 15; *See also Director of Lands v. CA*, 129 SCRA 689 (1984).

[79] *Valenton v. Murciano*, 3 Phil. 537, at 548-549 (1904). [English translation supplied by the Court.]

[80] Book 4, Title 12, Law 9, decreed by King Philip II at Del Prado, June 1, 1594: "We order that grants of farms and lands to Spaniards be without injury to the Indians and that those which have been granted to their loss and injury, be restored to the lawful owners." (Section III, *National Land Laws Affecting Ancestral Lands*, SOURCEBOOK, *supra* note 15, at 158).

[81] *Native Title*, *supra* note 77.

[82] 10 Phil. 86 (1908).

[83] Act No. 926 (1903).

[84] *Ramos v. Director of Lands*, 39 SCRA 175, at 181 (1918) discussing the *Mapa* decision.

[85] 39 SCRA 175 (1918).

> ownership. xxx When the claim of the private citizen and the claim of the government as to a particular piece of property collide, if the government desires to demonstrate that the land is in reality a forest, the Director of Forestry should submit to the court convincing proof that the land is not more valuable for agricultural than for forest purposes.[86]

Thus, the Court in its decisions in succeeding land classification cases[87] would require the government, as represented by the Director of Forestry, to prove that land sought to be registered is forest land. At this point, the pro-agricultural presumption seemed to infuse hope among tribal Filipinos that their claims to the land may be vindicated under the national law. But such hope was dashed by a gradual policy shift to the pro-forest presumption on the part of the Government.

The Forest Bureau later on applied the *Ramos* doctrine in the reverse and began to presume that lands were to be classified as agricultural only if the Director of Forestry did not consider them to be forest.[88] The ensuing practice of the Executive Department in treating public lands as forests unless classified as agricultural was believed to be spurred by the tendency within all bureaucracy to expand their scope and authority to the widest possible limits.[89]

The Legislature was also behind the policy shift to the pro-forest presumption. A year after *Ramos* was promulgated, the first Public Land Act was amended to subsume agricultural lands under a new classification called "alienable and disposable."[91] "Before the new classification, agricultural lands were *ipso jure* alienable and disposable. Now, a proclamation by the Executive Department that the agricultural land is alienable and disposable is necessary to release the land from any form of public land concession or private ownership."[92] The new classification worked more hardships to claimants who were given two obstacles to overcome: "first, a certification that the land is more valuable for agricultural purposes by the Bureau of Forestry and a recommendation by such administrative agency to the Chief Executive that it be classified as alienable and disposable; second, a proclamation or any official act by the executive declaring such land open to disposition or concession."[93]

In the wake of the policy-shift of the government to the pro-forest presumption, the Supreme Court vacillated in succeeding land classification decisions. In some cases the Court would ask the applicants to overcome by

[86] *Id.* at 186.

[87] *See Ankron v. Government of Philippine Islands*, 40 Phil. 10 (1919).

[88] *Native Title, supra* note 77, at 183.

[89] *Id.*

[90] Act No. 2874 (1919) amended Act No. 926.

[91] Rosario I. Bernardo, *Public Land Laws (1900-1945): A Critique on the Classification of our Most Vital Resource*, 1 Phil. Natural Resources Law Journal, Dec. 1988, at 16.

[92] *Id.* at 16-17.

[93] *Id.* at 16.

substantial proof the claim of the Director of Forestry.[94] In other cases the Court would reiterate the pro-agricultural presumption laid down in *Ramos*.[95] The Supreme Court, however, was consistent in one pronouncement: that possession of forest lands no matter how long can never ripen into ownership.[96]

The present law governing the classification and disposition of public lands is the Public Land Act, as amended.[97] It classifies lands of the public domain into alienable and disposable, timber, and mineral lands.[98] It also vests upon the legislature and the President, upon recommendation by the Minister of Natural Resources (now the Secretary of the Department of Environment and Natural Resources) the power to declare from time to time what public lands are open to disposition or concession.[99]

Ancestral land is not mentioned as a classification of land in the present Public Land Act and in the Constitution. Under the national law, therefore, ancestral lands can only be either public or private lands. On one hand, the State considers ancestral lands as public lands, hence, subject to the public land laws. On the other hand, the tribal Filipinos insist that their ancestral lands never formed part of the public domain, hence, private and outside the scope of the public land laws. This clash in views on land classification is the bedrock of the ancestral land problem.

While the Public Land Act recognizes vested rights of tribal Filipinos to their ancestral lands by virtue of long-time occupation, such vested rights are limited to alienable and disposable lands of the public domain.[100] Put in another way, forest lands cannot be registered. Considering that forest lands are usually sites of hunting areas, swidden farms, worship places, and burial grounds of tribal Filipinos,[101] it becomes clear why they have to insist that their ancestral lands are private lands. The present national land classification and dispositon system is not properly equipped with provisions that will fairly address the peculiar circumstances of ancestral lands. Unless large tracts of forest lands are declassified, tribal Filipinos cannot simply rely on the

[94] *See Vicente v. Director of Lands*, 10 CA Report 189 (1967); *Lee Hong Hok v. David*, 48 SCRA 372 (1972); *Director of Lands v. Reyes*, 68 SCRA 177 (1975); *Heirs of Amunategui v. Director of Forestry*, 126 SCRA 69 (1983); *Republic v. De Porkan*, 151 SCRA 88 (1987); *Republic v. CA*, 154 SCRA 476 (1987); *Director of Forest Administration v. Fernandez*, 192 SCRA 121 (1990).

[95] *See Republic v. CA*, 168 SCRA 77 (1988); *Tottoc v. IAC*, 180 SCRA 387 (1989).

[96] *See Vano v. Insular Government*, 41 Phil. 161 (1920); *Adorable v. Director of Forestry*, 107 Phil. 401 (1960); *Republic v. Animas*, 56 SCRA 499 (1974); *Director of Forestry v. Munoz* 23 SCRA 1128 (1968); *Republic v. CA*, 89 SCRA 648 (1979); *Vallarta v. IAC*, 151 SCRA 679 (1987); *Director of Lands v. CA*, 172 SCRA 455 (1989).

[97] Commonwealth Act No. 141 (1936), as amended.

[98] *Id.*, sec. 6.

[99] *Id.*, sec. 7.

[100] *Id.*, sec. 48 (b) and (c).

[101] Policy Research and People Empowerment Division (PRPED), Legal Rights and Resources Center, Inc (LRC), *Land Classification: Preliminary Notes on Implication for Upland Population*, 1 Phil. Natural Resources Law Journal, Dec. 1988, at 18-19.

public land laws to gain recognition of their pre-conquest vested rights to much of their lands. How can the Kalingas, for example, ever own their ancestral lands via the public land laws when almost the entire Kalinga-Apayao, their mother province, form part of the Central Cordillera Forest Reserve?[102]

While it is true that the pro-forest presumption tends to undermine vested rights of tribal Filipinos to ancestral lands, such presumption is reasonably defensible on the basis of national interest on forest resources. The leading forestry case of *Director of Forestry v. Muñoz*[103] convincingly explains the State's rationale in conserving forest lands:

> The view this Court takes of the cases at bar is but adherence to public policy that should be followed with respect to forest lands. Many have written much, and many more have spoken, and quite often, about the pressing need for forest preservation, conservation, protection, development, and reforestation. Not without justification. For, forests constitute a vital segment of any country's natural resources. It is of common knowledge by now that absence of the necessary green cover on our lands produces a number of adverse or ill effects of serious proportions. Without the trees, watersheds dry up, rivers and lakes which they supply are emptied of their contents. The fish disappear. Denuded areas become dust bowls. As waterfalls cease to function, so will hydro-electric plants. With the rains, the fertile top soil is washed away; geological erosion results. With erosion come the dreaded floods that wreak havoc and destruction to property— crops, livestock, houses, and high-ways— not to mention precious human lives. Indeed, the foregoing observation should be written down in a lumberman's decalogue.
>
> Because of the importance of forests to the nation, the State's police power has been wielded to regulate the use and occupancy of forests and forest reserves.[104]

There is nothing objectionable about the pro-forest presumption as having been formulated to conserve forest lands except that such presumption has been arbitrarily applied to the prejudice of millions of tribal Filipinos whose culture and economy are so interwoven with forest lands. The present law governing forest lands[105] is a showcase of the State's lack of respect for the almost sacrosanct relationship of tribal Filipinos to their ancestral lands.

It was the eighteen percent slope rule which finally sounded the death knell for vested rights to ancestral lands located within forest lands. Section 15 of The Revised Forestry Code, as amended, declares: "No lands of the public domain eighteen percent in slope or over shall be classified as alienable and disposable, nor any forest land fifty percent in slope or over, as grazing land. xxx" How the sweeping cut-off figures were arrived at has been the subject of many polemics. Actually, the eighteen percent slope rule was spawned

[102] Aranal-Sereno, *supra* note 37, at 445.
[103] 23 SCRA 1183 (1968).
[104] *Id.* at 1214.
[105] The Revised Forestry Code, Presidential Decree No. 705, as amended (1987).

by a mid-1970s national policy of maintaining at least forty-two percent forest cover for environmental considerations.[106] The reasoning was that since approximately forty -two percent of the nation's total land mass is above eighteen percent in slope,[107] then lands above the cut-off slope should be conserved. It was presumed that such lands are forest lands.[108] The present rigid criteria for determining forest cover represented a dramatic departure from previous standards which properly considered the complex inter-relationship of bio-physical factors like slope, soil type, susceptibility to erosion, watershed proximity, and flora and fauna.[109] The eighteen percent slope rule barred ancient occupants of mountainous areas from owning their lands. Thus, in one legislative sweep, hundreds of thousands of Ifugaos, Bontoks, Kankanaeys, Yapayaos, Kalingas, Ibalois, Tinggians, Isnegs, and other highland peoples of the Gran Cordillera have become virtual squatters in their ancestral lands.

