



# The Rights of Indigenous Communities in International Law: Some Implications under Philippine Municipal Law\*

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### INTRODUCTION

Indigenous communities are distinct groups of people with a continuity of existence or identity tracing their roots to the tribes or nations of their ancestral past. Historically, they have been identified as the original inhabitants of territories colonized by European powers.

In recent years, the United Nations has given special attention to the plight of these communities through the establishment of mechanisms and the drafting of international instruments aimed at addressing the historical injustice that these peoples have suffered. At the core of this protection is the recognition by the international community today that indigenous peoples enjoy collective rights as social groups on account of their distinct characteristics. Furthermore, their historical experience as a people during the colonization era, particularly the effective dispossession of their ancestral domains and lands through the use of colonial legal concepts, have led the United Nations to explore ways to contain their continuing economic and social marginalization.

International human rights instruments have been utilized by both international organizations and nation states as tools for advocacy and change in attitudes of certain sectors in society on toward highly contentious issues involving competing values. For instance, applied to indigenous peoples today, the need to balance the demands of economic development within a state and recognition of land rights of indigenous peoples requires effective standards and

mechanisms for a just resolution of conflicts of this nature. The development of new legal principles either through treaties or the general practice of states in this field of human rights law is not only timely but is long overdue in light of the threatening conditions faced by most of these indigenous peoples in various parts of the world.

This essay surveys the development of international principles and instruments affecting the rights of indigenous communities. It begins with a review of the various theories of publicists and writers on the status of the rights of indigenous communities during the period of conquest. Some relevant international and national judicial decisions will also be discussed related to these theories. The essay then proceeds to discuss the adoption of international legal instruments, specifically addressing the needs of indigenous communities. The relevance of state practice, through the courts, in the development of new legal principles, such as recognition of native title or ancestral land rights, is emphasized in the summary of landmark cases in Australia and Canada. Finally, the essay inquires into the implication of these developments in international law on the situation of indigenous peoples in the Philippines.

### I. CLASSICAL INTERNATIONAL LAW AND THE TREATMENT OF INDIGENOUS COMMUNITIES

#### A. *Philosophical and Legal Justification of Colonial Expansion*

One of the fundamental assumptions in the law of nations applied by European colonizers during the period of expansionism into the New World when dealing with the treatment of indigenous communities is that the lawfulness of an action must be determined according to the law in force at the time of the act, as opposed to the law in force when a subsequent dispute arises.<sup>1</sup> Therefore, the question as to whether the discovery of the New World and the subjection of its peoples to European control was lawful, must be judged according to the rules of international law in force during the age of discovery.

In a recent study on "Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations,"<sup>2</sup> Special Rapporteur Miguel Alfonso Martinez described how law became an instrument of colonialism. Corollary to the principle of intertemporal law, the doctrine of *terra nullius*, *encomienda*, and *repartimiento* systems instituted by the Spanish Crown in the sixteenth century, the "removal treaties" imposed on the indigenous nations of south-eastern United States in the 1830s, and the various

1. See *Island of Las Palmas*, 2 R.I.A.A. 831, 845 (1928); See also *Western Sahara Case*, 1975 I.C.J. 12 at 27, 38 (Oct. 16).

2. U.N. Doc. E/CN.4/Sub.2/1999/20 (June 22, 1999).

types of State legislation encroaching on previously recognized indigenous jurisdiction, had the effect of marginalizing the indigenous peoples.<sup>3</sup>

In a survey of the manner by which European colonizers established formal legal relationships with the indigenous peoples, particularly through treaties, Martinez observed that "the European parties were clearly aware that they were negotiating and entering into contractual relations with sovereign nations, with all the legal implications of that term during the period under consideration."<sup>4</sup> He posits the idea that this recognition was made imperative because of the need to legitimize colonization and trade interests of the European powers.<sup>5</sup> However, in the course of history, the European colonizers attempted to divest indigenous peoples of their sovereign attributes, especially jurisdiction over their lands, recognition of their forms of societal organization, and their status as subjects of international law.<sup>6</sup> This development led to what Martinez described as the "domestication" of the "indigenous question" removing the entire *problematique* from the sphere of international law and placing it squarely under the exclusive competence of the internal jurisdiction of non-indigenous States.<sup>7</sup>

What are the philosophical and legal justifications of colonial expansion? What were the arguments advanced to defend the subjugation of indigenous peoples? In order to answer ascertain these questions, one must view state practice at that time, the views of classical writers, and the leading cases of the era.

In the early part of the 14th Century, it was commonly believed that the entire globe was the property of God, which could, naturally, be distributed by the Pope.<sup>8</sup> The common practice was to seize territory which had not yet been claimed by other Christian states, regardless of the presence of local inhabitants. This was undertaken on the basis of the Papal Bulls, by which the Pope divided the undiscovered world between Portugal and Spain. The primary objective of this division was to spread Christianity.<sup>9</sup>

For instance, in the Papal Bull of May 4, 1493, the Pope granted to Ferdinand and Isabela, as well as all their descendants, all lands lying to the west of a line joining the North and South Poles, 100 leagues west of the Azores, including regions discovered and unknown, so long as they had not already

3. *Id.* at ¶ 100.

4. *Id.* at ¶ 110.

5. *Id.* at ¶ 111.

6. *Id.* at ¶ 112.

7. *Id.* at ¶ 192.

8. L.C. GREEN, O. DICKASON, *LAW OF NATIONS AND THE NEW WORLD* 4 (1989).

9. F.G. DAVENPORT, *EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES* 72 (1917), *cited in* GREEN & DICKASON, *supra* note 8, at 4-6.

been seized by any other Christian prince. All such lands to east of said line were awarded to Portugal.

That the rulers of Spain and Portugal considered the Pope's grant as being completely effective is evidenced by the Treaty of Tordesillas (1494),<sup>10</sup> whereby they shifted the one hundred league line demarcating the spheres of ownership to 370 leagues west of the Cape Verde islands. They recognized the right of each to cross into the territory of the other to the extent that it be necessary, but affirmed the exclusive ownership of each within its area. Another piece of evidence is the Confirmation by Bull *Ea Quae* of 1506.<sup>11</sup> This Bull reiterates and recognizes the right of the King of Portugal to "navigate the ocean sea, seek out the islands, ports, and mainlands lying within the said sea, and retain those found for himself, and to all others it was forbidden under penalty of excommunication, and other penalties ... from presuming to navigate the sea in this way against the will of the aforesaid king, or to occupy the islands and places found there."

It may be emphasized that none of these documents contain any reference to the possessory rights of any local inhabitants who might be found within the territories concerned.

Symbolic acts of possession were undertaken by explorers, consisting of putting up crosses as a sign of claim of title, often adorned with the arms of the sovereign. The explorers and their patrons considered these rather simple devices as effective to convey territorial title, to the exclusion of other European rulers as well as the original inhabitants.<sup>12</sup>

In 1492, Columbus planted the cross, hoisted the royal standard of Spain, and took possession of the countries.<sup>13</sup> The placing of marks was regarded as essential for the assertion of sovereignty, as evidenced by the patent given to Alonso de Hojedo in 1500 and 1501.<sup>14</sup> Early French expeditions to North America pursued the same practice, shown by Cartier's expeditions in the 1530s.<sup>15</sup> Certainly, the French considered the installation of markers as an act

10. See Treaty of Madrid (1495), in F.G. DAVENPORT, *EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES* 104 (1917), *cited in* GREEN & DICKASON, *supra* note 8, at 6.

11. F.G. DAVENPORT, *supra* note 9, at 110, *cited in* GREEN & DICKASON, *supra* note 8, at 6.

12. GREEN & DICKASON, *supra* note 8 at 8.

13. SPORTRONO, *MEMORIALS OF COLUMBUS* lvi (1823); C. COLUMBUS, *FOUR VOYAGES TO THE NEW WORLD* 142-43, 12, 22 (R.J. Major ed., 1847), *cited in* GREEN & DICKASON, *supra* note 8, at 7-8.

14. 2 *Biblioteca de Autores Espanoles, Obras de Fernandex de Navarrete* 195; III *Coleccion de los Viajes y Descubrimientos* 60 (J. Geobel trans.), *cited in* GREEN & DICKASON, *supra* note 8, at 8.

15. *THE VOYAGES OF JACQUES CARTIER* 64-66, 85, 89, 249-51 (Biggar trans., 1924), *cited in* GREEN & DICKASON, *supra* note 8, at 8-9.

entailing acquisition of sovereignty, indicating that the indigenous people would be placed under French protection.<sup>16</sup>

While the English explorers did not always raise a cross in the places where they landed and claimed, they did, nevertheless, consider it necessary to indulge in some formal ceremony, which often involved a symbolic taking of part of the realty.<sup>17</sup> The Russian practice was the same for the installation of markers, whether or not accompanied by other acts beckoning possession. This was regarded as a sufficient method of acquiring sovereignty during the early period of exploration without the need to enter into treaties or other formal arrangements.<sup>18</sup>

Despite the publicity, formality and assumption of nationhood, insofar as the indigenous population is concerned, there is no suggestion that the latter played any part in this proceeding, or had in fact been consulted as to whether they wished to become vassals.<sup>19</sup>

It is evident that between the 15th and 18th centuries, explorers commissioned by the European monarchs were convinced that they were able, in the name of their monarchs, to take over territories newly discovered by them, so long as there was no evidence that such places had already been acquired by another Christian prince.

However, insofar as the Protestant countries were concerned, they were not prepared to accept the authority of the Papal disposition of the New World, nor were they willing to acknowledge Christian sovereignty based merely on discovery and the placement of markers, in the absence of some concrete evidence of settlement. But there was never any thought that it was necessary to secure the agreement of the local inhabitants to the assumption of sovereignty, although attempts were made to assure them that by agreeing to the desires of their visitors they would be protected from their enemies. In view of the respect for symbols, formalities and the written word during this period, there is little doubt that if the explorers or their sovereigns had any thought that a treaty of any kind was necessary, such would, in fact, have been entered into. In any case, for the most part, the general attitude, to some extent

16. 2 THE WORKS OF SAMUEL DE CHAMPLAIN 272, 297 (Biggar ed., 1925); HISTORICAL COLLECTIONS OF LOUISIANA AND FLORIDA 167 (B.F. French ed., 1869); 1 F. PARKMAN, LA SALLE AND THE DISCOVERY OF THE GREAT WEST 53 (1897), cited in GREEN & DICKASON, *supra* note 8, at 9-10.

17. GREEN & DICKASON, *supra* note 8, at 10; see also J.H. WILLIAMSON, THE VOYAGES OF THE CABOTS 30 (1929); 2 SAMUEL PURCHAS, HEKLYTUS POSTHUMUS OR PURCHAS HIS PILGRIMES 129 (1905); THE WORLD ENCOMPASSED BY SIR FRANCIS DRAKE 75 (Vaux. ed., 1854), cited in GREEN & DICKASON, *supra* note 8, at 10-11.

18. W. CO. COXE, ACCOUNT OF THE RUSSIAN DISCOVERIES BETWEEN ASIA AND AMERICA I-2, 33-36 (1804), cited in GREEN & DICKASON, *supra* note 8, at 15.

19. GREEN & DICKASON, *supra* note 8, at 14.

flowing from the Papal attitude to non-Christian heathen, was that the indigenous population of the New World lacked any identity that required recognition nor rights which were entitled to respect. On the contrary, these people were looked upon as savages or barbarians who could be rightly subjected to the rule of European monarchs, under the ideological pretense that this subjection was, in the first place, for the glory of the Church, and only secondly for the greater aggrandizement of the monarch and country concerned.

