AN ANALYSIS OF NATIVE TITLE RECOGNITION IN THE PHILIPPINES FROM JOHNSON v McINTOSH TO CRUZ v SECRETARY OF ENVIRONMENT AND NATURAL RESOURCES[1]

FERNANDO SANCHEZ PENARROYO

I INTRODUCTION

In Philippine constitutional law, the term 'indigenous cultural communities' was introduced in the 1987 Constitution.[2] It refers to those groups of Filipinos who have retained a high degree of continuity from pre-Spanish conquest culture.[3] Philippine legal history has described them as uncivilised,[4] backward people,[5] with barbarous practices[6] and a low order of intelligence.[7] These are communities who have retained a distinct ethno-political, economic, social and cultural identity which is generally characterised by adherence to communal traditions, customs, values or systems of

[1] Native Title Law and Resources Development Research Paper for University of Melbourne LLM 10 July 2002

[2] Three constitutional provisions under the 1987 Constitution which deal with indigenous cultural communities, ancestral lands and ancestral domains are relevant in this paper:

Art II s 22. The State recognises and promotes the rights of indigenous cultural communities within the framework of national unity and development.

Art XII s 5. The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being.

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

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

[3] 4 Record of the Constitutional Commission 34.

[4] *Rubi v Provincial Board of Mindoro* (1919) 39 Phil 660, 680.

[5] Hearing before the Committee on the Philippines, United States Senate, Sixty-Third Congress, Third Session HR 18459 pp 346, 351 quoted in *Rubi v Provincial Board of Mindoro,* 686.

[6] United States President McKinleys' Instruction to the Philippine Commission, 7 April 1900 quoted in *Rubi v Provincial Board of Mindoro,* 680.

[7] *U.S. v Tubban* (1915) 29 Phil 434, 436.

thought where the distinction is often expressed in relation to an ethno-historical or historical association with a definite area or region. They are also referred to as indigenous peoples, which is defined as 'descendants of the original inhabitants of many lands who retain a strong sense of their distinct culture, the most salient feature of which is a relationship to the land.'[8] There are at present 110 ethno-linguistic groupings in the Philippines with a varying degree of socio-economic development. It is a historical irony that the very identity the indigenous cultural communities struggled to keep intact should now be their heaviest liability i.e. if they had lost out to Spanish or Muslim hegemony in their cultural domination and if they adapted the culture of either of the two, they would be categorised today not as minority but members of the majority who define the cultural milieux and compose the social mainstream.

Decades of encroachment of lands traditionally occupied by indigenous cultural communities by loggers, ranchers, miners, migrants, and other business interests have caused these communities to seek refuge in upland areas or forest lands classified under law[9] as belonging to the public domain. These communities often resort to the traditional practice of the shifting method of cultivation, which involves slash and burn cyclical farming complemented with hunting, fishing and gathering forest products. Thus, the forests where they carry out their means of subsistence form their economic base. However, the State prohibits the alienation and disposition of forest lands or lands above eighteen percent in slope thereby disenfranchising these communities of their tenurial rights to the land they have traditionally and actually occupied. Understandably then, infrastructure development projects, which are site

[8] The term 'indigenous peoples' is only one of the many terminologies employed as a general outside ascription to this distinct group. Among these terminologies with nuance of anthropological meaning are: 'aboriginal,' which implies having no known race preceding in the occupancy of the region; 'native,' which implies birth or origin in a particular region and these may include those not sharing the culture of the region but born in the area; and 'primitive,' which implicitly refers to those who lagged behind in the linear development of civilisation. These terms are sometimes perceived as laden with pejorative connotations. For the purpose of this paper, the terms 'indigenous cultural communities', 'indigenous peoples', and 'aboriginal' will be used interchangeably.