The legally sanctioned national affront to the rights of tribal Filipinos does not end with the eighteen percent slope rule. The law, by prohibiting under pain of fines and imprisonment[110] swidden farming or *kaingin*, seriously undermines the economic base of tribal Filipinos. Swidden[111] farming or *kaingin* is the primary source of livelihood of almost all indigenous peoples of the country. Outlawing this shifting method of cultivation is like taking food away from at least ten percent of the country's population.

Swidden farming has always been largely misunderstood. "It is often categorically condemned as primitive, wasteful or illegal with little regard for such pertinent local variables as population density, available land area, climate, or native agricultural knowledge."[112] But the pervasive misconception that swidden farming is ecologically disastrous has been debunked by respected anthropologists like Conklin who have done extensive studies on Philippine indigenous shifting methods of agriculture.

Conklin observed that the Hanunuo Mangyan practices a well-managed swidden farming which has sustained the tribe for centuries without damaging the ecological balance in the environment. He vividly describes a Mangyan swidden plot which is about three acres in size as a tropical garden with

[106] *Native Title, supra* note 77, at 184.
[107] The land rises 18 meters in height from sea level for every 100 meters run.
[108] *Native Title, supra* note 77, at 184.
[109] *Id.*
[110] P.D. 705 as amended, sec. 69. "xxx (I)n the case of an offender found guilty of making *Kaingin*, the penalty shall be imprisonment for not less than two nor more than four years and fine equal to eight times the regular forest charges due on the forest products destroyed xxx."
[111] Swidden farming is known by such designation as field forest rotation, slash and burn agriculture, shifting cultivation, or *kaingin*. The term "swidden" comes from the North England dialect word "swithen or swivven" which means burned clearing. *See* Harold C. Conklin, *An Ethnological Approach to Shifting Cultivation*, ENVIRONMENT AND CULTURAL BEHAVIOR, ECOLOGICAL STUDIES IN CULTURAL ANTHROPOLOGY 222 (Andrew Vayda ed., 1969).
[112] *Id.* at 221.

as many as forty diverse kinds of crops growing simultaneously.[113] He also points out that the Mangyans who manage the system are natural botanical experts who could distinguish more than 1,600 different plant types including an impressive number of 430 cultivates.[114]

Swidden farming has been found to be ecologically sound, because it is based on the principle of bio-diversity characterized by tropical forests. Experts on the field have this to say:

> In sum, a description of swidden farming as a system in which "a natural forest is transformed into a harvestable" forest seems a rather apt one. With respect to degree of generalization (diversity), to proportion of total system resources stored in living forms, and to closed-cover protection of an already weakened soil against the direct impact of rain and sun, the swidden plot is not a "field" at all in the sense, but a miniaturized tropical forest, composed mainly of food-producing and other useful cultivates.[115]

The two main objections to Swidden farming or *kaingin*—namely: that it is a cause of forest fires and that it is a wasteful practice as the field is abandoned after some time, have likewise been struck down by credible studies. Indigenous farmers have been shown to be very cautious in preparing the swidden field. The Tinggians in the Province of Abra, for instance, construct a fireline called "gaatan" around the intended swidden or *uma* before burning the dried up cuttings in the clearing.[116] This fireline is similar to the four meter-wide safety path cleared by Mangyans around their swidden plots.[117] In this way, fire is contained within the *uma*. Additional precautions are also made by conducting the burning or firing during less windy days or in times when the wind blows away from the forest.[118] With regard to the issue of abandonment of the field, such practice is not actually sheer waste of the land. The swidden field is abandoned after some time so that the soil can regenerate its spent out nutrients. The fallow period lasts anywhere from 8 to 15 years before the swidden is cleared and burned again for another cultivation.[119] Swidden farming, when well-managed, has been proven to be an efficient and ecologically sound cyclical shifting method of cultivation. The law by absolutely prohibiting *kaingin* without distinction only shows that it has improperly ventured into a field it cannot competently regulate.

The ban on swidden farming is brought up to further illustrate that the law is consistent in depriving tribal Filipinos of their ancestral lands.

[113] Clifford Geertz, *Two Types of Ecosystems*, ENVIRONMENT AND CULTURAL BEHAVIOR, ECOLOGICAL STUDIES IN CULTURAL ANTHROPOLOGY 8.

[114] *Id.* at 9.

[115] *Id.* at 14.

[116] FILOMENO AGUILAR, JR., SOCIAL FORESTRY FOR UPLAND DEVELOPMENT: FOUR CASE STUDIES 216 (1982).

[117] Conklin, *supra* note 111, at 226.

[118] *Id.*

[119] *Id.* at 228; *supra* note 113, at 13; *supra* note 116, at 28.

The Revised Forestry Code, as amended by P.D. 1559, commands the courts, in cases of *kaingin* farming together with the unauthorized occupation of national parks, to order the eviction of the violator from the land.[120] In theory, the law is supposed to be directed at everyone, but in practice it is the tribal Filipinos dependent on *kaingin* farming on ancestral lands who are actually hit by the automatic eviction provision. Indeed, the law takes no chances in conserving the forests. It has no scruples in resorting to confiscatory means repugnant to the constitutional due process clause in managing the national patrimony. How could a civilized society maintain an immoral situation that sanctions through legal niceties the extinction of its minority population?

It is simply amazing how the State, as successor-in-interest to the king under a misplaced version of the Regalian Doctrine, can recognize vested rights to the land out of sheer generosity, and at the same time extinguish the same rights out of serious concern for the national patrimony, without feeling any guilt on the underlying contradictions and resulting injustices. The Public Land Act allows tribal Filipinos to own the lands they have possessed since time immemorial. At the same time the Revised Forestry Code prohibits the alienation of lands which turn out to be ancestral lands. The left hand takes away what the right hand has given. It is possible that the classification of public lands can lead to an absurd and unjust national picture of large-scale land-grabbing.

II. ANALYSIS OF RESPONSES

A. Jurisprudence

Jurisprudence on the contentious public lands policy of the State has been fraught with vacillations on the effect of registration of public lands under claim of acquisitive prescription. On many occasions, the Court applied the Regalian Doctrine in deciding that lands cease to be public lands only upon the issuance of certificates of title.[121] In contrast, there have been cases where the court upheld vested rights,[122] including native title,[123] by virtue of long-time possession of the land, and declared that lands automatically become private upon the completion of the requisite period of acquisitive prescription provided for in the law. Present jurisprudence, however, has taken the turn that a certificate of title merely constitutes an evidence of

[120] Presidential Decree No. 705, as amended, sec. 69, 2nd par.

[121] *e.g. Oh Cho v. Director of Lands*, 75 Phil. 890 (1946); *MERALCO v. Castro-Bartolome*, 114 SCRA 799 (1982).

[122] "It has been observed that, generally, the term 'vested right' expresses the concept of present fixed interest, which in right reason and natural justice should be protected against arbitrary State action, or an innately just and imperative right which an enlightened free society sensitive to inherent and irrefragable individual rights, cannot deny." *See Ayog v. Cusi, Jr.*, 118 SCRA 493 at 499 (1982) *citing Pennsylvania Greyhound Lines, Inc. v. Rosenthal*, 192 A. 2d 587 (1921).

[123] The term "native title" refers to the original pre-conquest private title to the land as understood in *Cariño v. Insular Government*, 41 Phil. 935 (1909).

ownership. What vests private title to public lands is not its registration but the long-time occupation thereof.[124] It is within the context of tension between the operation of the Regalian Doctrine and the recognition of vested rights that the Court tried to address the issue on ancestral land.

At present, the courts adjudicate ancestral land claims on the basis of Section 48 (b) in relation to Section 48 (c) of Commonwealth Act No. 141 as amended, reproduced as follows:

> Sec. 48. The following described citizens of the Philippines, occupying lands of the public domain or claiming to own any such lands or an interest therein, but whose titles have not been perfected or completed, may apply to the Court of First Instance [now the Regional Trial Court] of the Province where the land is located for confirmation of their claims and issuance of a certificate of title thereafter, under the Land Registration Act, to wit:
>
> x x x
>
> (b) Those who by themselves or through their predecessors-in-interest have been, in continuous, exclusive, and notorious possession and occupation of agricultural lands of the public domain, under a bona fide claim of acquisition or ownership, for at least thirty years immediately preceding the filing of the application for confirmation of title, except when prevented by war or force majeur. Those shall be conclusively presumed to have perfomed all the conditions essential to a government grant and shall be entitled to a certificate of title under the provisions of this chapter.
>
> (c) Members of the national cultural minorities who by themselves or through their predecessors-in-interest have been in open, continous, 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 subsection (b) hereof.[125]

The deadline for the applicability of Section 48 for the judicial confirmation of imperfect or incomplete titles originally expired on December 31, 1938, but the last day had been repeatedly extended.[126] Under Republic Act No. 6940, claimants under the Section now have until December 31, 2000 to file their petitions.

The two leading cases that laid down definite pronouncements regarding the correct interpretation of Section 48 (b) of Commonwealth Act No. 141

[124] *De Guzman v. CA*, 156 SCRA 701(1987); *Director of Lands Management v. CA*, 205 SCRA 488 (1992).

[125] As amended by Republic Act No. 1942 and Republic Act No. 3872 (1964).

[126] Up to Dec. 31, 1941 by Commonwealth Act No. 292; up to Dec. 31, 1957 by Republic Act No. 107; up to Dec. 31, 1968 by Republic Act No. 2061; up to Dec. 31, 1976 by Republic Act No. 6236; up to Dec. 31, 1987 by Presidential Decree. No. 1073.

are *Manila Electric Company v. Castro-Bartolome* (1982)[127] and *Director of Lands v. Intermediate Appellate Court* (1986),[128] which overturned the former. The parties who sought registration of the land in the cases, however, were not members of the indigenous cultural communities, but corporations which trace their respective titles to their predecessors-in-interest who had possessed the lands for the statutory period of acquisitive prescription.