It may be emphasized that it was not only in the commissions issued by the monarchs and their delegates, the reactions to them of the explorers to whom they were addressed, and the grants of territory that were made in accordance with them, that illustrate the general view of the normal manner in which legal title to territory in the New World could be established. The same understanding is to be found in a number of treaties of the period in which one find undertakings not to encroach upon each other's territory, or for the mutual use thereof against a common enemy, but again there is no reference to any right of the aboriginal inhabitants.<sup>20</sup>

All these tend to confirm the view that, at the time of the discovery of the New World, it was established practice, amounting to law, that the state in whose name a settlement was established in territory formerly unsettled by the nations of any European monarch, became sovereign of the territory in question, regardless of any proprietary claims of the original inhabitants.<sup>21</sup>

## B. Attitude Toward the Indigenous Communities

### 1. In General

In the Papal Bull *Sublimis deus sic dilexit* of 1537,<sup>22</sup> Paul III decreed that the Amerindians were not to be treated as dumb brutes created for service, but as true men, capable of understanding the Catholic faith. Urban VIII threatened excommunication for those who deprived Amerindians of their liberty or property.<sup>23</sup>

20. See Treaty of Lyons of 1536 (Fr.-Port.); Franco-Spanish Treaty of Vaucelles (1556); Treaty of Joinville of 1585 (Fr.-Spain); Treaty of London of 1604; Anglo-Dutch Treaty (1598), cited in GREEN & DICKASON, *supra* note 8, at 35-37.

21. GREEN & DICKASON, *supra* note 8, at 38-39.

22. L. Hanke, *Pope Paul III and the American Indians*, HARV. THEO. REV. 30, 65, 72 (1937), cited in GREEN & DICKASON, *supra* note 8, at 18.

23. D. Alden, *Black Robes versus White Settlers: the Struggle for Freedom of the Indians in Colonial Brazil*, reprinted in PEEKHAM AND GIBSON, ATTITUDES OF COLONIAL POWERS TOWARD THE AMERICAN INDIAN 19-45 (1969), cited in GREEN & DICKASON, *supra* note 8, at 18.

However, these Papal Bulls did not apply to non-Catholics. In fact, in 1609, in *A Good Speed to Virginia*,<sup>24</sup> we find it clearly stated that: "[i]t is likely that these savages have no particular property or parcel of that country, but only a general residence there as wild beasts have in the forest."

In the 16th century, there was no doubt that this was the method by which sovereignty over territory in the Americas was considered proper, without any reference to the consent or views of the local inhabitants.

The later colonizing efforts of the 16th and 17th centuries also proceeded on the premise that there was no need to consult or obtain the consent of the native inhabitants. While letters of commission sometimes spoke of the missionary motives of expeditions, the documents indicate that the primary purpose was the acquisition of territory. The missionary character of voyages appears to be mere lip service. In 1608, when King Henry granted monopoly to Sieur de Monts, there was no reference to the missionary character of the exploration, other than in the most cursory fashion, although the acquisitive purpose was clearly understood.<sup>25</sup> Moreover, Champlain, recounting his discoveries in tones of high-sounding religiosity, did not disguise the fact that he was fully aware of the political and predatory significance of his undertaking.<sup>26</sup>

## 2. Some Significant Views of Early Writers

### i. Vitoria<sup>27</sup>

He put forward the view that the Indians of North America were neither chattel nor beasts, but human beings entitled to a modicum of respect, even from Catholics carrying the Word of God. He denied that the Pope possessed civil or temporal powers over the whole world, or even spiritual jurisdiction over believers. Therefore, the Pope had no secular power to confer territory upon princes.

The Pope's temporal power was only such as subserves spiritual matters, and since he possessed no spiritual power over Indian aborigines, he possessed no temporal power over them either. Therefore, even if the barbarians refused

24. C. Horton, *The Relations Between the Indians and the Whites in Colonial Virginia* 20 (1921) (unpublished M.S. Thesis) (on file with the University of Chicago), cited in GREEN & DICKASON, *supra* note 8, at 18.

25. W. L. GRANT, *VOYAGES OF SAMUEL DE CHAMPLAIN 1604-1618*, 122 (1907), cited in GREEN & DICKASON, *supra* note 8, at 28.

26. 3 *WORKS OF SAMUEL DE CHAMPLAIN 251-2, 258-60* (Biggar ed., 1925), cited in GREEN & DICKASON, *supra* note 8, at 30.

27. FRANCISCO DE VITORIA, *DE INDIS NOVITER INVENTIS* (J.P. Bate trans., 1532), cited in GREEN & DICKASON, *supra* note 8, at 39.

to recognize the lordship of the Pope, that furnished no ground for making war on them and seizing their property.

Vitoria recognized the right of indigenous people over property, and any claim based on discovery is discounted, for one can only acquire title by discovery over what is unowned, and the Indians were true owners. So long as the faith had not been preached to them, so that their ignorance was invincible, there was no basis to assault them. Nor did he consider that they were in mortal sin if they did not accept Christianity immediately upon hearing it, thus:

The barbarians in question cannot be barred from being true owners, alike in public and in private law, by reason of the sin of unbelief or any other mortal sin, nor does such sin entitle Christians to seize their goods and lands.... [T]he aborigines undoubtedly had true dominion in both public and private matters, just like Christians, and ... neither princes nor private persons could be despoiled of their property on the ground of their not being true owners.... [E]ven if we admit that the aborigines in question are as inept and stupid as alleged, still dominion can not be denied to them, nor are they to be classed with the slaves of civil law. True, some right to reduce them to subjection can be based on this reason and title.... Meanwhile the conclusion stands sure, that the aborigines in question were true owners, before the Spaniards came among them, both from the public and private point of view.<sup>28</sup>

However, Vitoria believes that after trying peaceful methods, the Spaniards could eventually take the property of the Indians through war. Another way is through propagation of Christianity. It is a universal rule of the law of nations that whatever is captured in war becomes the property of the conqueror.<sup>29</sup>

### ii. Gentili

Gentili does not question the right to claim possession of previously unknown territories, although he does state that an unbounded thirst for power and riches is not a legitimate reason for war:<sup>30</sup>

The warfare of the Spaniards in that part of the world seems to be justified, because the inhabitants prohibited other men from commerce with them; and it would be an adequate defense, if the statement were true. For commerce is in accordance with the law of nations... but the Spaniards were aiming there, not at commerce, but at dominion. And they regarded it as beyond dispute that it was lawful to take possession of those lands which were not previously known to us; just as if to be known to none of us were the same thing as to be possessed by no one.

However, he agreed with Vitoria in that the Spaniards had just cause to make war upon Indians, whom he considered brutish men.<sup>31</sup> He justified the

28. *Id.* § I, 19, 24, at 125, 128, cited in GREEN & DICKASON, *supra* note 8, at 40.

29. *Id.* § III, at 151-162, cited in GREEN & DICKASON, *supra* note 8, at 44.

30. ALBERTO GENTILI, *DE JURE BELLI* Bk. I, Ch. XIX at 89 (John C. Rolfe trans., 1933) (1612), cited in GREEN & DICKASON, *supra* note 8, at 48.

31. *Id.* Ch. XXV at 122, 126, cited in GREEN & DICKASON, *supra* note 8, at 49.

acquisition by Spain of those parts of the New World, since the conqueror acquires the whole of the conquered.<sup>32</sup>

Whether Catholic or Protestant, the view was generally the same, namely, that the representatives of the Old World were entitled to seek establishment in the New, and if they could not achieve their purpose by peaceful means, then they had cause to wage a just war. If they were victorious in such a war, then they had the right to take over the property and territory of their defeated enemy.<sup>33</sup>

### iii. Suarez<sup>34</sup>

He supported the view that the Pope had the power to distribute among temporal princes and kings, the provinces and realms of unbelievers, in order that they may make provisions for the sending of preachers of the Gospels to those infidels, and may protect such preachers by their power, even through the declaration of just war, if reason and a rightful cause should require it. The Pope likewise had the right to mark off specific boundaries for each prince, in order to preserve peace among Christian princes and also in order that each of these princes may procure with greater care, the welfare of the people committed to his charge.

Since the Church has a right to preach, it possesses the right to make the unbelievers listen, for it is permissible to employ coercion in order to prevent resistance to the preaching of the faith, if the pagans are unwilling to listen, and in that very unwillingness they resist and impede the preaching of the faith.<sup>35</sup>

However, Suarez did not consider that it was permissible to coerce them into believing, unless they were subjects of the prince on whose behalf the coercion was being exercised. Thus:

[i]f both the pagan king and kingdom offer simultaneous resistance, I think that they may be forced to permit the preachers of the Gospel to live in their territories for this tolerance is obligatory under the *jus gentium* and cannot be impeded without just cause. Moreover, that king and that people may be forced to permit these preachers to declare the word of God, without suffering violence or treachery, to those who are willing to hear; since it is probable that there will never be lacking individual persons who will hear voluntarily.... Accordingly, under such circumstances, there is involved no coercion to the hearing of the faith, but only a coercion to refrain from impeding the preaching of the Gospel, or placing obstacles in the way of those persons who may voluntarily choose to give ear to such preaching.

32. *Id.* Bk. II, Ch. V, X, XI at 307, 338, 341, cited in GREEN & DICKASON, *supra* note 8, at 49.

33. GREEN & DICKASON, *supra* note 8, at 50.

34. FRANCISCO SUAREZ, DE TRIPLICI VIRTUTE THEOLOGICA disp. XVII, § II (1621); SELECTIONS FROM THREE WORKS 746-49 (G.L. Williams trans., 1944), cited in GREEN & DICKASON, *supra* note 8, at 50.

35. *Id.* at 756, cited in GREEN & DICKASON, *supra* note 8, at 51.

It is clear, therefore, that Suarez maintained the right of the Church to seek the aid of the temporal power whenever it considered it necessary, and provided the basis for that temporal power to wage a just war, the net result of which was the acquisition of the pagan state's territory. The right of war was therefore available in defense of the innocents and to enable potential believers to hear and accept the Gospel.<sup>36</sup>

In addition, once a war has taken place, the victor is entitled to take all the movable and immovable property of his enemy. Such that with the success of the Christian arms the territory of the unbelieving enemy became part of the dominion of the Christian prince involved.<sup>37</sup>

### iv. Grotius

In his *De Jure Belli ac Pacis*,<sup>38</sup> Grotius does not justify seizures of new lands on the basis of spreading the Gospel, as his predecessors did. Notwithstanding this, he upholds the right to acquisition of title to territory via prescription. Grotius points out that should a man knowingly suffer another to enjoy his property for a considerable time without demanding it, it might be concluded that he designed to part with it altogether and looked upon it no longer as his property.<sup>39</sup> However, two things were required before one can reasonably presume from a man's silence that he has relinquished his right: (a) he should know that another possesses what belongs to him; and (b) he should be voluntarily silent, though he has full liberty to speak.

Therefore, the long exercise of sovereignty, with all the concomitant incidents of jurisdiction that go therewith, constitutes the necessary *novus actus interveniens*.

Grotius recognized the right of a monarch to wage war against those who have broken the law of nature, even though no wrong was caused to himself or his subjects.<sup>40</sup> One cause of this was the consumption of human flesh, of which he wrote that "the justest war is that which is undertaken against wild rapacious beasts, and next to it is that against men who are like beasts."<sup>41</sup> And like Suarez, Grotius rejects the argument that it is just to wage war against

36. *Id.* § V, at 826-27, cited in GREEN & DICKASON, *supra* note 8, at 54.

37. *Id.* § VII, at 841, 850, cited in GREEN & DICKASON, *supra* note 8, at 54.

38. HUGO GROTIUS, DE JURE BELLI AC PACIS, Bk. I, Ch. I, § II (F.W. Kelsey trans., 1925) (1625), cited in GREEN & DICKASON, *supra* note 8, at 54.

39. *Id.* Bk. II, Ch. IV, §§ V-VII, at 176-77, 222-24, cited in GREEN & DICKASON, *supra* note 8, at 54-55.

40. *Id.* Ch. XX, § XL, at 437, 505, cited in GREEN & DICKASON, *supra* note 8, at 55.