[9] The power to classify lands exclusively belongs to the Executive Department. The authority to determine whether or not land is alienable and disposable is delegated by the President to the Secretary of Environment and Natural resources, which supervises and directs the Director of the Lands Management Bureau and the Director of the Forest Management Bureau in classifying public agricultural lands and forest lands, respectively. [*Commonwealth Act No. 141* (1936), as amended, ss 3, 4, 5, and 6; *Administrative Code* (1987) Title XIV, ss 14 and 15] Under Art XII s 3 of the *Philippine Constitution,* alienation of lands of the public domain is prohibited except those classified as public agricultural lands.

specific and most often facilitated and instigated by government in lands claimed or occupied by indigenous peoples are sure to be mired in controversy.[10] Also, native title claims over lands classified by the State as belonging to the public domain have been a major obstacle to investment by natural resources companies particularly in the minerals sector.[11]

The concept of *jura regalia* where the Regalian Doctrine was derived states that private title to land must be traced to some grant, whether express or implied, from the Spanish Crown or its successors, the American Colonial government, and ultimately, the Philippine Republic. Since the State is constitutionally ordained as the source of all land grants, it is obligated to guarantee the validity and indefeasibility of the grants it issues. The heart of the ancestral domain controversy then is the apparent differences in the foundations of conflicting property concept between customary law and the national law on the ownership and use of land.

The Philippine experience with native title in comparison with the recognition given by common law systems where this form of property right has received extensive jurisprudence and commentaries, is unique for two reasons: first, being a former colony of Spain, its property laws particularly the concept of ownership are basically derived from civil law;[12] and secondly, the country was not a European settlement colony, much unlike North America, Australia or New Zealand. Thus there is no racial divide between mainstream society, which seeks to stabilise the existing land tenure system and the indigenous peoples, who aided by their political advocates in civil society, engages the mainstream to recognise their claim to lands traditionally held by them. While some civil law countries have similar native title

[10] Examples are Chico River Hydroelectric Power Project initiated by the National Power Corporation, the Mt. Apo Geothermal Power Plant of the Philippine National Oil Company and the San Roque Multipurpose Dam owned by a consortium dominated by Japanese companies.

[11] In a book published by the East Asia Analytical Unit in 1998 for the Australian Department of Foreign Affairs and Trade entitled 'The Philippines: Beyond the Crisis', the uncertainty in the interpretation of the *Indigenous Peoples Rights Act 1997* was considered as one of the factors which have prevented the issuance of new mining contracts by the Philippine Government resulting to the mining sector receiving a lower share of foreign direct investment.

[12] The civil law concept of ownership has the following attributes: *jus utendi* or the right to receive from the thing that which it produces, *jus abutendi* or the right to consume the thing by its use, *jus disponendi* or the power to alienate, encumber, transform and even destroy that which is owned and *jus vidicandi* or the right to exclude other persons from the possession of the thing owned.

recognition,[13] common law is more replete with doctrines and precedents on this emerging discipline of constitutional and property law. Furthermore, this land tenure was first given recognition in the legal history of this country during the colonial episode with the United States and for this reason this paper attempts to use the common law framework in analysing the recognition. Parallelisms are drawn with the Australian experience because the doctrine of terra nullius was held for some time in Australian common law before the High Court's decision in *Mabo* unlike in North America where native title evolved from the colonial policy of Great Britain to acquire aboriginal lands by treaty and purchase thus according some recognition to the right of the native occupants to possession and use.

This paper is organised as follows. Part II traces the development of the Regalian Doctrine[14] and describes how the colonial governments of Spain and the United States handed down the tradition to the present Philippine government and their policies on indigenous peoples. Part III briefly discusses two leading cases both decided by the U.S. Supreme Court, which led to the parallel development and recognition of native title in the Philippines. Part IV describes the *Indigenous Peoples Rights Act 1997*. Part V discusses the decision of the Supreme Court on the constitutional challenge to the controversial law. Finally Part VI concludes that there continues a manifest half-hearted effort if not deliberate reluctance by Philippine authorities to recognise native title.