In 1976, MERALCO filed an application for judicial confirmation of its title to two lots with a total area of 165 square meters located at Tanay, Rizal. The land used to be possessed by Ramos, who sold it in 1947 to the Piguing spouses who, in turn sold it to MERALCO in 1976. The Government opposed the application on the grounds that MERALCO as a private corporation was disqualified by the 1973 Constitution from acquiring public lands, and that the applicant and its predecessors-in-interest had not been in possession of the land for the period required by law to vest private ownership. The trial court assumed that the land sought to be registered was public land. It dismissed MERALCO's application believing that Section 48 (b) of Commonwealth Act No. 141 covers only natural persons and not juridical persons. On appeal to the Supreme Court, MERALCO contended that the land had long become private land in the hands of the predecessors-in-interest by virtue of acquisitive prescription even before the 1973 Constitution took effect. The Court through Justice Aquino ruled:.

> We hold that, as between the State and the MERALCO, the said land is still public land. It would cease to be public land only upon the issuance of the certificate of title to any Filipino citizen claiming it under Section 48 (b). Because it is still public land and the MERALCO, as a juridical person, is disqualified to apply for its registration under Section 48 (b), MERALCO's application cannot be given due course or has to be dismissed.[129]

The petitioner relied on the ruling in *Susi v. Razon*[130] that an open, continuous, and adverse possession of a land of the public domain from time immemorial by a private individual personally and through his predecessors-in-interest confers private ownership on said possessor. The Court struck down MERALCO's contention by citing its ruling in *Oh Cho v. Director of Lands*:[131]

> The benefits provided in the Public Land Act to applicant's immediate predecessor-in-interest are or constitute a grant or concession by the State; and before they could acquire any right under such benefits, the applicant's immediate predecessor-in-interest should comply with the condition precedent for the grant of such benefits.

[127] 114 SCRA 799 (1982).

[128] 146 SCRA 509 (1986).

[129] *MERALCO*, 114 SCRA at 806.

[130] 48 Phil. 424 (1925).

[131] 75 Phil. 890 (1946).

101945

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> The condition precedent is to apply for the registration of the land of which they have been in possession since July 26, 1894. This is what the applicant's immediate pedecessor-in-interest (meaning the Piguing spouses in the instant case) failed to do.
>
> They did not have any vested right in the lot amounting to title which was transmissible to the applicant. The only right, it may be thus called, is their possession of the lot which, tacked to that of their predecessor-in-interest, may be availed of by a qualified person to apply for its registration but not by a person as the appliant is disqualified.[132]

Justice Teehankee entered a vigorous dissenting opinion based on the failure of the majority to adhere to established doctrine since the 1909 case of *Cariño v. Insular Government*,[133] the 1925 case of *Susi v. Razon*,[134] down to the 1980 case of *Herico v. Dar*[135] that those who have held open, exclusive, and unchallenged possession of alienable public land for the statutory period provided by law shall be conclusively presumed to have performed all the conditions essential to a Government grant and shall be entitled to a certificate of title.[136] Justice Teehankee maintained that lands *ipso jure*, or by operation of law, cease to be lands of the public domain upon completion of the period of acquisitive prescription under the Public Land Act. His dissent in MERALCO was subsequently adopted by the Court four years later in *Director of Lands*.

The factual background of *Director of Lands* was similar to that of *MERALCO*. In *Director of Lands*, ACME Corporation purchased in 1962 during the effectivity of the 1935 Constitution five parcels of land measuring 481,390 square meters from members of the Dumagat tribe who have held the land since time immemorial. ACME applied for a Torrens title to the land in 1981, at the time the 1973 Constitution had already barred corporations from acquiring lands of the public domain. The trial court granted the registration after making a finding that "the land sought to be registered is a private land pursuant to the provision of Republic Act 3872[137] granting absolute ownership to members of the non-Christian tribes on land occupied by them or their ancestral lands, whether within the alienable or disposable public land or within the public domain."[138] On appeal, the Court citing its previous rulings in *Herico, Susi,* and *Carino* affirmed the lower court's decision. Speaking through Justice Narvasa, the Court ruled:

> The majority ruling in *MERALCO* must be reconsidered and no longer deemed binding precedent. The correct rule as enunciated in the line of cases already referred to, is that alienable public land held by a possessor personally or through his predecessor-in-interest, openly, continuously, and exclusively for the prescribed statutory period (30 years under The Public Land Act, as amended) is converted to private property by the mere lapse or completion of said period *ipso jure*. Following that rule and on the basis of the undisputed facts, the land subject to this appeal was already private property at the time it was acquired from the Infiels by ACME. ACME thereby acquired a registrable title, there being no prohibition against said corporation's holding or owning private land.[139]

[132] *MERALCO*, 114 SCRA at 808.

[133] 41 Phil. 935 (1909).

[134] 48 Phil. 424 (1925).

[135] 95 SCRA 437 (1980).

[136] *MERALCO*, 114 SCRA at 813.

[137] The Second Public Land Act amending Act No. 926.

[138] *Director of Lands*, 146 SCRA at 514.

The *Director of Lands* ruling insofar as the interpretation of Section 48 of Commonwealth Act No. 141 is concerned has been upheld in succeeding cases up to the most recent ones. *Director of Lands* has relied on a long line of cases based on the *Cariño* decision, which overturned the doctrine laid down in the 1904 case of *Valenton, et.al. v. Murciano*.[140] Thus, a fair assessment of *Director of Lands* can hardly be reached without looking at *Cariño* in the light of *Valenton*.

First, *Valenton*. In the year when the land registration courts were first set up in the country under Act No. 496[141] by the North American colonial government, the Court was asked to rule in *Valenton* which basis of ownership should prevail: long-time occupation or a deed from the government. The case was decided at a time when the colonial government was empowered by the Philippine Bill of 1902 to enact rules and prescribe terms for perfecting defective titles to public lands acquired during the Spanish colonial administration.

The plaintiffs entered a tract of land in 1860. Their peaceful occupation of the land was interrupted in 1892 when defendant Murciano, acting as agent for a certain Capulong, denounced the land as public, untilled, unoccupied lands owned by the existing Government of the Philippine Islands, and petitioned for the sale of the land to him. Murciano, over the objections of the plaintiffs, succeeded in acquiring for Capulong the land by purchase pursuant to the Spanish Mortgage Law of 1889, which then governed the disposition of public lands. Capulong later on sold the land to Murciano. The plaintiffs contended that they had become absolute owners of the property by virtue of their adverse possession for thirty years in accordance with the Siete Partidas, as well as in the Civil Code. The trial court held for defendant Murciano on the ground that the plaintiffs had lost all rights to the land by not pursuing during the Spanish administrative land transfer proceeding their objections to the sale. On appeal to the Supreme Court, the issue considered was whether or not during the years 1860 to 1890, private persons like the plaintiffs could have obtained as against the State the ownership of public land by means of occupation. After a lengthy discourse on the Spanish land laws in force then, the Courts through Justice Willard said:

[139] *Id.* at 522-523.

[140] 3 Phil. 537 (1904).

[141] Land Registration Act (1902).

> We hold that from 1860 to 1892 there was no law by which the plaintiff could obtain the ownership of these lands by prescription, without any action by the State, and that judgment below declaring the defendant the owner must be affirmed.[142]

What proved fatal to the plaintiffs' cause was their failure to have their land adjusted as required by Article 8 of the Royal Cedula of June 25, 1880[143] which provided:

> Art. 8. If the interested parties shall not ask an adjustment of the lands whose possession they are unlawfully enjoying within the time of one year, or, the adjustment having been granted by the authorities, they shall fail to fulfill their obligation in connection with the compromise, by paying the proper sum into the treasury, the latter will, by virtue of the authority vested in it, reassert the ownership of the State over the lands, and will, after fixing the value thereof proceed to sell at public auction that part of the same which either because it may have been reduced to cultivation or is not located within the forest zone is not deemed advisable to preserve as the State forest reservation.[144]

The plaintiffs, however, could have still gained ownership of the land had the Court interpreted in favor of the plaintiffs the doubt surrounding the meaning of the following provisions in the Royal Cedula:

> Art. 4. For all legal effects, those will be considered proprietors of the royal land herein treated who may prove that they have possessed the land without interruption during the period of ten years, by virtue of good title and good faith.
>
> Art. 5. In the same manner, those without such title deeds may prove that they have possessed their said lands without interruption for a period of twenty years, if in state of cultivation, or for a period of thirty if uncultivated, shall be regarded as proprietors thereof.[145]

The Court admitted that the wording of the provisions was not clear on three points: first, whether they automatically vested on those covered absolute ownership of the land without any action on their part or that of the State; second, whether they required those covered to seek an adjustment and obtain a deed from the State; and third, whether the failure to obtain a deed from the State within a prescribed period of time would result in the loss of all interests in the land. The Court upheld the Regalian Doctrine and resolved the doubt in favor of the State. The doctrine thus laid down was

[142] *Valenton*, 3 Phil at 557.

[143] Justice Holmes in *Cariño* would hold that this Royal Decree only applies to wrongful occupants of the land and not to those who have acquired vested rights to the land by long-time possession thereof.

[144] *Valenton*, 3 Phil at 549-550. [English Translation supplied by the Court.]

[145] *Id.* at 549.

similar to the ruling in *MERALCO*. The Court in *Valenton* declared that public lands can only become private by state action.

Valenton was not an extraordinary judicial pronouncement at that time. The decision arrived at was consistent with the policy enunciated in Act No. 926[146] adopting the Spanish policy of requiring settlers on public land to obtain deeds from the State.[147] What came as a surprise to the North American colonial government was the landmark case of *Cariño* penned by Justice Holmes for the United States Supreme Court.

Prior to *Cariño*, the Philippine Supreme Court consistently applied the ruling in *Valenton*.[148] Even *Cariño* itself would have been a clone of *Valenton* had not the plaintiff Mateo Cariño appealed the case to the United States Supreme Court.