41. *Id.* Bk. II, Ch. XX, § XL at 438, 506, cited in GREEN & DICKASON, *supra* note 8, at 55.



those unwilling to accept Christianity.<sup>42</sup> As a result of such wars, it is not merely the territory, but also civil authority and sovereignty which accrue to the victor.<sup>43</sup>

#### v. Pufendorf

He was a naturalist who sought to derive a law of nations from the precepts of natural law. He expressly controverted Vitoria's bases for the Spanish acquisition of Indian territories,<sup>44</sup> but still recognized that the acquisition of the lands of native inhabitants in areas previously unknown to and unoccupied by Christian princes was a recognized means of securing title. It is clear, therefore, that those who so acquired title did so in good faith and justly.<sup>45</sup> He likewise affirmed that title, by usurpation, is an adjunct to some other ground, frequently one deriving from victory in a just war, in which case the victor is of course entitled to keep without contest what he has taken from his vanquished enemy.<sup>46</sup>

#### vi. Bynkershock<sup>47</sup>

He was a positivist, who wrote after the European states had established themselves on the North American continent, and whose views depend a great deal on what they conceived the law to be in the light of state practice, without the same need that the clerics felt in justifying the assertions of the Christian kings.

He was of the opinion that, from state practice, it is not necessary for a new sovereign, particularly one claiming title by war, to be in actual physical possession of all the territory he claims, for it is

clear that when a part has been occupied, the whole is occupied and possessed if such is the intention of the captor.... Possession extends over what is occupied, and by natural law, what is occupied is brought into our possession, but even that which has not been touched all round by our hands and feet is conceived of as occupied, if that

42. *Id.* Ch. XLVIII, XLIX, at 557, 558-59, 516-18; Ch. XXIII, § II, at 484, 558, cited in GREEN & DICKASON, *supra* note 8, at 56.

43. *Id.* Ch. VIII, §§ I, IV, at 608-11, 697, 699-700, cited in GREEN & DICKASON, *supra* note 8, at 58.

44. SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM* Ch II at 364-65 (Oldfather trans., 1934) (1688), cited in GREEN & DICKASON, *supra* note 8, at 62.

45. *Id.* Ch. XII, at 646, 651-52, 655-56; Bk. IV, Ch. VI, at 577, cited in GREEN & DICKASON, *supra* note 8, at 62.

46. *Id.* Bk. VIII, Ch. VI, at 1310, cited in GREEN & DICKASON, *supra* note 8, at 64.

47. CORNELIUS VAN BYNKERSHOEK, *QUAESTIONUM JURIS PUBLICI* Bk. I, Ch. II 25 (Tanney Frank trans., 1930) (1737), cited in GREEN & DICKASON, *supra* note 8, at 65.

be the intention of the occupant, and the nature of the object so requires, as is the case with lands.<sup>48</sup>

This position received judicial recognition from Judge Huber who served as arbitrator in the *Island of Las Palmas Case*<sup>49</sup> between the Netherlands and the United States:

Manifestations of territorial sovereignty assume... different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment and on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from... the high seas.

Vitoria, on the other hand, recognized the state/nation characteristics of the American Indians, since these peoples

[a]re not of unsound mind, but have, according to their kind, the use of reason. This is clear, because there is a certain method in their affairs, for they have polities which are orderly arranged and they have definite marriages and magistrates, overlords, laws and workshops, and a system of exchange, all of which call for the use of reason; they also have a kind of religion. Further, they make no error in matters which are self evident to others; this is witness to the use of their reason. . . . Also, it is through no fault of theirs that these aborigines have for many centuries been outside the pale of salvation, in that they have been born in sin and void of baptism and the use of reason whereby to seek out the things needful for salvation. Accordingly I for the most part attribute their seeming so unintelligent and stupid to a bad and barbarous upbringing....<sup>50</sup>

Most writers would not concede that these "barbarians" could constitute a state and exercise the competence of civil governance.

#### vii. Wolff

He stated that:<sup>51</sup>

[S]ince a nation ought to be cultured... it ought not to follow the leadership of its natural inclinations and aversions, but rather that of reason, the law of nature imposing as it were a rule of conduct and urging, too, proper conduct.... Since nations ought to be cultured and civilized and not barbarous, they ought to develop the mind by that training which destroys barbarism, and without which civilized custom cannot exist.

48. *Id.* Ch. VI, at 44-45, cited in GREEN & DICKASON, *supra* note 8, at 65.

49. *Island of Las Palmas*, *supra* note 1, at 831, 841.

50. F. DE VITORIA, *DE INDIS*, *supra* note 27, at § I, 23, 127-28, cited in GREEN & DICKASON, *supra* note 8, at 66.

51. CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICO* Ch. I, §§ 29, 35, 52-55 at 20-21, 24, 43-46 (Joseph H. Drake trans., 1934) (1764); § 166, at 88, cited in GREEN & DICKASON, *supra* note 8, at 66.

[W]henever one nation is able to contribute to the preservation and perfection of another nation in that in which the other is not self-sufficient, it is bound by nature to contribute that to the other. For every nation is bound to preserve and perfect itself and its form of government. Therefore, since every nation owes to every other nation that which it owes itself ... one nation is bound to contribute whatever it can to the preservation and perfection of another in that in which the other is not self-sufficient.

For this author, any state which claims that a barbarous nation lacks the wherewithal to become a more civilized and therefore more perfect government, denies the right of the more civilized state to bring culture and civilization to the barbarians. Refusal to accept the culture being offered the barbarous nation is in fact denies to the more civilized state, the right to perform its duties, and as a result, providing the latter with grounds to wage a just war.<sup>52</sup>

#### viii. Vattel

Vattel, who is often regarded as a disciple of Wolff, justifies the annexation of North America on the ground of occupation of unoccupied lands. He claims that, from the point of view of international law as it existed in the middle of the eighteenth century, the Indians of North America never inhabited any territory to an extent sufficient to preclude newcomers regarding their lands as occupied and not amenable to the acquisition of sovereignty.<sup>53</sup>

Impliedly, Vattel rejects the view that the Indian tribes constituted a settled nation, for he states:

Those peoples who... though dwelling in fertile countries, disdain the cultivation of the soil and prefer to live by plunder, fail in their duty to themselves, injure their neighbors, and deserve to be exterminated like wild beasts of prey.... Those who still pursue this idle mode of life occupy more land than they would have need of under a system of honest labor, and may not complain if other more industrious nations, too confined at home, should come and occupy part of their lands. Thus, while the conquest of the civilized Empires of Peru and Mexico was a notorious usurpation, the establishment of various colonies upon the continents of North America might, if done within just limits, have been entirely lawful. The peoples of those vast tracts of land rather roamed over them than inhabited them... All men have an equal right to things which have not yet come into the possession of anyone, and these things belong to the person who first takes possession. *When, therefore, a Nation finds a country uninhabited and without an owner, it may lawfully take possession of it, and after it has given sufficient signs of its intention in this respect, it may not be deprived of it by another nation....* The law of Nations will only recognize the ownership and sovereignty of Nation over unoccupied lands when the Nation is in actual occupation of them, when it forms a settlement upon them, or makes actual use of them.

There is another celebrated question which has arisen principally in connection with the discovery of the New World. It is asked whether the Nation may lawfully occupy

52. See *id.*, § 180, at 94, cited in GREEN & DICKASON, *supra* note 8, at 68.

53. VATTEL, *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE* Bk. II, Ch. I, § 7, at 115-16 (1758), cited in GREEN & DICKASON, *supra* note 8, at 75.

any part of a vast territory in which are to be found only wandering tribes whose small numbers cannot populate the whole country. We have already pointed out... that these tribes cannot take to themselves more land than they have need of or can inhabit and cultivate. Their uncertain occupancy of these vast regions cannot be held as a real and lawful taking of possession, and when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them.<sup>54</sup>

#### ix. Wheaton

Wheaton,<sup>55</sup> who wrote in the middle of the nineteenth century, took the view that the countries of Europe which opened up the New World were reasonably consistent in their practice and there is little doubt that they believed themselves to be acting in accordance with existing law, or perhaps more correctly, to be engaged in processes which were creative of law. Thus:

The title of almost all the nations of Europe ... to the possessions held by them in the New World... was originally derived from discovery, or conquest and colonization, and has since been confirmed in the same manner, by positive compact. Independently of these sources of title, the general consent of mankind has established the principle that, long and uninterrupted possession by one nation excludes the claim of every other....

The Spaniards and Portuguese took the lead among the nations of Europe ... during the fifteenth and sixteenth centuries. According to the European idea of that age, the heathen nations of the other quarters of the globe were the lawful spoil and prey of their civilized conquerors.... [T]he right of prior discovery was the foundation upon which the different European nations, by whom conquests and settlements were successively made on the American continent, rested their respective claims to appropriate its territory to the exclusive use of each nation.... [T]here was one thing in which they all agreed, that of almost entirely disregarding the right of the native inhabitants of these regions.... It thus became a mission of policy and of law, that the right of the native Indian was subordinate to that of the first Christian discoverer, whose paramount claim excluded that of every other civilized nation, and gradually extinguished that of the natives. In the various wars, treaties, and negotiations, to which the conflicting pretensions of the different states of Christendom to territory on the American continents have given rise, the primitive title of the Indians has been entirely overlooked, or left to be disposed of by the states within whose limits they happened to fall, by the stipulations of the treaties between the different European powers. Their title has been almost entirely extinguished by force of arms, or by voluntary compact, as the progress of civilization gradually compelled the savage tenant of the forest to yield to the superior power and skill of his civilized invader.<sup>56</sup>

54. *Id.* Bk. I, Ch. VIII, § 81; Ch. XVIII, §§ 207-10, at 37-38, 84-86, cited in GREEN & DICKASON, *supra* note 8, at 73.

55. HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* §§ 165-66 (R.H. Dana ed., 1866), cited in GREEN & DICKASON, *supra* note 8, at 79.

56. In discussing the status of Indians in the United States, Dana, as editor, adds this note:

It is important to note the underlying fact, that the title to all the lands occupied by the Indian tribes ... is in the United States. The republic acquired it by the treaties of peace with Great Britain, by cessions from France and Spain, and by relinquishments made by the several states. The Indian tribes have only a right of occupancy. Their possession was held to be of so nomadic and uncivilized a character as to amount to



### C. Early Judicial Attitude: The United States Supreme Court

One leading judicial decision of the Supreme Court of the United States enunciating a legal position on the treatment of indigenous people is that of Chief Justice Marshall in *Johnson v. MacIntosh*, wherein he stated:

On the discovery of this immense continent the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire.... But, as they were all in pursuit of nearly the same object, it was necessary... to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. The principle was, that discovery gave title to the Government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no European could interfere. It was a right which all asserted for themselves, and to the assertion of which by others all assented.... While the different nations of Europe respected the rights of natives as occupants, they asserted the ultimate dominion to be in themselves, and claimed and exercised as a consequence of this ultimate dominion a power to grant the soil while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.<sup>57</sup>

Chief Justice Marshall was using the term "occupancy" as synonymous with "physical presence," not in the sense of "acquisition of title."

It was the position of the Court that discovery gave an exclusive right to extinguish the Indian title to occupancy, either by purchase or by conquest. It gave also a right to such degree of sovereignty as the circumstances of the people would allow themselves to exercise. Consequently, a conveyance of title derived solely from an Indian tribe to private persons conveyed no title.

### D. Decisions of International Tribunals

In the *Cayuga Indians Claim*, the Anglo-United States Arbitral Tribunal was concerned with the nature of a treaty between the *Cayugas* and the State of New York, and in the course of its opinion, dealt with the problem of the status of the Indian "nation":

The obligee was the Cayuga Nation, an Indian Tribe. Such a tribe is not a legal unit of international law. The American Indians have never been so regarded. From the time of the discovery of America the Indian tribes have been treated as under the exclusive protection of the power which by discovery or conquest or cession held the land which they occupied.... They have been said to be "domestic dependent nations" or states in a certain domestic sense and for certain municipal purposes. The power which had sovereignty over the land has always been held the sole judge of its relations with the tribes within its domain. The rights in this respect acquired by discovery have been held exclusive. No other power could interpose between them. So far as the

no more than a kind of servitude or lien upon the land, chiefly for fishing, and hunting; the absolute title being in the republic.

57. 21 U.S. (8 Wheat.) 543, 572-73, 579, 587 (1828).