II DEVELOPMENT OF THE REGALIAN DOCTRINE

A *ACQUISITION OF SOVEREIGNTY AND OWNERSHIP*

During the era of European colonisation, customary law laid down the acceptable means of acquiring sovereignty, which included conquest, cession, and occupation of terra nullius.[15] While the acquisition of territory by a sovereign state

[13] Brazil amended its constitution in 1988 to call for demarcation and protection of indigenous lands, and Chile passed a law calling for demarcation in 1993.
[14] Art XII s 2 *Philippine Constitution 1987* provides 'All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated.'
[15] *Mabo v Queensland* (2) (1992) 107 ALR 1, 21.

for the first time is an act of state which cannot be challenged, controlled, or interfered with by the courts of that state making state sovereignty non-justiciable under domestic law,[16] 'the consequences of an acquisition' of territory may be freely litigated in domestic courts.[17] The distinction between territory settled by occupation of terra nullius and that conquered or ceded, is that in the latter case the ceded or conquered territory retained its pre-existing laws until the new sovereign altered them.[18] Terra nullius was considered not to have any laws except those carried with them by the settlers.[19] Sovereignty is the right to exercise the functions of a State to the exclusion of any other State.[20] Common law recognise the fact that sovereignty over land is distinct from ownership of land. Sovereignty, which only a sovereign can acquire, is the political power to govern territory while ownership (or 'absolute beneficial title'), which can belong to anyone, is private title to a piece of property: the right to possess, occupy, use, and enjoy that property.[21] Despite this distinction, the acquisition of sovereignty through occupation of terra nullius was equated with the acquisition of absolute beneficial ownership by the sovereign when 'no other proprietor of such lands' was found to exist.[22] The theory of the feudal system was that title to all lands was granted out to others who were permitted to hold them under certain conditions while theoretically the King retained the title.[23] By this fiction of law, the King is then regarded as the original proprietor of all lands as the true and only source of title, and from him all lands were held.[24]

In civil law, the capacity of the State to own or acquire property is the State's power of *dominium* as distinguished from *imperium,* which is the government authority possessed by the State expressed in the concept of sovereignty.[25] *Dominium* was the basis for the early Spanish decrees embracing the theory of *jura regalia.* If *dominium,* not *imperium,* is the basis of the theory of *jura regalia,* then the lands which Spain acquired in the 16th century were limited to non-private lands, because it

---

[16] Ibid 31.
[17] Ibid 32.
[18] 1 William Blackstone, Commentaries 108 (1978).
[19] Ibid.
[20] *Case Concerning the Island of Las Palmas* (1928) UNRIAA II 829,838.
[21] Ibid 30, 31, 56.
[22] *Mabo v Queensland [No. 2]* (1992) 107 ALR 1, 27.
[23] Williams, *Principles of the Law on Real Property* (6th ed, 1886) 2.
[24] Warkvelle, *Abstracts and Examination of Title to Real Property* (1907) 18.
[25] *Lee Hong Kok v David* (1972) 48 SCRA 372, 377.

could only acquire lands which were not yet privately owned or occupied by the original inhabitants. Hence, Spain acquired title only over lands, which were unoccupied and unclaimed, i.e. public lands.

Basic property doctrine was grounded on possession; and nothing appeared to bar the Crown's assertion of both sovereignty and ownership if no other persons were present to assert possession of land because the newly discovered land is uninhabited. As exploration and colonisation continued, Europeans began settling in occupied lands, and the doctrine of terra nullius was expanded by agreement among the European powers to include lands occupied by indigenous populations considered 'barbarous', 'unsettled' or 'primitive', with no recognisable law of their own and with no claim to land rights.[26] Other justifications for acquiring both sovereignty and ownership of previously occupied territory through the expanded terra nullius doctrine included bringing the benefits of Christianity and European civilisation to 'backward peoples' and cultivating land that had not been cultivated by its original occupants.[27]