In 1903, Mateo Cariño, an Ibaloi, sought to register with the land registration court a parcel of land measuring 146 hectares located in the Muncipality of Baguio in the Province of Benguet. His ancestors had possessed and occupied the land since time immemorial. His grandfather had built fences around the property for the holding of cattle. His father had cultivated the land using parts of it for pasturing cattle. It was not disputed that Cariño inherited the land in accordance with Igorot custom. He tried to have the land adjusted under the Spanish land laws, but no document issued from the Spanish Crown.[149] In 1901, Cariño obtained a possessory title to the land under the Spanish Mortgage Law.[150] The North American colonial government, however, ignored his possessory title and built a public road on the land prompting him to seek a Torrens title to his property in the land registration court. While his petition was pending, a United States military reservation was proclaimed over his land, hence he and his cattle were ordered off the land.[151]

In 1904, the land registration court granted Cariño's application for absolute ownership to the land. Both the Government of the Philippine Islands and the United States Government appealed the case to the Court of First Instance of Benguet which dismissed Cariño's application.[152] Cariño went up to the Supreme Court which, rebuffed him by applying the *Valenton* ruling. A wealthy and determined Ibaloi, Cariño took the case to the United States Supreme Court under a writ of error. On one hand, the government invoked the regalian

[146] Section 56 of Act. No. 926 required claimants to public lands to file a petition for confirmation of imperfect titles with the land registration court.

[147] *Valenton*, 3 Phil at 553.

[148] *See Cansino v. Valdez*, 6 Phil. 320 (1906); *Tiglao v. Insular Government*, 7 Phil. 80 (1906).

[149] It was the practice of the Spanish Colonial Government not to issue title to the Igorots. *See Invisible Peoples*, *supra* note 71 at 288, *citing* the testimony of the Governor of the Province of Benguet.

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

[151] *Invisible Peoples*, *supra* note 71 at 288-289.

[152] Within 6 months after the appeal was filed, the Philippine Commission revoked the authority of the land registration courts to entertain land registration petitions over resource-rich provinces including Benguet. *Id.* at 289.

theory and contended that Cariño failed to comply with the provisions of the Royal Decree of June 25, 1880, which required registration of land claims within a limited period of time. Cariño, on the other hand, asserted that he was the absolute owner of the land *jure gentium*, and that the land never formed part of the public domain.[153] Justice Holmes found for Cariño and ruled:

> There 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, whenever made, was not to confer title, but simply to establish it, as already conferred by the decree, if not by earlier law. The royal decree of February 13, 1894 declaring forfeited titles that were capable of adjustment under decree of 1880, for which adjustment had not been sought, should not be construed as confiscation, but as the withdrawal of a privilege.[154]

Cariño stood out in Philippine jurisprudence as the first, and probably the only case to uphold native title of tribal Filipinos. The following pronouncement became the standard by which succeeding ancestral land cases have been decided:

> It might, perhaps, be proper and sufficient to say that when, as far back as testimony goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish Conquest, and never to have been public land.[155]

Evidently, Justice Holmes believed that ancestral lands had always been private lands over which ancient possessors thereof enjoyed a vested right to ownership known as native title.

Native title is a concept derived from the United States common law concept of aboriginal title.[156] In American jurisprudence, the aboriginal title of American Indians is based on their presence on the land before the arrival of the White settlers.[157] *Johnson v. McIntosh*,[158] the leading American case on conveyance of Indian lands decided in 1823, at least recognizes the rights of Indians to their lands, even if such rights were limited to mere occupancy. Moreover, Justice Marshall in *Johnson* affirmed the government's right to extinguish native title only by purchase or by conquest.

In the light of the then prevailing American jurisprudence on aboriginal title, it was not surprising for Justice Holmes to have justified Cariño's native title in this manner:

[153] *Supra* note 15 at 170. Excerpts from, the "Brief on Behalf of Plaintiff in Error" filed by the Attorney for Mateo Cariño.

[154] *Cariño*, 41 Phil at 944.

[155] *Id.* at 941.

[156] Antonio M. La Viña, *Arguments for Communal Title*, 1 Phil. Natural Resources Law Journal, Dec. 1988, at 268 *citing* Lynch,Jr.

[157] *U.S. v. Ringrose*, 788 F. 2d 638, at 641 *citing Tee-Hit-Hon Indians v. United States*, 348 U.S. 272, 271 (1955).

[158] 21 U.S. (8 Wheat) 543.

> The Province of Benguet was inhabited by a tribe that the Solicitor-General, in his argument, characterized as a savage tribe that never was brought under the civil or military government of the Spanish Crown. It seems probable, if not certain, that the Spanish officials would not have granted anyone in that province the registration to which formerly the plaintiff was entitled by the Spanish laws, and which would have made his title beyond question good. Whatever may have been the technical position of Spain, it does not follow that, in the view of the United States, he had lost all rights and was a mere trespasser when the present government seized his land. The argument to that effect seems to amount to a denial of native titles throughout an important part of the Island of Luzon, at least, for the want of ceremonies which the Spaniards would not have permitted and had not the power to enforce.[159]

Simply put, Spain was not able to effectively extinguish Cariño's native title. To meet any argument by the Government that native title had been extinguished by cession via the Treaty of Paris, Justice Holmes subtly distinguished between native title and aboriginal title:

> The acquisition of the Philippines was not like the settlement of the White race in the United States. Whatever consideration may have been shown to the North American Indians, the dominant purpose of the Whites in America was to occupy the land. It is obvious that, however stated, the reason for our taking over the Philippines was different. No one, we suppose, would deny that, so far as consistent with paramount necessities, our first object in the internal administration of the islands is to do justice to the natives, not to exploit their country for private gain.[160]

For the United States Supreme Court, the United States colonial government was mandated not primarily to occupy the Philippine Islands, but to administer them. Consistent with the due process clause in the Philippine Bill of 1902, *Cariño* in effect declared that the arbitrary extinguishment of native title cannot be tolerated. In this backdrop, it can be fairly concluded that ancestral lands are not covered by the regalian theory adopted by the United States in administering the colony.

For the tribal Filipinos, *Cariño* was their struggle's one shining moment which died out too soon. The *Cariño* decision was ignored by the executive department which continued to expropriate ancestral lands by classifying them as inalienable forests lands.[161] The legislature, with all the good intentions, tried to entrench in the Public Land Acts the *Cariño* doctrine which now became Sec. 48 (b) and (c) of Commonwealth Act No. 141, and ended up accidentally repudiating native titles by creating the presumption that ancestral lands originally formed part of the public domain.[162] The courts

[159] *Cariño*, 41 Phil at 939.

[160] *Id.* at 939-940.

[161] *Invisible Peoples*, *supra* note 71, at 299.

[162] Act No. 926 (1903) and Act No. 2874 (1919) both contained provisions similar to sec. 48(b) of Commonwealth Act No. 141. *See* Leonen, *supra* note 72, at 24.

which probably had twice the legislature's goodwill, applied *Cariño* in construing Section 48 (b) of Commonwealth Acts No. 141 and came up with doctrines that missed Justice Holmes' more essential points.[163]

Going back to *Director of Lands.*, the ruling in that case, as mentioned, traces its roots to a long line of cases from *Herico* to *Susi* which were all precipitated by *Cariño*. While both *Cariño* and the *Director of Lands* cluster of cases arrived at the same conclusion that the native occupants of the land are entitled to a certificate of title by virtue of long-time possession of the land, it must be stressed that unlike the *Director of Lands* cluster, *Cariño* was not decided under the Public Land Acts, but rather under the common law concept of native title and due process. The divergence in the bases used makes a big difference when the decisions are viewed in the light of the Regalian Doctrine. *Cariño*, by upholding native title and by saying that ancestral lands never formed part of the public domain, carves out an exception to the prevailing theory that all lands of the public domain are owned by the State.[164] Hence, *Cariño* allows the alienation of ancestral lands regardless of whether such lands are classified by law as inalienable forest lands. In contrast, the *Director of Lands* cluster, by bringing ancestral lands under the operation of the Public Land Act, assumes that such lands have once formed part of the public domain, and are therefore subject to the statutory and constitutional prohibition on the alienation of forest lands.[165] The fine distinctions made may seem like splitting hairs over a legal issue overrun by the entrenchment of the Regalian Doctrine in the Constitution. But how else can one explain the incontrovertible fact that the *Cariño* decision has never been overturned by the Supreme Court in all the occasions that exposed the said ruling to a possible rejection?

With *Cariño* in place, all is not lost for the cause of tribal Filipinos to recover their ancestral lands, especially in the wake of new developments in the nation's recent attempts to address the ancestral domain problem.

B. Innovations: From Integration to Preservation

From the time the Philippines became a Republic in 1946 up to the present, three fundamental laws have successively governed it, namely: the 1935, 1973, and the 1987 Constitutions. In all three fundamental laws, the State has always asserted ownership over the lands of the public domain and all the minerals and other natural resources found therein.[166] Thus, it can be said that the Constitution has been the traditional domain of the Regalian

[163] *e.g. Lee Hong Hok v. David*, 48 SCRA 372 (1972), for a contrary decision, cited *Cariño* to uphold the totality of the application of the Regalian Doctrine. *Oh Cho v. Director of Lands*, 75 Phil. 890 (1946) cited *Cariño* accurately, but only for an *obiter* pronouncement.

[164] Aranal-Sereno, *supra* note 37, at 431.

[165] Sec. 4 of Presidential Decree No. 1073 (1977) provides that sec. 48 (b) of Commonwealth Act No. 141 does not apply to forest lands; *Director of Lands v. CA*, 133 SCRA 701 (1984) ruled that sec. 48(b) of Commonwealth Act No. 141 cannot apply to forest lands before such lands are declassified to form part of the disposable agricultural land.