*Indian tribe exists as a legal unit, it is by virtue of the domestic law of the sovereign nation within whose territory the tribe occupies the land, and so far only as that law recognizes it.*<sup>58</sup>

In 1933, the Permanent Court of International Justice was called to decide upon the sovereignty of Eastern Greenland as between Denmark and Norway, and in so doing, had occasion to examine the status of resident Eskimos in Greenland and the extent to which they might be able to extinguish a title established by a European power. After discussing the events surrounding the history of Greenland, the Court stated:

The Danish claim is not founded upon any particular act of occupation but alleges ... a title founded on the peaceful and continuous display of State authority over the island. It must be borne in mind, however, that ... it is not necessary that sovereignty over Greenland should have existed throughout the period during which the Danish Government maintains that it was in being ... [A] claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority ... It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.

In the period when the early Nordic colonies founded... in the 10th century in Greenland were in existence, the modern notions as to territorial sovereignty had not come into being. It is unlikely that the chiefs or the settlers in these colonies drew any sharp distinction between territory which was and territory which was not subject to them. On the other hand, the undertaking... that fines should be paid to the King of Norway by the men in Greenland in respect of murders whether the dead man was a Norwegian or a Greenlander and whether killed in the settlement or as far to the North as the Pole Star, shows that the King of Norway's jurisdiction was not restricted to the confines of the two settlements.... So far as it was possible to apply the modern terminology to the rights and pretensions of the kings of Norway in Greenland in the 13th and 14th centuries, the Court holds that at that date these rights amounted to sovereignty and that they were not limited to the two settlements.

It has been argued on behalf of Norway that after the disappearance of the two Nordic settlements, Norwegian sovereignty was lost and Greenland became a *terra nullius*. Conquest and voluntary abandonment are the grounds on which this view is put forward.

The word "conquest" is not an appropriate phrase, even if it is assumed that it was fighting with the Eskimos which led to the downfall of the settlements. *Conquest only operates as a cause of loss of sovereignty when there is war between two states and by reason of the defeat of one of them sovereignty over territory passes from the loser to the victorious state. The principle does not apply in a case where a settlement has been established in a distant country and its inhabitants are massacred by the aboriginal population....*<sup>59</sup>

58. R.I.A.A. 173, 176-77, 179 (1926) [emphasis supplied].

59. Legal Status of Eastern Greenland (Den. V. Nor.), 1933 P.C.I.J. 151, 154-59, 161, 164-66, 170-72.

It was not until 1975 in the *Western Sahara Case*,<sup>60</sup> that an international tribunal raised doubts about the question whether land occupied by indigenous people could be consigned *terra nullius*. In his Separate Opinion, Vice-President Ammoun considered that the concept of *terra nullius* had been employed at all periods to justify conquest and colonization and as such stood condemned.<sup>61</sup> The majority held, however, that territory was not *terra nullius* if it were occupied by peoples having "social and political organization."<sup>62</sup>

## II. STRUGGLE FOR RECOGNITION

### A. Development of International Instruments

Historically, indigenous people have struggled to make their concerns heard by governments, the United Nations, and other intergovernmental bodies. Indigenous peoples have been seeking representation on the international level since they first approached the League of Nations early in the twentieth century. During that time, the problem of indigenous communities was largely a matter of domestic concern. Neither were minority rights provisions mentioned in either the United Nations Charter or the Universal Declaration of Human Rights.

As early as 1921 the International Labor Organization (ILO) began to undertake studies on the conditions of indigenous workers. The ILO Conventions have sought to become international legal instruments, addressing the living and working conditions of indigenous and tribal peoples. The first of these instruments, the Indigenous and Tribal Populations Convention (No. 107),<sup>63</sup> adopted in 1957, was the first attempt to codify their rights in international law. Convention 107 entered into force in June 1959. It is structured as follows: the Preamble is followed by Part I which describes its general policy; Part II deals with various rights relating to land; Part III with "Recruitment and Conditions of Employment;" Part IV with "Vocational Training, Handicrafts and Rural Industries;" Part V with "Social Security and Health;" Part VI with "Education and Means of Communication;" Part VII with "Administration;" and Part VIII with residual General Provisions.

As enunciated in the Preamble, the major themes of the Convention are the protection of the populations concerned, their progressive integration into their respective national communities, and the improvement of their living and working conditions. Thornberry argues, however, that the ILO and its

60. *Island of Las Palmas*, 2 R.I.A.A. 831 (1928).

61. *Id.* at 86.

62. *Id.* at 39.

63. See PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 334-68 (1994), for a critique of this instrument.

instruments are very labor-oriented and that Convention 107 focuses on the social and economic issues affecting indigenous peoples but does not deal adequately with the cultural question. There is also a general perception that Convention 107 needs to be updated particularly in light of the development in the field of human rights.<sup>64</sup>

The ILO's subsequent international legal instrument, Convention No. 169, takes the approach of respect for the cultures, ways of life, traditions and customary laws of the indigenous and tribal peoples who are covered by it. It presumes that they will continue to exist as parts of their national societies with their own identity, their own structures and their own traditions. The Convention stresses that these structures and ways of life have a value that needs to be protected. It also points out that these peoples are, in most cases, able to speak for themselves and to take part in the decision-making process as it affects them. The Convention recognizes that the participation of the indigenous peoples in the decision-making process will be a valuable one in the country in which they live.

Aside from general human rights applicable to all citizens, the Convention grants to indigenous and tribal peoples, rights applicable only to those peoples. These rights, among others, include: collective ownership and possession rights of their lands, the right to retain their language and institutions, and under given circumstances, the right to solve internal disputes according to customary law.

Subsequently, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination<sup>65</sup> was adopted, affirming the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person. This was followed by the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>66</sup> This Convention affirms that the United Nations has condemned colonialism and all policies of discrimination associated therewith, in whatever form and wherever they exist. It calls for the prevention and outlawing of all forms of distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

It likewise affirms that special measures should be taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or

64. *Id.* at 369-82.

65. G.A. Res. 1904, (XVIII) (Nov. 20, 1963).

66. Jan. 4, 1969, 660 U.N.T.S. 195.

individuals requiring such protection, as may be necessary, in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms are not deemed as discrimination.

Notwithstanding this, the circumstances of indigenous peoples still remained largely unnoticed by the international community until a landmark study was undertaken by the United Nations Sub-Commission on the Protection of Minorities and Prevention of Discrimination in the 1970s. The Sub-Commission appointed Special Rapporteur José Martínez Cobo of Ecuador to investigate the problem of discrimination against the world's various indigenous populations. His monumental work proved to be a watershed, and led directly to the establishment of the United Nations Working Group on Indigenous Populations, which met for the first time on August 9, 1982.

Over its 18 years of existence, the Working Group has completed several studies on the relationship of indigenous peoples to land, on treaties and agreements, and on the protection of the cultural heritage of indigenous peoples, among others. Throughout all its work, the Working Group has consistently reported that indigenous peoples around the world continue to be among the most marginalized and impoverished, and that their ways of life, cultural heritage and languages continue to be threatened. At the same time, the various world conferences of recent years have repeatedly validated the contribution of indigenous societies, particularly regarding sustainable development and the protection of the planet's biodiversity.

Recent developments have been the adoption of the UNGA Resolution and Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,<sup>67</sup> the draft UN Declaration on the Rights of Indigenous Peoples adopted by the UN Commission on Human Rights on August 26, 1994,<sup>68</sup> and the establishment of a Working Group on the Draft Declaration by the Commission on March 3, 1995.<sup>69</sup> The United Nations General Assembly adopted the program of activities for the International Decade of the World's Indigenous Peoples (1995-2004), and the General Assembly also called for the International Day of the World's Indigenous Peoples to be observed annually on August 9 as part of the Decade. The United Nations Economic and Social Council has also adopted by consensus on July 31, 2000, a resolution to establish a Permanent Forum for Indigenous

67. 32 I.L.M. 911 (1993). This resolution affirms that states must protect the existence and the national, ethnic cultural religious identity of minorities within their respective territories, and shall encourage conditions for the promotion of that identity, including the adoption of appropriate legislative measures to achieve those ends.

68. Sub-Commission on Prevention of Discrimination and Protection of Minorities, 34 I.L.M. 541 (1995).

69. *Id.* at 535.

Issues. Thus, indigenous representatives, not only representatives of Member States will, for the first time, participate in a high-level forum in the United Nations system.

#### B. *UN Draft Declaration on the Rights of Indigenous Peoples*<sup>70</sup>

Professor Dr. Erica-Irene A. Daes explains that the Draft Declaration, as a whole, does not lay down make a new law, but removes a very old discriminating application of the law of United Nations Charter.<sup>71</sup> She identified as the main elements of the Draft Declaration the following: (a) legal personality; (b) territorial security; and (c) international responsibility.<sup>72</sup>

On the first element, Daes maintains that the Declaration recognizes that indigenous peoples continue to possess a distinct collective legal character and standing even in cases when they have agreed to be incorporated into existing States.<sup>73</sup>

On the second element, indigenous peoples have defined historical territories and the right to keep these territories physically intact, environmentally sound and economically sustainable in their own ways.<sup>74</sup>

On the third element, as a corollary of indigenous peoples' legal personality, defending the rights of indigenous peoples continues to be a matter of international concern.<sup>75</sup>

Part I of the Draft Declaration is a statement of the fundamental principles of equality and non-discrimination, with regard to indigenous peoples collectively as peoples, and individually as human persons.

Part II broadly recognizes the right of indigenous peoples to their physical existence and cultural identity. It rejects the four principal threats to indigenous peoples' survival today: forced relocation, forced assimilation, militarization of their territories, and official denial of their indigenous identity.

Part III, IV, and V focus on issues of special concern to indigenous peoples in the exercise of their rights of equality, self-determination and collective identity. These issues include religious, spiritual, cultural and linguistic freedom, and the renewal of indigenous institutions in the fields of education, health, economy and communications.

70. U.N. Doc. E/CN.4/Sub.2/1994/Add. 1 (1994).

71. Daes, *Dilemmas Posed by the UN Draft Declaration on the Rights of Indigenous Peoples*, 63 NORDIC J. INT'L L. 208 (1994).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

Part VI deals with land, natural resources, cultural and intellectual property and other economic rights, as well as the right to the protection of environment and ecological security

Part VII provides some general guidelines for those situations in which indigenous peoples exercise their political rights through forms of autonomy or internal self-government within existing states.

Finally, Part VIII addresses the specific responsibilities of states and the future role of the indigenous community in ensuring recognition and respect for the rights of indigenous peoples and the implementation of the provisions of the draft declaration.

### C. *Aboriginal Title and State Practice Through Municipal Courts*

#### 1. The *Mabo* Decision (Australia)<sup>76</sup>

Prior to the ruling in *Mabo*, the legal perception was that Australia had been, before 1788, a legal desert. The Crown, therefore, became the first proprietor and possessor of the land as well as the first sovereign. The title to Australia was, consequentially, an original title rather than a derivative one. Annexation was effected by occupation rather than by conquest or cession.

In June of 1992, the Australian High Court in *Mabo v. Queensland* reversed prior authority, and held that Australia was not *terra nullius* when occupied and that significant pre-settlement indigenous land rights continue to exist under the common law of Australia. The Court decided that when Britain claimed Australia, the Crown gained what is known as the radical title over the territory but did not become the beneficial owner of the land. It remained in the possession of the indigenous peoples and, in theory at least, their title was protected by the common law. The Court held that the Crown extinguished native title in a piecemeal fashion over many years as the wave of settlement washed over the continent. But native title had survived on the Murray Islands because the Queensland government had done nothing between 1879 and 1992, to extinguish it. The Court applied the principles in question to Australia as a whole, with the clear implication that native title may have survived in other parts of the country. Therefore, *terra nullius* was rejected in relation to property.

The issue in the case was whether, as had always been assumed, the Crown had also acquired beneficial ownership over all lands, thereby extinguishing any pre-existing indigenous rights.