B *RECOGNISING NATIVE INHABITANTS*

The right of native title inhabitants to possess property at the time of colonial expansion and European hegemony, particularly from the 16th century, may be traced to its ecclesiastical roots in the Middle Ages. Innocent IV, following theories of St. Thomas Aquinas, upheld the rights of non-Christians to property and the exercise of authority.[28]

The concept of Indian title has its roots in the Spanish conquests of the Americas. One of the classical international law writers who wrote extensively on the issue of the rights of the *indios*[29] was Francisco de Vitoria, who forty years after

---

[26] *Mabo* (1992) 175 CLR 1, 24-27.
[27] Ibid 21.
[28] L.C. Green and Olive P. Dickason, *The Law of the Nations and the New World,* (1989) 242.
[29] In Spanish colonial history, the term '*indio'* applied to natives throughout the vast Spanish empire. India was a synonym for all of Asia east of the Indus River. Even after it became apparent that the explorer Christopher Columbus was not able to reach territories lying to the east coast of Asia, the Spanish persisted in referring to all natives within their empire as *'los indios'.* See Owen J. Lynch, The Philippine Colonial Dichotomy: Attraction and Disenfranchisement, (1988) 63 *Phil Law J* 112. In Philippine history, *'los indios'* ultimately became the hispanised Filipinos while the non-Christian

Columbus' discovery, advised Charles V, grandson of Ferdinand and Isabella, that as inheritor of the Spanish Empire he was the sovereign owner of the newly discovered lands and that the Indians 'were entitled to remain undisturbed in the possession of their lands,' and that only the sovereign could negotiate the surrender of Indian title.[30] In Vitoria's legal treatise entitled *De Indis Noviter Inventis* (1532), he put forward the view that the *indios* were neither chattels nor beasts, but human beings entitled to a modicum of respect.

> …that the barbarians in question [the Indians] 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 sins, 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 their princes nor private persons could be despoiled of their property on the ground of their not being true owners. It would be harsh to deny to those, who have never done any wrong, what we grant to Saracens and Jews, who are the persistent enemies of Christianity. We do not deny that these latter peoples are true owners of their property, if they have not seized lands elsewhere belonging to Christians…[E]ven if we admit that the aborigines in questions are 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.[31]

Vitoria's theory is founded on his profound respect for the equality of races as was evident in his dissertations entitled *De Indis et de Jure Belli Relectiones* delivered at the University of Salamanca in 1532.[32] Vitoria's doctrine was in fact given papal support in 1537 by the Bull *Subliminis Deus* where Pope Paul III declared:

> We, who, though unworthy, exercise on earth the power of our Lord and seek with all our might to bring those sheep of His flock who are outside, into the fold committed to our charge, consider, however, that the Indians are truly men and that they are not only capable of understanding the Catholic faith but, according to our information, they desire exceedingly to receive it. Desiring to provide ample remedy for these evils, we define and declare by these our letters,

---

Filipinos were referred to as *'moros'* for the Muslims and *'dociles',' feroces' or 'infieles'* for the non-Muslims. The American colonial government called the latter as non-Christian tribes.

[30] W.C. Arnold, Native Land Claims in Alaska (1967) 4 (unpublished manuscript, on file with the University of New Mexico School of Law Library) cited in John R. Boyce and Mats A.N. Nilsson, 'Interest Group Competition and the Alaska native land Claims Settlement Act' (1999) 39 *Nat. Resources J.* 755, 758-759.

[31] Ibid 40 quoting an English translation of 1696 text by J.P.Bate (1934) .

[32] Felix S. Cohen, 'The Spanish Origin of Indian Rights in the Law of the United States' (1942) 31 *Georgetown Law Review* 1, 11.