[166] PHILIPPINE CONST. art. XIV, sec. 1 (1935); art. XIV, sec. 8 (1973); art. XII, sec. 2 (1987).

Doctrine. But with the effectivity of the present Constitution, the supremacy of the Regalian Doctrine over certain portions of the public domain has been seriously challenged by constitutional innovations geared for the recognition of the rights of indigenous cultural communities to their ancestral domain. To put these innovations in the proper perspective, a little backtracking to the previous constitutions is in order.

The 1935 Constitution did not carry any state policy on tribal Filipinos, who were then officially known as non-Christian Filipinos or national cultural minorities. The raging issue then was the conservation of the national patrimony for the Filipinos. It was this kind of nationalism that impelled the framers of the fundamental law to entrench the Regalian Doctrine in the 1935 Constitution.[167] The national fervor to conserve lands of the public domain and the natural resources therein did not contemplate conserving as well the culture of tribal Filipinos, who virtually depend on forest resources for subsistence. This is not surprising, for the mainstream society then looked down upon the indigenous way of life as backward. Confirming the State's condescending attitude on the culture of tribal Filipinos is the passage of the law creating the Commission on National Integration (CNI) in 1957 pursuant to the following policy:

> It is hereby declared to be the policy of Congress to foster, accelerate, and accomplish by all adequate means and in a systematic manner the moral, material, economic, social, and political advancement of the Non-Christian Filipino, hereinafter called National Cultural Minorities, and to render real, complete, and permanent the integration of all the said National Cultural Minorities.[168]

The law called for a policy of integration of tribal Filipinos into the Philippine mainstream. This policy harked back to the North American colonial government policy of assimilation which led to the establishment of the Bureau of Non-Christian Tribes (BNCT) in 1903.[169] It will be remembered that the BNCT was responsible for shipping to the United States a whole village of Igorots to be ogled at by the white race at the Philippine exhibit during the seven month-long 1904 Louisiana Purchase Centennial Exposition in Missouri.[170] The BNCT treated the tribal Filipinos as immature wards who should be guided, educated, and eventually assimilated into the "civilized" world. The CNI was given, more or less, the same task. Thus, the post-independence policy of integration, like the colonial policy of assimilation, was founded

[167] Adrian S. Cristobal, Jr., *The Constitutional Policy on Natural Resources: An Overview*, 3 Phil. Natural Resources Law Journal, Dec. 1990, at 48 *citing* 2 ARUEGO, THE FRAMING OF THE PHILIPPINE CONSTITUTION 595 (1949).

[168] Republic Act No. 1888, *An act to effectuate a more rapid and complete manner the economic, social, moral, and political advancement of the non-Christian Filipinos or national cultural minorities and to render real, complete, and permanent the integration of all said national cultural minorities into the body politic, creating the Commission on National Integration charged with said functions.*

[169] O.J. Lynch, Jr., *The Philippine Colonial Dichotomy: Attraction and Disenfranchisement*, 63 Phil. L.J., at 139 (1988); SOURCEBOOK, *supra* note 15, at 226.

[170] *Id.* at 140-141.

upon a highly questionable premise: that the tribal Filipinos are culturally inferior to the mainstream society. After all, assimilation or integration of tribal peoples had always been understood in the context of a guardian-ward relationship.[171]

The downtrodden tribal Filipinos gained self-respect when the the 1973 Constitution was adopted providing for the following:

> The State shall consider the customs, traditions, beliefs, and interests of national cultural communities in the formulation and implementation of State policies.[172]

For the first time in Philippine history, the tribal Filipinos who were previously called as *dociles, feroces or infieles* by the Spaniards[173] and as non-Christian tribes by the North Americans, were officially addressed as "communities" by the highest law of the Republic. To top it all, their way of life was also recognized. For the tribal Filipinos, this innovation in the constitution was a big leap forward which, however, ended in a peat bog. Destined to implement the Constitution was President Marcos, who had gained via martial rule executive and legislative power in a turbulent political era. Marcos abolished the CNI and transferred its functions to the PANAMIN.[174] In 1978, he elevated the PANAMIN to cabinet rank through Presidential Decree No. 1414 which provided:

> It is hereby declared to be the policy of the State to integrate into the mainstream of Philippine society certain ethnic groups who seek full integration into the larger community, and at the same time protect the rights of those who wish to preserve their original lifeways beside that larger community.[175]

While still adopting the integration policy, the decree at least recognized the right of tribal Filipinos to preserve their way of life. The ensuing notoriety[176] of the PANAMIN in exploiting the tribal Filipinos, however, belied the administration's sincerity in implementing section 11 of the 1973 Constitution.

In 1974, Marcos seemed determined to address the ancestral domain issue when he promulgated Presidential Decree No. 410, otherwise known as the Ancestral Lands Decree. The decree provided for the issuance of land occupancy certificates to members of the national cultural communities, who were given up to 1984 to register their claims. But doubts on the political will of the Executive heightened when he failed to release the implementing rules and regulations of the Ancestral Lands Decree. Up to the time Marcos

[171] *See Rubi v. Provincial Board of Mindoro*, 39 Phil. 660 (1919).

[172] PHILIPPINE CONST., art. XV, sec. 11 (1973).

[173] SOURCEBOOK, *supra* note 15, at 56.

[174] *Supra* note 22.

[175] Presidential Decree No. 1414, sec. 1 (1978).

[176] *Supra* note 22.

was deposed in 1986, no land occupancy certificate was ever issued. The Marcos regime was thus an era of false hopes for the tribal Filipinos.[177]

After the historic February Revolution, a strong commitment for human rights and social justice emerged in the political arena as a reaction to the human rights abuses perpetrated by the Marcos regime. The 1987 Constitution stood as a monument to the nation's determination to balance the inequities in Philippine society. With the spirit of the EDSA revolution sweeping the nation, it was inevitable that the policy on tribal Filipinos would shift from that of integration to preservation.[178]

The present Constitution carries at least six provisions which insure the right of tribal Filipinos to preserve their way of life.[179] This Constitution is also the first fundamental law in the nation to expressly guarantee the rights of tribal Filipinos to their ancestral domains. The primary effect of these innovations in the Constitution is to bolster the claims of tribal Filipinos to their ancestral lands.

Now referred to as indigenous cultural communities, tribal Filipinos have been placed on firmer ground to counteract the yoke of the Regalian Doctrine. Section 5 of the article on National Economy and Patrimony is very explicit in declaring:

> 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.[180]

[177] To the credit of Mr. Marcos, however, he issued E.O. No. 561 in 1979 creating the Commission on the Settlement of Land Problems (COSLAP). *Cf.* Administrative Code of 1987 (E.O. No. 292) title III, sec. 32 E.O. No. 561 provided a mechanism for the expeditious resolution of land problems involving small settlers, landowners, and tribal Filipinos. However, what COSLAP resolves are land disputes among private claimants. It is the Department of Environment and Natural Resources (DENR) which is exclusively authorized to settle public land claims against the government. *Cf.* Administrative Code of 1987, title XIV, sec. 4.

[178] President Aquino, invoking her mandate under the Freedom Constitution, issued E.O. Nos. 122-A, 122-B, and 122-C in 1987 creating the Office on Muslim Affairs (OMA), Office for Northern Cultural Communities (ONCC), and Office for Southern Cultural Communities (OSCC), respectively, which were all under the Office of the President. The preamble of E.O. No. 122-B states: "Believing that the new government is committed to formulate more vigorous policies, plans, programs, and projects for tribal Filipinos, otherwise known as Indigenous Cultural Communities, taking into consideration their communal aspirations, customs, traditions, beliefs, and interests in order, to promote and preserve their rich cultural heritage and insure their participation in the country's development for national unity; xxx"

[179] PHILIPPINE CONST. art. II, sec. 22; art. VI, sec. 5, cl. 2; art. XII, sec. 5; art. XIII, sec. 6; art. XIV, sec. 17; and art. XVII, sec. 12.

[180] PHILIPPINE CONST. art. XII, sec. 5.

Times have changed. The policy of integration, under which the State looks down upon the culture of tribal Filipinos, has now given way to a policy of preservation which guarantees basic human rights. The State, by recognizing the rights of tribal Filipinos to their ancestral lands and ancestral domains, has effectively upheld their right to live in a culture distinctly their own. Finally, the State has understood what the tribal Filipinos have been trying to say all these years: *land is life.*

Section 5 of Article XII of the Constitution [hereinafter referred to as SECTION 5] alone already fairly addresses the three issues on ancestral domain raised earlier in this paper, namely: development aggression, conflict between the national law and customary law, and land classification. The deliberations of the 1986 Constitutional Commission [hereinafter referred to as CONCOM] regarding SECTION 5 best explains how these three issues are confronted by the State after the EDSA Revolution.

On the issue that development policies work injustices to the tribal Filipinos, the following exchange during the CONCOM deliberations is in point:

> BISHOP BACANI: In Commissioner Davide's formulation of the first sentence, he says: "The State, SUBJECT TO THE provisions of this Constitution AND NATIONAL DEVELOPMENT AND PROGRAMS shall guarantee the rights of cultural or tribal communities to their ancestral lands to insure their economic, social, and cultural well-being". There are at least two concepts here which receive different weights very often. They are the concepts of national development policies and programs, and the rights of cultural or tribal communities to their ancestral lands, et cetera. I would like to ask: When the Commissioner proposed this amendment, which was the controlling concept? I ask this because sometimes the rights of cultural minorities are precisely transgressed in the interest of national development policies and programs. Hence, I would like to know which is the controlling concept here. Is it the rights of indigenous cultural communities to their ancestral lands or is it national development policies and programs?
>
> MR. DAVIDE: It is not really a question of which is primary or which is more paramount. The concept introduced here is really the balancing of interests. That is what we seek to attain. We have to balance the interests taking into account the specific needs and the specific interests also of these cultural communities in like manner that we did so in the autonomous regions.[181]

Times have really changed. The State usually never bothers to acknowledge the legitimate presence of tribal communities to lands of the public domain, which are officially targetted for expropriation. Now, the framers of the Constitution speak of balancing of interests. This puts the rights of tribal Filipinos to their ancestral lands and domains officially on equal plane with the right of the State to pursue development goals. A State with a more human face has emerged.