76. See Gerald P. McGinley, *Indigenous Peoples Rights: Mabo and Others vs. State of Queensland - The Australian High Court Addresses the 200 Years of Oppression*, DENV. J. INT'L L. & POL'Y (1992); *Mabo v. Queensland*, 107 A.L.R. (1992); 175 CLR 1.

Justice Brennan held it to be an untenable position that Australia was occupied as uninhabited territory because its indigenous peoples were few in number and of such low social order that it would be idle to impute to them legal rights. The view that Australia was *terra nullius* was based on misinformation, was racially discriminatory and as such, was not in keeping with contemporary international law or current Australian community values. For, if the Crown did have exclusive ownership of all the land in Australia, it would mean that the common law extinguished the land rights of the indigenous people on the first settlement thereby exposing them to:

Deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live. Judged by a civilized standard, such law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned.<sup>77</sup>

His Honor considered acquisition of territory by way of the enlarged doctrine of *terra nullius*, namely, that states could acquire territory by discovery and occupation, although the territory had an indigenous population provided that the Aboriginal inhabitants were not organized in a society that was united for political action. His Honor then considered the status of the enlarged theory of *terra nullius* in international law. Referring to the *Western Sahara* opinion, he concluded that the enlarged notion of *terra nullius* no longer commanded general acceptance. It followed from this that:

[i]f the international law notion that inhabited land may be classified as *terra nullius* no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be "so low in the scale of social organization" that it is "idle to impute to such people some shadow of the rights known to our law" can hardly be retained. If it were permissible in the past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.... The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.<sup>78</sup>

Thus, Justice Brennan reasons that first, a law based on mistaken facts should have no application if it leads to racial discrimination and, second, that as international law no longer accepts the enlarged doctrine of *terra nullius*, the current doctrine should be applied in order to protect indigenous human rights.

Therefore, no territory inhabited by human beings could be thought to be *terra nullius* under the common law of Australia. It follows from this that certain pre-settlement Aboriginal rights continue to exist under Australian law.

77. *Id.* [emphasis supplied].

78. *Id.*

It should be pointed out, however, that the doctrine of *terra nullius* was retained when it came to the question of sovereignty. In fact, the Court confirmed the doctrine on sovereignty, putting the matter beyond the reach of review in domestic Australian courts.

There appears to have been a number of reasons and a mixture of legal and political considerations. At the forefront was "the act of state doctrine" which upholds the proposition that questions relating to the extension of sovereignty touching on the prerogative powers of the Crown cannot be questioned in the courts. By this doctrine the annexation of the Murray Island group to Queensland was "an act of State by which the Crown in right of the Colony of Queensland exerted sovereignty over the islands." In his judgment, Justice Brennan explained that the law was such that it precluded any contest between the Executive and Judicial branches of government as to whether a territory was within the domain of the Crown. Such issues, he observed, were not justiciable in the municipal courts.

Brennan's interpretation was in accord with established legal doctrine. But there was more to the question than just that. A second reason for the Court's interpretation appears to be the view that any questioning of the settled colony doctrine would seriously fracture the core principle of its legal system.<sup>79</sup>

In *Mabo v. Queensland*, the Court determined that the law in relation to Aboriginal land rights must be brought in line with contemporary standards of justice and that it was possible to do so without undermining the legal system. If the two objectives had been incompatible, then justice would have given way to stability. Justice Brennan further argued that "the court could adopt contemporary notions of justice and human rights if in so doing it did not fracture the skeleton principles which gave the common law its shape and consistency."<sup>80</sup>

## 2. The Delgamuukw Decision (Canada)<sup>81</sup>

In *Delgamuukw*, the Supreme Court of Canada decided, for the first time, what Aboriginal title means, how it can be proved and how Section 35 of the Constitution Act of 1982 protects that title. The case was begun in the early 80s by the Gitksan and Wet'suwet'en peoples, in order to force the British Columbia government to acknowledge Aboriginal title and enter into land claims negotiations.

The entire claim was dismissed by Trial Judge McEachern, who opined that all Aboriginal title and rights were extinguished by laws enacted by the

79. *Id.* at 29.

80. *Id.*

81. Available at <<http://cstc.bc.ca/treaty/delgmkwsmky.html>> (Aug. 30, 2000).

Colonial Legislature of British Columbia before 1871. He also decided that if all Aboriginal rights had not been extinguished, the Chiefs would only have Aboriginal rights to use a portion of their claimed territories for villages or traditional harvesting activities. He ruled that the Chiefs could not have jurisdiction over their lands, because Canada's Constitution Act of 1867 assigned all legislative jurisdiction to the federal or provincial governments.

The case was appealed to the B.C. Court of Appeal, and then to the Supreme Court of Canada. On December 11, 1997, the Supreme Court unanimously decided that due to the divergence between the claim made by the Appellants at trial (the claim was to "ownership and jurisdiction by the individual hereditary chiefs") and the relief sought on appeal to the Supreme Court of Canada (Declaration of Communal Aboriginal Title), and the errors of the Trial Judge in his treatment of the evidence, a new trial was necessary. However, the Court did decide a large number of important issues of general law, regarding the nature and effect of Aboriginal title, the manner in which it may be proven, whether provincial laws can extinguish Aboriginal title or rights, and the Crown's authority and related fiduciary duties regarding Aboriginal title which is recognized and affirmed by Section 35 of the 1982 Constitution Act.

### i. Proof of Aboriginal Title

The test for proof is met by the Aboriginal group establishing that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the Aboriginal title. For the purposes of the case on appeal, this was found to be the date of the Oregon Boundary Treaty of 1846. It was held that occupation must be exclusive. However, it is recognized that there may be a shared exclusivity, where two or more Aboriginal groups shared the land to the exclusion of others.

It appears that the test for proof of Aboriginal title today also requires that the Aboriginal group has maintained a "substantial connection" with the land since the assertion of Canadian sovereignty. However, it stated that "the fact that the nature of occupation has changed would not ordinarily preclude a claim for Aboriginal title, as long as a substantial connection between the people and the land is maintained."<sup>82</sup>

The Court applied the principle of reconciliation to the evidence that may be introduced to prove Aboriginal title. It is stated that Aboriginal rights demand a unique approach to the treatment of evidence which accords due weight to the perspective of Aboriginal peoples. Specifically, it is held that oral history is to be placed on equal footing with the types of historical evidence that courts are familiar with. The Chief Justice ruled admissible the formal oral

82. *Id.*

history of the Appellants, as this were found to be of integral importance to their distinctive cultures.

## ii. Content of Aboriginal Title

This first general proposition was stated:

Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves Aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of Aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. However, the range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's Aboriginal title. This inherent limit, to be explained more fully below, flows from the definition of Aboriginal title as a *sui generis* interest in land, and is one way in which Aboriginal title is distinct from a *fee simple*.<sup>83</sup>

It is stated that Aboriginal title is held, not individually, by Aboriginal persons, but communally. It is a collective right to land held by all members of an Aboriginal nation.

Two clear propositions are stated:

first, that Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those Aboriginal practices, customs and traditions which are integral to distinctive Aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.<sup>84</sup>

In a discussion of these propositions, it was made clear that Aboriginal title includes the right to surface and subsurface resources, and that these resources may be put to economic use in today's commercial context, subject only to such uses not preventing the future use of land for more traditional activities. However, if the land is surrendered to the Crown for the benefit of the Aboriginal group, it may be put to uses that are inconsistent with continued traditional uses.

It is held that Aboriginal title at common law is protected in its full form by section 35(1) of the 1982 Constitution Act. However, this protection does not depend upon proof of existence of a particular Aboriginal right at common law. Aboriginal title confers the right to the land itself, and that may constitute an exclusive right today. If title cannot be proven, specific rights can still be made out, based on evidence that a particular activity was integral to the distinctive culture of the Aboriginal group at the time of contact.

83. *Id.*

84. *Id.*

## iii. Extinguishment

It is held that provincial laws cannot, of their own constitutional force, have the effect of extinguishing Aboriginal rights. Further, provincial laws that are made applicable to Indians by Section 88 of the Indian Act does not extinguish Aboriginal rights as Section 88 does not manifest a clear and plain intention to provide for extinguishment.

The decision does not deal specifically with federal power to extinguish Aboriginal rights, including title. It is plain, however, that this power existed, at least prior to 1982, but that the exercise of a federal power must reveal a clear and plain intention to extinguish, if that is to be the result. This question is academic in British Columbia, as there has been no exercise of a federal power that could be contended to have the clear and plain intent to extinguish Aboriginal title.

## iv. Infringement of Aboriginal Title

Aboriginal rights may be infringed by both the federal and provincial governments. However, Section 35(1) of the Constitution Act, 1982 requires that infringements satisfy the test of justification. The test of justification has two parts: (1) the infringement must be in furtherance of a legislative objective that is compelling and substantial; and (2) the infringement must be consistent with the special fiduciary relationship between the Crown and Aboriginal peoples.

With respect to the first part of the test for justification, the decision states that the principles of reconciliation entails the recognition that distinctive Aboriginal societies exist within, and are a part of, a broader social, political and economic community. Hence, the following are considered to be valid legislative objectives: "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims...."<sup>85</sup>

Whether a government act can be justified by reference to one of those objectives must be determined on a case-to-case basis.

On the application of the second part of the test of justification, the fiduciary duty of the Crown requires that the following be taken into account: (1) Aboriginal title encompasses the right to exclusive use and occupation of land; (2) Aboriginal title encompasses the right to choose to what uses lands can be put; and (3) the lands held pursuant to Aboriginal title have an inescapable economic component. These must be taken into account in the

85. *Id.*



allocation of resources by government. Both the process that the government follows, and the actual allocation of resources, must reflect the prior interest of the holders of Aboriginal title. With respect to the actual allocation of resources, the Court suggests the following example:

That governments accommodate the participation of Aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licenses for forestry and mining reflect the prior occupation of Aboriginal title lands, that economic barriers to Aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced. This list is illustrative and not exhaustive.<sup>86</sup>

With respect to the process by which resources are allocated, the decision reiterates the duty to consult. The nature and scope of the duty of consultation will vary with the circumstances. The following passage is illustrative:

Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.<sup>87</sup>

Finally, it is held that because Aboriginal title has an economic aspect, compensation is relevant to the question of justification.

### III. INDIGENOUS COMMUNITIES AND PHILIPPINE MUNICIPAL LAW

#### A. Historical Perspective on Indigenous Communities: *Reduccion*

At the time of Spanish arrival on the islands of the Philippines, historians identified three distinct groups inhabiting specific areas of the archipelago. The inhabitants of the lowlands of Luzon and Visayas were the first to be pacified by Spanish conquistadors in the 16th century. The population of the lowlanders would have to come to about 667,612 based on the figure recorded in the *Relacion de las Encomiendas* of 1591.

The Spaniards called this indigenous lowland population *indios*, a term also used to describe the inhabitants of their colonies in the Americas. As William H. Scott wrote, "the Spaniards quickly formed their own image of the *indio* – a dark-skinned person wearing pants who attended mass, paid taxes, obeyed Spanish laws, and went to war when the government told him to do so."<sup>88</sup>

On the other hand, Scott distinguished the peoples inhabiting the mountains of the northern Luzon which the colonizers referred to collectively

86. *Id.*

87. *Id.*

88. WILLIAM HENRY SCOTT, *THE DISCOVERY OF IGOROTS* 3 (1977).

as the *tribus independentes* who "obviously did not conform to the pattern of the *indio*."<sup>89</sup> Finally, in the southern part of the archipelago were the *Moro* sultanates of Maguindanao which had the most developed social organization. The last two groups of people mentioned belong to the Malay race, while the lowland inhabitants were identified to be comparable with today's *Negritos* who form a distinct race.

Pre-Hispanic settlement in the lowlands and northern Luzon were organized into small villages. In the case of the lowlanders, the basic social unit was called the *barangay*, derived from the Malay term *balangay*, meaning boat. The northern people of the Grand Cordillera Central according to Scott "were independent people, not that they were organized into independent provinces. They had no tribal governments or tribal boundaries, did not fight tribal wars or claim descent from common tribal ancestors.... Rather, they were villages of more or less related persons like a prehistoric *barangay*."<sup>90</sup>

In contrast, the Southern region already had three Muslim principalities called *sultanates* – Sulu, Maguindanao, and Buayan. These principalities were political entities that had developed far beyond the simple structure of the *barangay*. This cohesion is attributed to Islamic political and social institutions introduced to the native population as early as the end of the thirteenth century or the beginning of the 14th century. The principalities in fact covered extensive lands in other islands and maintained diplomatic and commercial ties with the sultanates of the Malay islands.