> or by any translation thereof signed by any notary public and sealed with the seal of any ecclesiastical dignitary, to which the same credit shall be given as to the originals, that, notwithstanding whatever may have been or may be said to the contrary, the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect.[33]

Aside from the Papal Bull, the Spanish *Laws of the Indies* gave us an understanding of the official Spanish policies regarding the property rights of native inhabitants during the Spanish colonial regime.[34]

In their surveys of the Spanish Crown's practice regarding the treatment of the native inhabitants by Spanish colonial authorities, Green and Dickason observed that Spain's official attempts at realising the principles of social justice in its imperial administration were outweighed by the oppression practiced by Spanish authorities in the colonies. They made the observation that:

---

[33] Ibid 12.

[34] They can be summarised as follows:

> Book 6, Title 1, Law 15, decreed by King Philip II, at Madrid, 7 November 1574. 'We command that in the Philippine Islands the Indians not be removed from one to another settlement by force and against their will.'
>
> Book 6, Title 1, Law 32, decreed by King Philip II, at El Pardo, 16 April 1580. 'We command the Viceroys, Presidents, and Audiencias that they see to it that the Indians have complete liberty in their dispositions.'
>
> Book 4, Title 12, Law 9, decreed by King Philip II, at Del Prado, 1 June 1594. 'We order that grants of farms and lands to Spaniards be without injury to the Indians and that those which have been granted to their loss and injury, be returned to the lawful owners.'
>
> Book 6, Title 1, Law 23, otherwise known as Ordinance 10 of 1609 decreed by King Philip III. 'It is right that time should be allowed the Indians to work their own individual lands and those of the community.
>
> Book 4, Title 12, Law 14. 'We having acquired full sovereignty over the Indies and all lands, territories and possessions not heretofore ceded away by our royal predecessors, or by us, or in our name, still pertaining the royal crown and patrimony, it is our will that all lands which are held without proper and true deed of grant be restored to us according as they belong to use, in order that…after distributing to the natives what may be necessary for tillage and pasteurage, confirming them is what they now have and giving them more if necessary, all resort of said land may remain free and unencumbered for us to dispose of as we wish.

> Spain experienced the widest gap between idealistic royal intentions and actual events in the colonies. Impelled by commercial advantage, those events were being acted out at a high cost in human terms.[35]

The attitude of Spanish and other colonial authorities had the effect of undermining the rights of native inhabitants to their lands and Green and Dickason lamented that:

> Continuous use and possession of land 'from time immemorial' as a basis for title dates back to Roman times, when jurists considered it to be a self-evident rule of natural law. It was recognised in the Justinian's code, and continued under feudalism in common law. But it interfered with the politics of expansion, and so was circumvented during the age of Discovery.[36]

In Philippine legal history, the application of Spanish land laws *vis-a-vis* Indian title was discussed by the Supreme Court in *Valenton v Murciano*[37] where it stated that prior to 1880, there were no laws specifically providing for the disposition of land and it was understood that the *Laws of the Indies* would be followed in the absence of any special law to govern a specific colony. In the *Royal Order of 5 July 1862,* it was decreed that until regulations on the subject could be prepared, the authorities of the Philippine Islands should follow strictly the *Laws of the Indies*, the *Ordenanza of the Intedentes of 1786,* and the *Royal Cedula of 1754*.[38] The Regalian Doctrine or *jura regalia* was first introduced by the Spaniards through the Laws of the Indies and the Royal Cedulas. *Law 14, Title 12, Book 4 of the Novisima Recopilacion de Leyes de las Indias,* declared the Spanish Crown's policy on the Philippine Islands:

> We, having acquired full sovereignty over the Indies, and all lands, territories, and possessions not heretofore ceded away by our royal predecessors, or by us, or in our name, still pertaining to the royal crown and patrimony, it is our will that all lands which are held without proper and true deeds of grant be restored to us as they belong to us, in order that after reserving before all what to us or to our viceroys, *audiencias,* and governors may seem necessary for public squares, ways, pastures, and commons in those places which are peopled, taking into consideration not only their present condition, but also their future and their probable increase, and after distributing to the natives what may be necessary for tillage and pasturage, confirming them in what they now have and giving them more if necessary, all the rest of said lands may remain free and unemcumbered for us to dispose of as we may wish.