[181] 4 RECORD OF THE CONSTITUTIONAL COMMISSION 34 (1986).

On the conflict between the national law and customary law on land ownership and use, the deliberations of the CONCOM, likewise, provide some answers:

> MR. CALDERON. I would like to ask some questions of Commissioner Bennagen in line with the questions asked by Commissioner Bacani concerning ancestral lands and codification of laws. Shall they prevail over the rights granted under the regalian doctrine?
>
> MR. BENNAGEN. The idea is for this matter to be incorporated as part of the national law and, therefore, they should be taken in those terms. Again, when there is a conflict between this and the national law, the general principle is that the national law shall prevail, but there should always be the effort to balance the interest as provided for in the national law and the interest as provided for in the customary law.
>
> MR. CALDERON. To be specific, shall mining rights granted by the government under the regalian doctrine be recognized by the tribal communities?
>
> MR. BENNAGEN. Yes, as long as there is a just share and it is subject to due process, because what has happened in the past is that the rights of the indigenous communities are not respected in terms of their share of the benefits derived from extraction of resources including minerals. It is as if we are dealing with them as private persons and that, therefore, they should benefit from this.[182]

It can be gleaned from the above exchange that the Regalian Doctrine will still be in place, but the harsh and confiscatory effects of this constitutionally-adopted feudal theory is now counteracted by SECTION 5 in conjunction with the other constitutional doctrines like balancing of interests, due process, compensation, and social justice.

The second paragraph of SECTION 5 allows Congress to apply customary laws in addressing the ancestral domain issue. Throwing light on the proper construction of SECTION 5 is the following excerpt:

> MR. SUAREZ. In terms of codifying the customary laws on the part of Congress, is my understanding correct in that regard? Is Congress under obligation to codify the customary laws?
>
> MR. BENNAGEN. That is my understanding.
>
> MR. SUAREZ. Therefore, before the codification of these customary laws by Congress, the State may not apply these customary laws to property relations or rights?
>
> MR. BENNAGEN. My understanding is that, even without the action of Congress, the State shall already protect. But the final definition of the ancestral domain shall wait for the action of Congress in respect to codification. So once it is codified, it will be included as part of national law.

[182] *Id.*

MR. SUAREZ. When we speak of customary laws governing property rights or relations in determining the ownership and extent of the ancestral domain, are we thinking in terms of the tribal ownership or community ownership within the ancestral lands or ancestral domain?

MR. BENNAGEN. The concept of customary laws is that it is considered as ownership by private individuals, clans, and even communities.

MR. SUAREZ. So, there will be two aspects to this situation. This means that the State will set aside the ancestral domain and there is a separate law for that. Within the ancestral domain it could accept more specific ownership in terms of individuals within the ancestral lands.

MR. BENNAGEN. Individuals and groups within the ancestral domain.[183]

The issue on the present land classification scheme as a system incapable of properly appreciating the peculiar circumstances of ancestral lands was tangentially discussed in the CONCOM deliberations. The Commissioners were more interested in defining the extent of the ancestral land and ancestral domain than in the impact of SECTION 5 on the land classification system. The following discussion pointed out some important distinctions:

MR. NATIVIDAD. xxx How vast is this ancestral land? Is it true that parts of Baguio City are considered as ancestral lands?

MR. BENNAGEN. They could be regarded as such. If the Commissioner still recalls, in one of the publications that I provided the Commissioners, the parts could be considered as ancestral domain in relation to the whole population of Cordillera but not in relation to certain individuals or certain groups.

MR. BENNAGEN. Yes, in the sense that it belongs to Cordillera or in the same manner that Filipinos can speak of the Philippine archipelago as ancestral land, but not in terms of the right of a particular person or particular group to exploit, utilize, or sell it.

MR. NATIVIDAD. But it is clear that the prior rights will be respected.

MR. BENNAGEN. Definitely.

xxx

MR. SUAREZ. xxx Is there any substantial difference between "lands" and "domain"?

MR. BENNAGEN. I tried to go into the deliberations on the 1973 Constitution, following the proposal of Atty. William Claver and I did notice that in the deliberations, distinctions were made between ancestral land and ancestral domain, as well as in the existing literature even outside of the Philippines. Ancestral lands would be more specific in relation to how people use, exploit, and sell; whereas, ancestral domain would include a broader area, including those that are not yet actually being occupied but which generally belong to what we call a cultural region. So, deep forests that are not yet in effective use are part of the ancestral domain, but not yet a part of the ancestral land.[184]

[183] *Id.* at 37.

While the deliberations in the CONCOM tend to favor the immediate protection of the ancestral domain pending the enactment of a law implementing SECTION 5 of Article XII, the statements of the constitutional commissioners do not bind the government. The fact remains that SECTION 5 is qualified by the phrase "subject to the provisions of this Constitution and national development policies and programs." Since the Constitution prohibits, under the the Regalian Doctrine, the alienation of lands of the public domain other than public agricultural lands, inevitably two views have emerged as to the proper interpretation of the sections.[185] The first view claims that SECTION 5 automatically modified the Regalian Doctrine provisions in the Constitution. Thus, ancestral lands are deemed segregated from the public domain even without an implementing legislation. By extension, SECTION 5 also modifies all public lands and forestry statutes so as to take out ancestral lands from the operation of these statutes. The second view maintains that until a law is passed defining the coverage of ancestral lands, all public lands claimed or possessed by indigenous cultural communities shall be subject to the Regalian Doctrine provisions in the Constitution. This means that pending the enactment of the implementing law, tribal Filipinos cannot yet invoke SECTION 5 to claim lands classified by law as inalienable like forest lands.

Of the two views, the first one seems more persuasive when tested by the principles of statutory construction. It is well-settled that the construction which will give effect to the whole law is to be adopted. If the second view, which upholds the supremacy of the Regalian Doctrine were to be adopted, then SECTION 5 would be rendered useless because ancestral lands primarily consist of forest lands. The continued application of the Regalian Doctrine to ancestral lands is tantamount to a denial of the rights of tribal Filipinos protected under SECTION 5. Surely, the framers of the Constitution could not have introduced a constitutional innovation that is rendered ineffecual by other constitutional provisions. It is just fair to assume that when the framers of the Constitution formulated SECTION 5, they knew that ancestral lands are primarily forest lands. As Commissioner Bennagen stated during the deliberations, ancestral lands must be protected even before the implementing law is enacted. Ancestral lands are unnecessarily lost daily not only by reason of fraudulent titling schemes of individuals and juridical entities, but also by the demise of aging tribal elders who know the exact boundaries of the ancestral domain. Consistent with the spirit of SECTION 5, the first view, which calls for the automatic exclusion of ancestral lands and ancestral domains from the operation of the Regalian Doctrine must be upheld.

[184] *Id*. at 36.

[185] Ma. Vicenta P. De Guzman, LAND/RESOURCE TENURE LEGAL AND POLICY FRAMEWORK (Annex), at A-3 (1992).

The Executive Department through the Department of Environment and Natural Resources (DENR) has tackled the two divergent views by meeting them halfway. Pending the enactment of the law on ancestral domain, the DENR has adopted the Integrated Social Forestry Program (ISFP) under which upland communities, especially the tribal communities, can possess, but not own, forest lands. "Under the ISFP,[186] qualified individuals or communities are allowed by the government to continue occupying and cultivating uplands. ISFP participants, through Individual or Community Stewardship Agreements are given a tenure over the land for a period of 25 years, renewable for an additional 25 years."[187] As a legal tenure for upland Filipinos, the ISFP does not, however, amount to a waiver by tribal Filipinos of their claims to their ancestral lands. This upland program is merely a stop-gap measure designed by the DENR to stem the gradual loss of ancestral lands and to make up for the inadequacy of public lands and forestry laws in treating upland tenurial rights. As early as 1990, the DENR has also started issuing Certificates of Ancestral Land Claims (CALC) to tribal Communities in Palawan and in the Cordillera Region in Northern Luzon.[188] The then Secretary of the DENR, Fulgencio Factoran, however, made it clear that these CALCs are mere evidentiary proofs to an ancestral land claim.[189] Although the DENR has chosen to be cautious by waiting for the enactment of the ancestral domain law before fully implementing SECTION 5, it seems to subscribe to the view that the rights of tribal Filipinos to their ancestral lands/domains should be protected immediately. The adoption of the ISFP and the issuance of CALCs by the DENR indicate that the Executive Department is willing to implement as soon as possible the spirit of SECTION 5.

The legislature during the administration of President Aquino tried to settle the divergent views on Ancestral Domain[190] rights by proposing quite a number of bills treating the contentious subject. The House of Representatives came up with a consolidated proposal, House Bill No. 33881, which called for the creation of a Commission on Indigenous Cultural Communities and Ancestral Domain. The Senate drew up a counterpart proposal, Senate Bill No. 909, which provided for the creation of an Ancestral Domain Commission. Both bills empowered the proposed commission to protect the rights of tribal Filipinos not only to their ancestral lands, but also to their ancestral domains.[191] Both bills, however, were archived when the term of the proponent legislators expired in 1992. Only House Bill No. 3881 was refiled as House Bill No. 595 in the present Congress.[192]

[186] The ISFP has been in existence since 1982 pursuant to President Marcos' Letter of Instruction No. 1260.

[187] Antonio La Viña, *Democratizing Access to Forest Resources: A Legal Critique of National Forestry Policy*, 3 Phil. Natural Resources Law Journal, Dec. 1990, at 13.