#### 1. Expeditions to the Cordilleras and Moroland

The early subjugation of the predominant lowland Filipinos gave the Spaniards the much needed time and people to pursue the ultimate objective of *reduccion* or the process to convert pagan people to a civilized way of life exemplified by the life of the Hapsburg Empire aimed this time at the northern inhabitants and the sultanates in the south. Scott explained the use of the term to clarify the prevailing Spanish policy at that time:

the verb *reducir* must sometimes be translated 'convert' but other times 'subjugate' or 'civilized.' Similarly, the term *pacification* meant not merely the termination of armed resistance but the establishment of civil administration. The Spaniards were themselves sensitive to the implications of the term, and the Law of the Indies specifically proscribed the use of the words *conquista* in everything having been undertaken in total peace and charity. Such a reduction naturally required the relocating of scattered tribes and semisedentary agriculturalists into settled communities where they could not be reached by clergy, tribute-collectors, and road foremen, but where effective police power could prevent family feuding, alliances

89. *Id.*

90. *Id.*

with non-Spanish forces, and pressure or outright attack from independent neighbors.<sup>91</sup>

How did the highlanders and the Moro respond to the Spaniards? Scott argued, with regard to the *Ygolot* or *Igorots* of the Cordilleras, that their response was more immediately obvious than the Spanish aims, as evidenced by missionary accounts of Spanish expeditions in Igorot lands.<sup>92</sup>

Historical accounts of early Spanish contacts with the Igorots showed that the conquistadors were lured by the gold-rich territory of the highlanders. It was only during the 18th century that the *reduccion* was attempted on the east side of the Cordilleras and later from the west side. The establishment of the so-called *commandancias politico-militares* or zones of military occupation around the newly created provinces located near the Cordilleras and some of its parts was not without legal significance from the point of view of Spain. Scott observed that in terms of colonial jurisprudence, these garrisons were both the legal and logical extension of earlier punitives sent out in just retribution for such breaches of natural or international law as entering Spanish territory to attack Spanish subjects, or to sell them contraband goods like tobacco.

Scott referred to those short-lived garrisons temporarily established by commanding officers during various expeditions into Cordillera. Again he cited historical accounts evidencing that Spanish authorities were aware of the legal personality of the Igorots under international law. In one of the expeditions resulting in the founding of a garrison, authorities in the lowlands made a decision that a just war could be waged against the Igorots for their offenses to loyal vassals of the Crown, and that the discovery and exploitation of their gold mines would benefit everybody concerned. In another document dated 1619, it was similarly invoked in response to a complaint that the Igorots were denying free passage to the *Ilokanos* and *Cagayanes* who were inhabitants of the Christian region flanking the Cordilleras.

Punitive expeditions became more frequent from 1750 until the military occupation of a fraction of the mountain communities in the early 19th century. The *commandancias politico-militares*, unlike the garrisons, constituted actual political divisions of the colony. These were established by the middle of the 19th century. Initially, the military governors pursued a policy of attraction as expressed by Governor General Narciso Claveria who established the first of the *commandancias* in the early 1870's. This policy was to shift upon the arrival of a new Governor General in the person of Don Fernando Primo de Rivera in 1880 who introduced another method of accomplishing the reduction defined in a decree of January 14, 1881 as follows: "All the Filipino inhabitants of the island of Luzon shall fall under one common legislation from this date,

91. *Id.* at 75.

92. *Id.* at 75-137.

saving only such exceptions as are established in this decree based on the differences of education, customs, needs of the different pagan races who occupy part of its territory."<sup>93</sup>

The decree required the registration of these inhabitants as subjects and pursuant to a policy of attraction the unsubjected races of the *Aetas* or mountain Igorots were offered certain advantages in exchange for their voluntary submission:

residence in towns, their families united together; the concession of good lands and the right to cultivate them in the method they desire or which is most productive for them; maintenance for one year and clothing upon their actual submission; respect for their customs and traditions insofar as they are not opposed to the natural law; to leave to their own will whether to become Christians or not... to be governed by the local authorities which they themselves elect, under the direct responsibility of the authority of the province or district.<sup>94</sup>

Paragraph 11 of the decree provided for the "persecution and the castigation of the Tribes which ignore the peace, protection, and advantages which they are being presented."<sup>95</sup>

The mailed-fist policy of Governor General Primo de Rivera was immediately suspended upon orders from Madrid of the same year on account of strong opposition from a faction of the Advisory Council of the Philippines, pointing out that "no nation in Europe maintained such a feudal practice as Philippine-style forced labor."<sup>96</sup> Madrid reminded the Governor General then that any further expeditions in line with such policy were discordant with the Laws of the Indies prohibiting "ill treatment of the Filipinos or their enforced submission to Spanish sovereignty."<sup>97</sup>

While there was evidence of increased vassalage among the inhabitants of the Cordilleras, Scott concludes that another response was less in keeping with the Spanish goal of *reduccion* because the Igorots began running away to the lowlands avoiding forced labor.

Before the Philippine revolution against Spain in 1896, there existed only four *commandancias politico-militares* in the pacified areas of Cordilleras. These were subsequently abolished with the ultimate defeat of Spain by the United States in 1898. Thus, about three centuries of Spanish attempts to carry out the *reduccion* achieved only a marginal level of political organization in the land of the *tribus independientes*.

93. *Id.* at 268, citing Sr. Gobernador General D. Fernando Primo de Rivera, *Documentos Referentes a la Reduccion de Infieles e Inmigracion en las Provincias de Cagayan y La Isabela dictados como primeras Disposiciones adoptadas por el Exmo 10-34 (1881)*.

94. *Id.*

95. *Id.* at 269.

96. *Id.* at 271.

97. *Id.* at 271-72.

The campaign against Moros took a more complicated route and was marked by intense military conflicts known as the "Moro Wars." It is also interesting to note at the outset that the more developed political and social systems of the Southern Communities, including previous foreign relations with other European powers, required Spain to enter into a series of "treaties" with the sultans which was remarkably absent in the case of Spanish expeditions to the Cordilleras.<sup>98</sup>

Spanish claims over the island of Mindanao were allegedly based upon the Treaty of Tordesillas entered into with Portugal. However, Great Britain did not respect these claims and instead, conducted negotiations with the Sulu sultanate, without Spain's participation.<sup>99</sup> In the same manner, the consul of Austria-Hungary had once acquired contract rights over North Borneo in an agreement forged with the same sultanate. It thus appears from these accounts that the existing sultanates already enjoyed a certain level of international personality and independence recognized by other nations, particularly the western imperial powers then in Asia.

Filipino historians are divided in their view of Spanish aims over the southern sultanates. One view suggests that the military expeditions were intended to end the Moro raids against the conquered islands of Visayas. Following this position, the acts committed by the Moros would be interpreted under international law as mere felonious attacks. The contrary view is that Spain had intended to crush Islam, consistent with the policy of *reduccion*. On this premise it has been concluded that the intention behind the piratical acts was to preserve independence from Spanish Imperialism.<sup>100</sup> Citing the instructions of an expedition in 1578, the same writer even suggested a subordination of the propagation of the Catholic faith to an economic end:

From this city and island of Borneo... you (Figueroa) shall go to the islands of Jolo, where you shall endeavor to reduce that chief and his people to the obedience of his Majesty. You shall bargain with them as to what tribute they shall pay, which shall be in pearls, as they are wont to give to the King of Borneo... you must order that... they shall obtain as many as possible, so that we, the Spaniards or Castellans may buy them; that they must trade with us from now on.<sup>101</sup>

The political organization of the sultanates was in the nature of a loose federation, but it never evolved into a single state. Local leaders called *datus* composed a *rumah bichara*, or state council, which assumed the function of adopting relevant measures, including the ratification of treaties entered into by the Sultan.

98. See NAJEEB M. SALEEBY, THE HISTORY OF SULU 87-94, 107-12, 124-31 (1908).

99. *Id.* at 222.

100. *Id.* at 64-66.

101. *Id.* at 49-50.

It is essential to point out at this stage that the pagan tribes which refused to adopt the new religion introduced by the Mohammedan Malays fled to the mountains while the others remained in nearby hills. Saleeby identified those who remained in the mountains ever since as the *Manobos* and those close to the Muslim settlements as *Tinuray*. Other known tribes were the *Bilans*, *Tagabilis*, and *Subanos*.

The 19th century saw more Spanish incursion into Moroland. More treaties of peace were signed with greater concessions to the conquering forces. In the treaty of 1837, for instance, Sultan Quadrat II, after submitting to Spanish sovereignty, carried the subordinate title of Feudatory King of Tamontaka. Spain had the power to appoint the sultan's successor and to regulate commerce within his jurisdiction. Again, in 1884, another sultanate under one Idris fell into Spanish hands and the sultan signed a treaty in which he unconditionally relinquished power over Talakuku.

It is evident from the Moro wars that the conquest of Mindanao was achieved only partially and at a very late stage of the Spanish colonial period, such that by the termination of Spain's control over the Philippines in 1894, the great majority of the inhabitants in the south had barely been integrated with the rest of the Philippine society, but only some of their *datus* had found a foothold in the colonial order.

The policy of attraction which Spain employed in its limited occupation of the Cordilleras was similarly applied in regard to the population outside the garrisons and other settlements in the southern region. In fact Spain allowed the people to practice their Muslim faith and even left the *datus* undisturbed in their authority over the members of their community.

## 2. The Short-Lived Philippine Republic and the Indigenous Peoples

Spain's military expeditions against the Cordillera people and the Muslim sultanates had constantly used the Christian natives in battle. Thus, in the nationalist revolution against Spain from 1896 to 1899, independence was an issue only for Christian Filipinos.<sup>102</sup> The settlements in the North and South clearly remained predominantly unoccupied by the Spaniards and unsympathetic to the cause of the nationalists on account of the prejudices or distrust which they had developed.

It is of interest to recall, however, the speech delivered by the head of the Filipino revolutionary government, General Emilio Aguinaldo, during the ratification by the First Philippine Congress of the "Act of the Declaration of Independence" in which he referred to the Cordillera people and the Muslims:

102. See CESAR ADIB MAJUL, THE POLITICAL AND CONSTITUTIONAL IDEAS OF THE PHILIPPINE REVOLUTION (1967).

a banner ... is being honored and respected throughout the Philippines. Behold this banner with three colors, three stars and a Sun, all of which have the following meaning... *Three stars with five points signify the islands of Luzon, the Visayas, and Mindanao...* And lastly, the eight rays of the rising sun signify the eight provinces of Manila, Bulakan, Pampanga, Nueva Ecija, Morong, Laguna, Batangas, and Cavite where Martial Law was declared. These are the provinces which gave light to the Archipelago and dissipated the shadows that wrapped her... *By the light of the sun the Aetas, the Igorots, the Mangyans, and the Moslems are now descending from the mountains, and all of them I recognize as my brothers.*<sup>103</sup>

It is evident from this speech and the provisions of the Malolos Constitution of 1899 that the new Filipino government intended to integrate the territory of Cordillerans and the Muslims into the republic. A constitutional guarantee of self-government was absent however. It appears that in terms of the protection of the rights of the Cordillerans and the Muslims, the Malolos Constitution made this a subject of the freedom of religion clause only.

#### B. Philippine Jurisprudence: Circa Early 1900s

##### 1. *Cariño v. Insular Government* (Native Title) and *Reavis v. Fianza* (Native Title and Natural Resources)

In the case of *Cariño v. Insular Government*,<sup>104</sup> an application for the registration of a parcel of land was filed by an Igorot from Benguet where the land was located. For more than 50 years before the Treaty of Paris, the applicant and his ancestors had held the land as owners in accordance with Igorot custom. No document of title had been issued from the Spanish Crown. The applicant claimed ownership of the land and sought registration under the Philippine Commission's Act No. 496 of 1902. The Insular Government maintained that Spain assumed title to all the land in the Philippines except so far as it saw fit to permit private titles to be acquired and that the failure of applicant to register his property pursuant to a decree of June 25, 1880 converted applicant's land to public land. Upon succession to the title of Spain by the United States, Insular authorities argued that the applicant no longer had any rights that the Philippine government was bound to respect. In finding for the applicant on appeal to the U.S. Supreme Court, Justice Oliver Wendell Holmes said:

It is true that Spain, in its earlier decrees, embodies the universal feudal theory that all lands were held from the Crown... (but) it does not follow that... applicant 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... for the want of

103. The speech delivered on the occasion of the Malolos Congress ratification of the Declaration of Independence on Sept. 29, 1898, available at <http://www.mindanao.com/kalinaw/people/people2.htm> [emphasis supplied].

104. 53 L. ed. 594 (1909).

ceremonies which the Spaniards would not have permitted and had not the power to enforce.<sup>105</sup>

The recognition of native custom in regard to property rights was made explicit by Justice Holmes when he stated that

it is hard to believe that the United States was ready to declare... that... it meant by property (referring to the due process clause of the Philippine Bill of 1902) only that which had become such by ceremonies of which presumably a large part of the inhabitants never had heard, and that it proposed to treat as public land what they, by native custom and by long association, - one of the profoundest factors in human thought, - regarded as their own.<sup>106</sup>

Justice Holmes went on to emphasize that in a situation like the present case:

Every presumption is and ought to be against the government... It might, perhaps, be proper and sufficient to say that when, as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership. It will be presumed to have been held in the same way from before the Spanish conquest, and never to have been public land.<sup>107</sup>

It appears further from the decision that the theory of *jura regalia* stood side by side with legal rules that recognized exceptions to *jura regalia*.

The *Cariño* doctrine was applied to claims of native inhabitants even to mineral lands in the subsequent case of *Reavis v. Fianza*.<sup>108</sup> In this case, appellees were Igorots who, for fifty years, and probably for many more, held possession of the mines in question through their ancestors. Fianza filed an action to claim title over these mining areas under the Philippine Act of July 1, 1902, Chapter 1369, Section 45. Reavis, an American, sought to set-up title to the same gold mines being claimed by Fianza. Finding for the appellees, Justice Holmes, reiterating the *Cariño* doctrine, explained:

[i]t sufficiently appears that the appellee's family had held the place in Igorot fashion, and to deny them possession in favor of Western intruders probably would be to say that the natives had no rights under the section that an American was bound to respect.

It is suggested that the possession of Fianza was not under a claim of title, since he could have no title under Spanish law. But whatever may be the construction of Rev. Stat. Section 2332, the corresponding Section 45 of the Philippine Act cannot be taken to adopt from the local law any other requirement as to the possession than the length of time for which it must be maintained. Otherwise, in view of the Spanish and American law before July 1, 1902, no rights could be acquired, and the section would be empty words; whereas, as we have said before, another section of the Act,

105. *Id.* at 596.

106. *Id.* at 597.

107. *Id.*

108. 215 U.S. 16 (1909).

Section 16, still further shows the intention of Congress to respect native occupation of public lands.<sup>109</sup>

From a comparative perspective, United States policy on the issue of the native Indians' right to minerals reveals a similar treatment. Cohen writes:

in 1924, when the later notorious Secretary of Interior Albert Fall sought to dispose of minerals in certain Indian lands without Indian consent, Attorney General Stone (now Chief Justice of the United States) issued an opinion holding that the Secretary of Interior had no right to dispose of such minerals in the manner proposed, for the reason that the minerals in question belonged to the Indians whose property rights were complete and exclusive.<sup>110</sup>

The *Cariño* ruling has been further reiterated in later rulings of this Court.<sup>111</sup>

## 2. Rubi v. Provincial Board of Mindoro (State of Pupilage)

The case of *Rubi, et al. v. The Provincial Board of Mindoro*<sup>112</sup> involved an application for privilege of the writ *habeas corpus* in favor of Rubi and other Manguianes of the Province of Mindoro. It was alleged that the *Manguianes* were illegally deprived of their liberty by the provincial officials of that province, for they were held on the reservation established at Tigbao, Mindoro against their will.

The justification for the provincial government's actions was based on Provincial Board Resolution No. 25, which provided as follows:

Whereas several attempts and schemes have been made for the advancement of the non-Christian people of Mindoro, which were all a failure,

Whereas it has been found out and proved that unless some other measure is taken for the Mangyan work of this province, no successful result will be obtained toward educating these people,

Whereas it is deemed necessary to oblige them to live in one place in order to make a permanent settlement,

Whereas the provincial governor of any province in which non-Christian inhabitants are found is authorized, when such a course is deemed necessary in the interest of law

109. *Id.* at 76-77.

110. Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L. J. 1, 9 (1942), citing Op. Atty. Gen. 18: (1924).

111. *Ankron v. Government of the Philippine Islands*, 40 Phil. 10 (1919); *Abaog v. Director of Lands*, 45 Phil. 518 (1923); *Susi v. Razon*, 48 Phil. 424 (1925); *Oh Cho v. Director of Lands*, 75 Phil. 890 (1946); *Manarpaac v. Cabanatan*, 21 SCRA 743 (1967); *Republic v. Gonong*, 118 SCRA 729 (1982); *Republic v. C.A. & Gosalan*, 208 SCRA 428 (1992); *Republic v. C.A.*, 182 SCRA 290 (1990); and *Director of Lands v. Buycó*, 216 SCRA 78 (1992).

112. 39 Phil. 660 (1919).

and order, to direct such inhabitants to take up their habitation on sites on unoccupied public lands to be selected by him and approved by the provincial board,

Whereas the provincial governor is of the opinion that the sitio of Tigbao on Lake Naujan is a place most convenient for the Mangyanes to live on,

Now, therefore be it resolved, that under Section 2077 of the Administrative Code, 800 hectares of public land in the sitio of Tigbao on Naujan Lake be selected as a site for the permanent settlement of Mangyanes in Mindoro subject to the approval of the Honorable Secretary of the Interior.<sup>113</sup>

Any Manguian who refused to comply with the order was imprisoned in accordance with section 2759 of the Revised Administrative Code. It was the opinion of the Provincial Government that the resolution was a necessary measure for the protection of the *Manguianes* of Mindoro as well as the protection of public forests in which they roam, and to introduce civilized customs among them.

Section 2145 of the Administrative Code of 1917 reads as follows:

SEC. 2145. *Establishment of non-Christians upon sites selected by provincial governor.* — With the prior approval of the Department Head, the provincial governor of any province in which non-Christian inhabitants are found is authorized, when such a course is deemed necessary in the interest of law and order, to direct such inhabitants to take up their habitation on sites on unoccupied public lands to be selected by him and approved by the provincial board.

In connection with the above-quoted provision, Section 2759 of the same Code should also be noted, which reads as follows:

SEC. 2759. *Refusal of a non-Christian to take up appointed habitation.* — Any non-Christian who shall refuse to comply with the directions lawfully given by a provincial governor, pursuant to section two thousand one hundred and forty-five of this Code, to take up habitation upon a site designated by said governor shall upon conviction be imprisoned for a period not exceeding sixty days.<sup>114</sup>

In order to understand the policy of the Philippine Government with reference to the uncivilized elements of the islands, Justice Malcolm traced the history of the attitude assumed by the authorities towards non-Christians, with particular regard to the legislation on the subject.<sup>115</sup>

Furthermore, Justice Malcolm explained that the meaning of the term "non-Christian" refers not to religious belief, but to geographical area, as well as the level of civilization of a people:

In one sense, the word can have a geographical signification. This is plainly to be seen by the provisions of many laws. Thus, according to the Philippine Bill, the authority

113. *Id.* at 667.

114. *Id.* at 669.

115. For a more detailed discussion and elaboration than is possible here, see *id.* at 670-83 (tracing the laws governing the non-Christian inhabitants of the Philippines from the time before the Philippines was acquired by the United States until after its acquisition).

of the Philippine Assembly was recognized in the "territory" of the Islands not inhabited by Moros or other non-Christian tribes. Again, the Jones Law confers similar recognition in the authorization of the twelfth senatorial district for the "territory not now represented in the Philippine Assembly." The Philippine Legislature has, time and again, adopted acts making certain other acts applicable to that "part" of the Philippine Islands inhabited by Moros or other non-Christian tribes.

Section 2145, is found in Article XII of the Provincial Law of the Administrative Code. The first section of this article, preceding Section 2145, makes the provisions of the article applicable only in specially organized provinces. The specially organized provinces are the Mountain Province, Nueva Vizcaya, Mindoro, Batanes, and Palawan. These are the provinces to which the Philippine Legislature has never seen fit to give all the powers of local self-government. They do not, however, exactly coincide with the portion of the Philippines which is not granted popular representation. Nevertheless, it is still a geographical description.

It is well-known that within the specially organized provinces, there live persons some of whom are Christians and some of whom are not Christians. In fact, the law specifically recognizes this.

If the religious conception is not satisfactory, so again the geographical conception is likewise inadequate. The reason is that the motive of the law relates not to a particular people, because of their religion, or to a particular province because of its location, but the whole intent of the law is predicated on the civilization or lack of civilization of the inhabitants.

At most, "non-Christian" is an awkward and unsatisfactory word. Apologetic words usually introduce the term. "The so-called 'non-Christian' is a favorite expression. The Secretary of the Interior who for so many years had these people under his jurisdiction, recognizing the difficulty of selecting an exact designation, speaks of the 'backward Philippine peoples, commonly known as the 'non-Christian tribes.'"

The idea that the term "non-Christian" is intended to relate to degree of civilization, is substantiated by reference to legislative, judicial, and executive authority.<sup>116</sup>

In resume, therefore, the Legislature and the Judiciary, inferentially, and different executive officials, specifically, join in the proposition that the term "non-Christian" refers, not to religious belief, but, in a way, to geographical area, and, more directly, to natives of the Philippine Islands of a low grade of civilization, usually living in tribal relationship apart from settled communities.<sup>117</sup>

The Manguianes of Mindoro were considered to have a very low degree of culture. They have considerable Negrito blood and have not advanced beyond the Negritos in civilization. They are a peaceful, timid, primitive, semi-nomadic people. The Manguianes have shown no desire for community life, and as indicated in the preamble to Act No. 547,<sup>118</sup> have not progressed sufficiently in civilization to make it practicable to bring them under any form of municipal government.<sup>119</sup> The methods followed by the Government of the

116. *Rubi*, 39 Phil., at 683-86 [citations omitted].

117. *Id.* at 685-88.

118. *Entitled An Act Providing for the Establishment of Local Civil Governments for the Manguianes in the Province of Mindoro.*

119. *See* I CENSUS OF THE PHILIPPINE ISLANDS 22, 23, 460 (1903).

Philippine Islands in its dealings with the so-called non-Christian people were said to be practically identical with that followed by the United States Government in its dealings with the Indian tribes. Valuable lessons could therefore be derived by an investigation of the American-Indian policy.<sup>120</sup>

From the beginning of the United States, and even before, the Indians have been treated as "in a state of pupillage." The recognized relation between the Government of the United States and the Indians may be described as that of guardian and ward. It is for the Congress to determine when and how the guardianship shall be terminated. The Indians are always subject to the plenary authority of the United States.

Chief Justice Marshall in his opinion in *Worcester vs. Georgia*, hereinbefore mentioned, tells how the Congress passed an Act in 1819 "for promoting those humane designs of civilizing the neighboring Indians." After quoting the Act, the opinion goes on — "This act avowedly contemplates the preservation of the Indian nations as an object sought by the United States, and proposes to effect this object by civilizing and converting them from hunters into agriculturists."