[188] The DENR issued DENR Special Order No. 31 dated January 17, 1990 (amended by DENR Special Order No. 31-A) providing for the creation of Special Task Forces on acceptance, identification, evaluation, and delineation of ancestral land claims in the Cordillera Administrative Region. *See also*, DENR Circular No. 3, series of 1990 which provides for the implementing rules for DENR Special Order No. 31.

[189] 10 TRIBAL FORUM May-June 1992, at 8.

[190] Introduced by: Reps. Andolona, Puzon, Dupaya, Aquino H., Lumauig, Dominguez, Bernardez, Dangwa, Garduce, Rodriguez, Bandon Jr., Zubiri Jr., Valdez, Camasura Jr., Gonzales, Labaria, Almario, Pilapil, Santos, Dimaporo A., Verano-Yap, Carloto, Dayanghirang, Lagman, Plaza, Adasa Jr., Bautista Jr., Dans, Tuzon, Cua, Arteche, and Domingo Jr.

Pending the enactment of a law on Ancestral Domain rights, the Legislative Department has also acknowledged the self-executory nature of SECTION 5 by drawing up special provisions on ancestral land in two statutes, namely, Republic Act No. 6657 or the Comprehensive Agrarian Reform Law (CARL) and Republic Act No. 7586 or the National Integrated Protected Areas System (NIPAS) Law. The CARL authorizes the government to suspend the implementation of the Comprehensive Agrarian Reform over ancestral lands for the purpose of identifying and delineating such lands.[193] The NIPAS law empowers the DENR to prescribe rules and regulations to govern ancestral lands within protected areas.

Section 13 of the NIPAS law provides:

> Ancestral lands and customary rights and interest arising shall be accorded due recognition. The DENR shall prescribe rules and regulations to govern ancestral lands within protected areas: provided, That the DENR shall have no power to evict indigenous communities from their present occupancy nor resettle them to another area without their consent: Provided, however, that all rules and regulations, whether adversely affecting said communitites or not, shall be subjected to notice and hearing to be participated in by members of concerned indigenous community.[195]

This provision serves as the basis for the issuance on January 15, 1993 of DENR Department Administrative Order (DAO) No. 02 implementing SECTION 5 of the Constitution. The intent of DAO No. 02 is embodied in its declaration of basic policy which states:

[191] Introduced by: Senators Rasul, Estrada, and Romulo.

[192] Introduced by: Reps. Andolana and Bulut.

[193] Republic Act No. 6657, sec. 9 (1988).

[194] In June 23, 1992, the Department of Agrarian Reform- Cordillera Administrative Region (DAR-CAR) and the Department of Environment and Natural Resources-Cordillera Administrative Region (DENR-CAR) entered into a Memorandum of Agreement (MOA) clarifying the jurisdiction of each Department on the disposition of public lands. Under the MOA, DAR-CAR may issue certificates of land occupancy award (CLOA) to individually or collectively-owned alienable and disposable public agricultural lands to ancestral land claimants in the Cordilleras (except in Baguio City) who were previously issued certificates of ancestral lands claim (CALC) by the DENR, and who further qualify as farmer beneficiaries under the Comprehensive Agrarian Reform Law (CARL). *See also*, DAR-DENR Joint Circular No.01 (1992) implementing the DAR-CAR and DENR-CAR Memorandum of Agreement.

[195] The NIPAS law does not list the making of *kaingin* or swidden farming as a prohibited act under Section 20. This can be interpreted as the legislature's implied recognition of the tribal Filipinos indigenous farming methods.

It is the policy of the DENR to preserve and maintain the integrity of ancestral domains and ensure recognition of the customs and traditions of the indigenous cultural communities therein pursuant to the Constitutional mandate for the recognition and protection of the rights of indigenous cultural communities.

Further, the government recognizes the importance of promoting indigenous ways for the sustainable management of the natural resources such as the ecologically sound traditional practices of the indigenous cultural communities.

Pursuant thereto, there is an urgent need to identify and delineate ancestral domain and land claims, certify them as such, and formulate strategies for their effective management.[196]

The DENR now issues Certificate of Ancestral Domain Claims (CADC) to replace the Certificate of Ancestral Land Claims (CALC). The change in the designation is not merely semantic. Under DAO No. 02, an Ancestral Domain can cover a much larger area than an Ancestral Land as enunciated in the following:

Composition of Ancestral Lands – Unless Congress otherwise provides, ancestral lands chall consist of lands occupied, possessed, or utilized by individuals, families or clans who are members of the indigenous cultural communities since time immemorial by themselves or through their predecessors-in-interest, continuously to the present except when interrupted by war, *force majeur* or displacement by force, deceit or stealth, including but not limited to residential lots, rice terraces or paddies, private forests, swidden farms and tree lots.

Composition of Ancestral Domains – Unless otherwise Congress provides, ancestral domains shall consist of all territories possessed, occupied or utilized by indigenous cultural communities, by themselves or through their ancestors or predecessors-in-interest since time immemorial in accordance with their customary laws, traditions and practices, irrespective of their present land classification and utilization, including but not limited to such lands used for residences, farms, burial grounds, communal and/or private forests, pasture and hunting grounds, worship areas, individually owned lands whether alienable/disposable or otherwise and other natural resources.[197]

By completely ignoring the Regalian Doctrine limitations in defining the extent of Ancestral Lands and Ancestral Domains, the Executive Department through the DENR has demonstrated again its willingness to take out ancestral lands and ancestral domains from the operation of the Regalian Doctrine.

Whether or not the Legislative Department will pick up from the initiative of the Executive Department depends on how the legislators will act on House Bill No. 595, which carries the following definitions:

Ancestral Domain – refers to all lands and natural resources owned, occupied or possessed by indigenous cultural communities, by themselves or through their ancestors, communally or individually, in accordance with their customs and traditions since time immemorial, continuously to the present except when interrupted by war, *force majeure*, or displacement by force, deceit, or stealth. It shall include ancestral lands, titled properties, forest, pasture, residential, agricultural, and other lands individually owned whether alienable/disposable or other wise, hunting grounds, worship areas, burial grounds, bodies of water, air space, mineral and other natural resources.

Ancestral lands – refers to those real properties within the ancestral domain which are communally owned, either by the whole community or by a clan/group thereof.

If the bill is enacted into law with these definitions intact, ancestral domains and ancestral lands will be effectively taken out of the operation of the Regalian Doctrine. The bill, however, is not clear on the extent of regulations the State will impose on the possession and utilization of ancestral domains and ancestral lands by tribal Filipinos. The bill merely tasked the proposed Commission on Indigenous Cultural Communities and Ancestral Domain to consult the customary laws of tribal Filipinos and formulate the necessary rules and regulations that will carry out the policy of protecting the rights of indigenous cultural communities to their ancestral lands and domains. It is highly improbable, however, that the legislators will consider ancestral lands/domains as privately owned by the tribal Filipinos in the sense that such lands become alienable as any other private lands. As mentioned many times in this paper, ancestral lands or domains are primarily made up of inalienable forest and mineral lands over which the State possesses legitimate interests for the common good. The State, for instance, has the inherent right and duty to maintain a substantial forest cover for the entire land mass of the country for ecological purposes, so that the environment may be able to support the growing population.

House Bill No. 595 itself conspicuously provides for the general concept of "rights to ancestral lands/domains" instead of the more specific "ownership of ancestral lands/domains". What prevented Congress from providing for the ownership of ancestral lands/domains are environmental considerations, as implied in Section 16 of the bill which states:

> Ancestral domains or portions thereof, which are found to be necessary for critical watersheds, mangroves, wildlife sanctuaries, wilderness, forest cover, or reforestation, as determined by appropriate agencies with the full participation of the indigenous cultural community concerned shall be maintained, managed, and developed for such purposes. The indigenous cultural community within the ancestral domain shall be given the responsibility to maintain, develop, protect, and conserve said areas with the assistance of the government agencies.

The tribal Filipinos may have no other choice but to concede to the State its right to conserve critical areas for the common good. Everyone depends on a stable environment for health. But the tribal Filipinos, according to the bill, are given priority rights in the harvesting, extraction, development, or exploitation of any natural resources within ancestral domain perimeters.[198]

Furthermore, a non-member of the tribe who plans to make use of the natural resources within the ancestral domain must first seek the consent of the whole tribal community occupying it and must give the tribe an equitable share on the revenues generated.[199]

So long as the tribal Filipinos are assured of living their distinct kind of life in peace, in stability, and in perpetuity, then the protracted problem on ancestral domain rights is adequately addressed. Section 5 of Article XII of the Constitution and the other constitutional innovations designed to uphold ancestral domain rights holds much promise for the vindication of the rights of tribal Filipinos. But such promise is so fragile that to prevent from breaking all three Departments of the Government have to deliver in utmost sincerity and in sophisticated coordination.

CONCLUSION

A. Summary

1. Tribal Filipinos are dispossessed of their ancestral lands everytime the government pursues a development policy involving lands of the public domain. There is nothing phenomenal about this. Tribal Filipinos have been occupying many parts of the public domain since time immemorial. Still, in the name of progress, the government has relied time and again on a legal fiction which presumed that lands of the public domain are unoccupied territories. The truth is that around six million tribal Filipinos live in many portions of the public domain. To hasten the completion of development targets, the government found it more convenient to ignore these tribal Filipinos than to address their legitimate and inherent tenurial rights to ancestral lands.

2. The ancestral domain problem revolves around the disposition and utilization of public lands. At the core of the problem is the conflict between customary law and the national law on land. On one hand, the national land law is founded upon a Western feudal theory called the Regalian Doctrine, which vested by legal fiction ownership of all public lands on the State. The Regalian Doctrine has enabled the State, acting through the government, to assume the sole authority to grant ownerhsip of public lands. Grants from the State are evidenced by a paper title called the Torrens Title, which is guaranteed by the State as indefeasible and imprescriptible as against any other claimant. On the other hand, customary law generally treats land as a common economic and cultural base which cannot be owned and alienated like an ordinary chattel. Unwritten customary law does not rely on documents to prove ownership, but rather on oral traditions drawn from the actual and long occupation by the indigenous cultural community. Since the national law does not usually recognize customary law, the government, for some time, has viewed the tribal Filipinos as squatters on public lands. The tribal Filipinos, however, have always asserted that tradition has vested in them legitimate tenurial rights to their ancestral lands. Unless this disjunction between customary law and the national law is bridged, the ancestral domain problem cannot be fully and fairly settled.