A leading case which discusses the status of the Indians is that of the *United States vs. Kagama* (118 U. S. 375 [1886]). Reference is herein made to the clause of the United States Constitution which gives Congress "power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The court then proceeds to indite a brief history of the position of the Indians in the United States (a more extended account of which can be found in Marshall's opinion in *Worcester vs. Georgia, supra*), as follows:

"The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States, has always been an anomalous one and of a complex character.

"Following the policy of the European Governments in the discovery of America towards the Indians who were found here, the colonies before the Revolution and the States and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority. When a tribe wished to dispose of its land, or any part of it, or the State or the United States wished to purchase it, a treaty with the tribe was the only mode in which this could be done. The United States recognized no right in private persons, or in other nations, to make such a purchase by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."

The opinion then continues:

It seems to us that this (effect of the law) is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no

120. *Rubi*, 39 Phil. at 694.



protection. Because of the local ill-feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arise the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.... The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

In the later case of *United States vs. Sandoval* (231 U. S. 28 [1913]) the question to be considered was whether the status of the Pueblo Indians and their lands was such that Congress could prohibit the introduction of intoxicating liquor into those lands notwithstanding the admission of New Mexico to statehood. The court looked to the reports of the different superintendents charged with guarding their interests and found that these Indians are dependent upon the fostering care and protection of the government "like reservation Indians in general." Continuing, the court said "that during the Spanish dominion, the Indians of the pueblos were treated as wards requiring special protection, were subjected to restraints and official supervision in the alienation of their property." And finally, we note the following: "Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long-continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state."<sup>121</sup>

As far as the first point is concerned, the decision just quoted could be used as authority to determine that Rubi, the Manguian petitioner, a Filipino, and a citizen of the Philippine Islands, is a "person" within the meaning of the Habeas Corpus Act, and as such, entitled to sue out a writ in the Philippine courts.<sup>122</sup>

The Court went on to decide the constitutional questions raised in the case. It held that there was no undue delegation of legislative power, neither does the term "non-Christian" discriminate on individuals on account of religious differences, since it merely refers to natives with a low grade of civilization.<sup>123</sup> Finally, Justice Malcolm declared that the pledge that no person shall be denied the equal protection of the laws is not infringed by a statute which is applicable to all of a class, so long as the classification has a reasonable basis and is not purely arbitrary in nature.<sup>124</sup> In any case, the Philippine Government had, both on reason and authority, the right to exercise sovereign police power in the promotion of the general welfare and the public interest.

121. *Id.* at 694-97.

122. *Id.* at 699-700.

123. *Id.* at 700-02.

124. *Id.* at 707.

It was recalled that the reasons for the actions of the provincial government were: (1) the failure of former attempts for the advancement of the non-Christian people of the province; (2) the only successful method for educating the *Manguianes* was to oblige them to live in a permanent settlement; (3) the protection of the *Manguianes*; (4) the protection of the public forests in which they roam; and (5) the necessity of introducing civilized customs among the *Manguianes*.

To attain the end desired, the Court pronounced that work of a civilizing influence may be continued among the non-Christian people. The Court also recognized that:

Our attempt at giving a brief history of the Philippines with reference to the so-called non-Christians has been in vain, if we fail to realize that a consistent governmental policy has been effective in the Philippines from early days to the present. The idea is to unify the people of the Philippines so that they may approach the highest conception of nationality. If all are to be equal before the law, all must be approximately equal in intelligence. If the Philippines is to be a rich and powerful country, Mindoro must be populated, and its fertile regions must be developed. The public policy of the Government of the Philippine Islands is shaped with a view to benefit the Filipino people as a whole. The *Manguianes*, in order to fulfill this governmental policy, must be confined for a time, as we have said, for their own good and the good of the country."<sup>125</sup>

This "traditional" attitude toward indigenous communities was subsequently reiterated in *De Palad v. Saito*,<sup>126</sup> and *People v. Cayat*.<sup>127</sup>

### C. *The Development of Constitutional Policies on Indigenous Communities, 1935 - 1987*

The policies of the American colonial rulers in the treatment of indigenous communities in the Philippines continued even after independence. Nothing in the 1935 Constitution could be cited as an expression of any radical shift in attitude toward indigenous communities. Constitutional policy affecting the rights of indigenous communities did not come about until the adoption of the 1973 Constitution wherein it stated in Section 11, Article 15 (General Provisions) that "[t]he State shall consider the customs, traditions, beliefs, and interests of national cultural communities in the formulation and implementation of state policies."

This provision, however, did not give any clear indication on indigenous issues, such as, recognition of ancestral land rights and self-determination or governance.

125. *Id.* at 719; see *id.* at 711-16, 718 for a more detailed discussion and elaboration than is possible here (discussing the process of successfully continuing the work of a civilizing influence among the non-Christian people).

126. 55 Phil. 631 (1974).

127. 68 Phil. 12 (1975).

The 1987 Constitution, on the other hand, introduced several provisions which would later on become the cornerstones for the Indigenous Peoples' Rights Act of 1997.<sup>128</sup> These provisions are as follows:

Section 22, Article II. The State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development.

Section 5, Article XII. 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 domains.

Section 1, Article XIII. The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.

To this end, the state shall regulate the acquisition, ownership, use, and disposition of property and its increments.

Section 6, Article XIII. The State shall apply the principles of agrarian reform or stewardship, whenever applicable in accordance with law, in the disposition or utilization of other natural resources, including lands of the public domain under lease or concession suitable to agriculture, subject to priority rights, homestead rights of small settlers, and the rights of indigenous communities to their ancestral lands.

The State may resettle landless farmers and farmworkers in its own agricultural estates which shall be distributed to them in the manner provided by law.

Section 17, Article XIV. The State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.

Section 12, Article XVI. The Congress may create a consultative body to advise the President on policies affecting indigenous cultural communities, the majority of the members of which shall come from such communities.

*D. Current Legal Challenge: Jura Regalia and the Indigenous Peoples' Rights Act (R.A. 8371)*

The benefits expected from the passage of the Indigenous Peoples' Rights Act (IPRA) of 1997 pursuant to the express mandate of the 1987 Constitution did not immediately accrue in favor of indigenous peoples in light of the legal challenge posed against the implementation of the law.

Petitioners Isagani Cruz and Cesar Europa filed an action<sup>129</sup> before the Supreme Court of the Philippines for prohibition and *mandamus* as citizens and

<sup>128</sup>R. A. 8371 (1997).

<sup>129</sup>See Cruz v. Secretary of Environment and Natural Resources, G.R. No. 135385, Resolution dated Dec. 6, 2000.

taxpayers, assailing the constitutionality of certain provisions of IPRA, and its Implementing Rules and Regulations.

The following provisions of the IPRA and its Implementing Rules have been assailed on the ground that they amount to an unlawful deprivation of the State's ownership over lands of the public domain as well as minerals and other natural resources therein, in violation of the Regalian doctrine embodied in Section 2, Article XII of the Constitution:

1. Section 3(a) which defines the extent and coverage of ancestral domains, and Section 3(b) which, in turn, defines ancestral lands;
2. Section 5, in relation to section 3(a), which provides that ancestral domains including inalienable public lands, bodies of water, mineral and other resources found within ancestral domains are private but community property of the indigenous peoples;
3. Section 6 in relation to Section 3(a) and 3(b) which defines the composition of ancestral domains and ancestral lands;
4. Section 7 which recognizes and enumerates the rights of the indigenous peoples over the ancestral lands;
5. Section 8 which recognizes and enumerates the rights of the indigenous peoples over the ancestral lands;
6. Section 57 which provides for priority rights of the indigenous peoples in the harvesting, extraction, development or exploration of minerals and other natural resources within the areas claimed to be their ancestral domains, and the right to enter into agreements with non-indigenous peoples for the development and utilization of natural resources therein for a period not exceeding 25 years, renewable for not more than 25 years; and,
7. Section 58 which gives the indigenous peoples the responsibility to maintain, develop, protect and conserve the ancestral domains and portions thereof which are found to be necessary for critical watersheds, mangroves, wildlife sanctuaries, wilderness, protected areas, forest cover for reforestation.<sup>130</sup>

Petitioners also contend that, by providing for an all-encompassing definition of "ancestral domains" and "ancestral lands" which might even include private lands found within said areas, Sections 3(a) and 3(b) violate the rights of private landowners.<sup>131</sup>

In addition, petitioners question the provisions of the IPRA defining the powers and jurisdiction of the National Council on Indigenous Peoples (NCIP) and making customary law applicable to the settlement of disputes involving ancestral domains and ancestral lands on the ground that these provisions violate the due process clause of the Constitution. These provisions are:

<sup>130</sup>*Id.* at 6.

<sup>131</sup>*Id.* at 7.

1. Sections 51 to 53 and 59 which detail the process of delineation and recognition of ancestral lands and which vest on the NCIP the sole authority to delineate ancestral domains and ancestral lands;
2. Section 52[i] which provides that upon certification by the NCIP that a particular area is an ancestral domain and upon notification to the following officials, namely, the Secretary of Environment and Natural Resources, Secretary of Interior and Local Government, Secretary of Justice and Commissioner of the National Development Corporation, the jurisdiction of said officials over said area terminates;
3. Section 63 which provides that the customary laws, traditions and practices of indigenous peoples shall be applied first with respect to property rights, claims of ownership, hereditary succession and settlement of land disputes, and that any doubt or ambiguity in the interpretation thereof shall be resolved in favor of the indigenous peoples;
4. Section 65 which states that customary laws and practices shall be used to resolve disputes involving indigenous peoples; and,
5. Section 66 which vests on the NCIP the jurisdiction over all claims and disputes involving rights of the indigenous peoples.<sup>132</sup>

Finally, petitioners assail the validity of Rule VII, Part II, Section 1 of the NCIP Administrative Order No. 1, series of 1998, which provides that "the administrative relationship of the NCIP to the Office of the President is characterized as a lateral but autonomous relationship for the purpose of policy and program coordination." They contend that said Rule infringes upon the President's power of control over executive departments under Section 17, Article VII of the Constitution.

It is interesting to note how the evolving progressive trend in international law and other jurisdictions will affect the present case before the Supreme Court. The adoption of internationally acceptable standards in regard to indigenous peoples may augur well for the Davide Court which has demonstrated judicial activism in some recent rulings.

#### CONCLUSION

This brief survey of legal principles, decisions and international instruments affecting rights of indigenous communities reveals an emerging progressive attitude in favor of the indigenous communities.

In some countries, jurists have, in fact, re-defined the relationship between the State and indigenous communities to the extent of abandoning the classical legal concept of *terra nullius* for the purpose of giving due recognition to ancestral land rights. The notion of pupillage has also given way to a more participative concept of right to self-determination of these communities within the context of national unity and territorial integrity of the State.

<sup>132</sup>. *Id.* at 8.

From the perspective of human rights, it is worth noting that some classical writers in international law have already espoused the principle of respect for the rights of original inhabitants of the occupied territories during the period of colonization. There is also evidence to show that these communities have been treated as nations or sovereign entities capable of entering into agreements with the occupying European powers. In some jurisdictions, these agreements have been recognized and afforded great weight in the settlement of historical proprietary claims.

Clearly, a set of generally accepted principles of international law has emerged, affecting rights of indigenous communities. Consensus on the content of these rights has developed through international instruments.

In an effort to advance the cause of indigenous peoples, the Philippine government, particularly in light of the current challenge to the IPRA, could derive inspiration and strength of will by giving effect to the principles enunciated, for instance, in the draft Declaration on the Rights of Indigenous Peoples.<sup>133</sup> The experience of other states in the resolution of indigenous issues would also be of great value to our own courts.

Finally, the author emphasized in his introduction that application of human rights norms have been effective vehicles to generate changes in attitudes among various sectors of society within a State. The case of indigenous communities is a concrete example of how traditional legal concepts on property rights and State ownership of all lands of the public domain (Regalian doctrine) should now be reconciled with fundamental rights of these communities. For indigenous peoples around the world, their concept of ancestral domain and other land rights is central to their struggle for self-determination as land is their source of life and being as a people.

<sup>133</sup>. *Discrimination Against Indigenous Peoples*, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., Provisional Agenda Item 15, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).