3. The operation of the Regalian Doctrine in the national legal system gave the State the authority to classify public lands. To conserve the national patrimony, the State absolutely prohibited the alienation and disposition of forest lands or lands above eighteen percent in slope. Since most ancestral lands are highlands above eighteen percent in slope, this blanket prohibition disenfranchised in one sweep millions of tribal Filipinos of their tenurial rights to their ancestral lands. While the public land laws recognize the vested rights of tribal Filipinos to their lands by virtue of continuous occupation for at least 30 years, these laws applied only to alienable lands of the public domain. What the government has given in one law is taken away in another law. This absurdity in land classification has precipitated a large-scale, government-backed encroachment upon ancestral lands.

4. Jurisprudence on the contentious public lands policy was marked with judicial vacillations. The Court in the 1904 case of *Valenton* declared that State recognition is necessary before ownership to the land is vested by virtue of acquisitive prescription. However, the 1909 case of *Cariño* introduced into the Philippine jurisprudence the American concept of native title. Penned by Justice Holmes, the Court in *Cariño* ruled that lands occupied since time immemorial shall be deemed as never to have formed part of the public domain. The *Cariño* doctrine gave rise to the amendment of the first public land act in order to accommodate the land claims of tribal communities. The ensuing public land law, however, failed to consider that most of the lands of tribal Filipinos are inalienable forest lands. Thus, in applying the *Cariño* doctrine and the public land law together to adjudicate ancestral land disputes, the court was ridiculously trying to uphold at the same time two diametrically opposed concepts, namely, the Regalian Doctrine and Ancestral Domain rights. *The Cariño* decision was based on native title and not on the public land laws. *The Cariño* doctrine could only be applied as an exception to the operation of the Regalian Doctrine in the national legal system. Justice Holmes was merely being prudent when he decided *Cariño* under the concept of native title, rather than under the Regalian theory. The rights of tribal Filipinos to their ancestral lands could never be vindicated under a legal theory which has no room for the application of customary law.

5. The Constitution now recognizes under Section 5 of Article XII the rights of tribal Filipinos to their ancestral domains and ancestral lands. While the Executive Department, acting through the Department of Environment and Natural Resources (DENR), has manifested its willingness to immediately implement the provision on ancestral domain rights, it is hampered by two opposing views on the proper interpretation of such

provision. One view holds that the provision automatically segregated ancestral lands from the public domain without need of an implementing law. The other view maintains that pending the enactment of an implementing law, the provision did not exempt ancestral lands from the operation of the Regalian Doctrine and the public land laws. Present developments, however, in the Executive and Legislative Departments tend to favor the first view. The DENR, for instance, has adopted the Integrated Social Forestry Program (ISFP) to legalize the continued occupation of tribal Filipinos to their ancestral lands pending the enactment of an ancestral domain law. The DENR has also started issuing Certificates of Ancestral Land Claims (CALCs), now known as Certificates of Ancestral Domain Claims (CADCs), which will serve as evidentiary proofs to future adjudications on ancestral domain claims. On the legislative front, House Bill No. 595, which is the sole ancestral domain bill pending in Congress, has ignored the Regalian theory in defining ancestral domains and ancestral lands. Even the framers of the Constitution have revealed during the 1986 Constitutional Commission deliberations that the provision on ancestral domain rights was intended to be self-executory. Based on the foregoing observations, it could be concluded that the principles of statutory construction overwhelmingly favor the adoption of the view, which holds that Section 5 of Article XII of the Constitution automatically segregated ancestral lands from the public domain. This interpretation, however, does not prevent the government from regulating the right of tribal Filipinos to their ancestral lands which happen to be forest lands. After all, every citizen has a legitimate interest in the preservation of the forests for environmental considerations. But in any case, the rights of tribal Filipinos to their ancestral domains are always given paramount consideration and protection.

B. Recommendations

1. *On the Constitution.* An amendment is suggested making ancestral land as a new classification of land. Ancestral land should not be subsumed under the classification of lands of the public domain under Section 3 of Article XII. The purpose of the amendment is to take out ancestral lands from the operation of Section 2 of Article XII or the Regalian Doctrine Provision. If such amendment is made, lands in the archipelago would be classified under three major groups, namely: public lands, private lands, and ancestral lands. In this case, ancestral lands are neither public nor private lands. Ancestral Lands are lands possessed by the indigenous cultural communities under their own respective customary laws. They are not private lands in the sense that they do not become as alienable as any other privately titled lands under the Torrens System. Ancestral lands are also not public lands in the sense that State does not own them in the concept of *dominium* under the Regalian theory. But just like in privately-titled lands, rights to ancestral lands can be regulated by the State under its police power and power of eminent domain subject to the constitutional principles of due process and just compensation. The State, for instance, can prohibit ancestral land occupants from alienating critical areas for watershed, forest cover, mangrove culture, and the like, and even charge them the responsibility of preserving these areas for environmental purposes.

2. *On the Judiciary.* In deciding ancestral lands cases, the courts should apply the *Cariño* Doctrine based on the Constitutional provisions upholding the rights of Indigenous Cultural Communities, especially Section 5 of Article XII. In case the proper occasion arises, the Supreme Court should categorically declare that Section 5 of Article XII of the Constitution had automatically taken out ancestral lands from the operation of the public land laws and the Regalian Doctrine. This will have the effect of clearing up the massive confusion that has long plagued the contentious public lands policy of the State regarding ancestral lands. Pending the enactment of an ancestral domain law, the void as to what law shall govern ancestral lands can be temporarily filled in by the common law jurisprudence on native title and by the administrative orders of the Department of Environment and Natural Resources (DENR).

3. *On the Executive Department.* The DENR should embark on a massive and systematic campaign to delineate ancestral domain boundaries. As far as practicable, the oral traditions of each tribe should be given paramount consideration in determining the extent of the ancestral domain. Pending the enactment of an ancestral domain law, the DENR should exhaust all administrative actions within its jurisdiction to protect ancestral domains from encroachment by non-members of the tribal community concerned. Initiatives on the codification of customary laws should also be undertaken by the DENR by working closely with the University of the Philippines Institute of Human Rights whose ongoing study on customary laws of indigenous Filipinos has already yielded a voluminous collection of verified and documented oral traditions of indigenous Filipinos.

4. *On the Legislative Department.* Congress should hasten the passage of a law which will comprehensively govern ancestral domain rights. But Congress must consult with all major indigenous cultural communities before passing the law. A permanent body clothed with quasi-judicial powers must be created by law to take charge of all matters regarding the resolution of the ancestral domain problem. House Bill No. 595 which calls for the creation of a Commission on Indigenous Cultural Communities and Ancestral Domain (CICCAD) holds promise as a reasonable proposal. The bill, however, should categorically declare the segregation of ancestral lands from the public domain. Aside from enacting an ancestral domain law, Congress should also review and accordingly modify all existing public land laws, including the Revised Forestry Code and the Property Registration Decree, to reflect the intent of the Constitution in protecting ancestral domain rights. The following suggestions are

workable: a) Commonwealth Act No. 141, as amended, should be amended again to eliminate ancestral lands from its coverage; b) the Revised Forestry Code, as amended, should be amended again to eliminate all its provisions (e.g. ban on *kaingin* farming, the 18% slope rule) which work against the tenurial rights of indigenous cultural communities; and c) the Property Registration Decree or the Torrens System should be amended to accommodate communal titling of ancestral lands consistent with the ancestral domain law that may be enacted in the future.

Resolving the ancestral domain problem is an intimidating task. The fronts to be attended to are so many like human rights, social justice, economic development, reformation of laws, political autonomy, ethnography, ecology, education, health, law enforcement, and special adjudication, to name some, which all cry out for simultaneous government action. Thus, one cannot help but say that only a highly competent, intensely determined, and fully humane government can peacefully settle this complex, age-old, and all-encompassing problem on ancestral domain rights. Perhaps it is more appropriate to say that a people that can humanely solve a problem of such magnitude is truly worthy of being called a nation.

THE RIGHT TO CLEANER AIR: STRATEGIES FOR THE CONTROL OF AIR POLLUTION FROM STATIONARY SOURCES IN THE LIGHT OF EXISTING LAWS

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One of the problems brought about by the industrialization of the country is the increasing pollution of the air, which threatens human health and survival.

This thesis makes a survey of existing laws that deal with pollution from stationary sources, as well as other related laws, rules and regulations, and the cases that interpret these, with the end in view of evaluating the efficacy of these laws and mapping out a legal strategy which may be used by persons, especially community members, who may be aggrieved by problems of pollution. In the process, the author discusses the main governmental agencies involved in pollution control, and the role and enhanced powers of the local governments in the task of pollution control, as provided in the Local Government Code of 1991.

After mapping out such strategy, the author goes on to conclude that the basic framework for air pollution control has been set in place, and makes recommendations for the more effective use of the law in air pollution control.

INTRODUCTION

A. Background of the Study

> Petitioner takes note of x x x [its] plea [,] focusing on its huge investment in this dollar-earning industry. It must be stressed, however, that concomitant with the need to protect investments and contribute to the growth of the economy is the equally essential importance of protecting the health, nay the very lives of the people, from the deleterious effects of the pollution of the environment.[1]

We live in an era which demands a delicate balance of important forces and interests. While on one hand there is a growing concern for the envi-

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[1] *Technology Developers, Inc. v. Court of Appeals*, 192 SCRA 147 at 152 (1991).