---

[35] Green and Dickason, above n 27, 245-246.
[36] Ibid 249.
[37] (1904) 3 Phil 537.
[38] Ibid 548.

> We therefore order and command that all viceroys and presidents of pretorial courts designate at such time as shall to them seem most expedient, a suitable period within which all possessors of tracts, farms, plantations, and estates shall exhibit to them and to the court officers appointed by them for this purpose, their title deeds thereto. And those who are in possession by virtue of just prescriptive right shall be protected, and all the rest shall be restored to us to be disposed at our will.[39]

The Supreme Court gave an interpretation of the preamble of *Law 14, Title 12, Book 4 of the Recopilacion de las Indias:*

> In the preamble of this law there is, as is seen, a distinct statement that all those lands belong to the crown which have not been granted by Philip, or in his name, or by the kings who preceded him. This statement excludes the idea that there might be lands not so granted, that did not belong to the king. It excludes the idea that the king was not still the owner of all ungranted lands, because some private person had been in the adverse occupation of them. By the mandatory part of the law all the occupants of the public lands are required to produce before the authorities named, and within a time to be fixed by them, their title papers. And those who had good title or showed prescription were to be protected in their holdings. It is apparent that it was not the intention of the law that mere possession for a length of time should make the possessors of the owners of the land possessed by them without any action on the part of the authorities.[40]

The *Royal Cedula of 15 October 1754* reinforced the *Recopilacion* when it ordered the Crown's principal subdelegate to issue a general order directing the publication of the Crown's instructions:

> x x x to the end that any and all persons who, since the year 1700, and up to the date of the promulgation and publication of said order, shall have occupied royal lands, whether or not … cultivated or tenanted, may … appear and exhibit to said subdelegates the titles and patents by virtue of which said lands are occupied…Said subdelegates will at the same time warn the parties interested that in case of their failure to present their title deeds within the term designated, without a just and valid reason therefore, they will be deprived of and evicted from their lands, and they will be granted to others.[41]

The *Ley Hipotecaria,* or the *Mortgage Law of 1893* followed the *Laws of the Indies,* which provided for the systematic registration and taxation of titles and deed

---

[39] Ibid 543.
[40] Ibid 543-544.
[41] Ibid 545-546.

as well as possessory claims pursuant to the *Royal Decree of 1880.* The last Spanish land law promulgated in the Philippines, the *Royal Decree of 1894* or the *Maura Law,* partially amended both the *Mortgage Law of 1893* and the *Laws of the Indies,* and required the registration of all agricultural lands, the failure of which will revert the lands to the Crown. The Supreme Court interpreted this development as:

> While the State has always recognised the right of the occupant to a deed if he proves a possession for a sufficient length of time, yet it has always insisted that he must make that proof before the proper administrative officers, and obtain from them his deed, and until he did that the State remained the absolute owner.[42]

By virtue of the *Treaty of Paris of 10 December 1898,* Spain ceded to the United States of America all rights, interests, and claims over the national territory of the Philippine islands for a consideration of US$20 million whose colonial government then pursued the Spanish policy of requiring settlers on public lands to obtain deeds from the government.[43]

President McKinley gave his instructions to the Philippine Commission of 7 April 1900 on how to address the natives:

> In dealing with the uncivilised tribes of the Islands, the Commission should adopt the same course followed by Congress in permitting the tribes of our North American Indians to maintain their tribal organisation and government, and under which many of those tribes are now living in peace and contentment, surrounded by civilisation to which they are unable or unwilling to conform. Such tribal government should, however, be subjected to wise and firm regulation; and, without undue or petty interference, constant and active effort should be exercised to prevent barbarous practices and introduce civilised customs.[44]

The Spanish colonial government had no effective system of land registration and for this reason the succeeding U.S. colonial administration, through the Philippine Commission, passed the *Land Registration Act 1903,*[45] which brought all lands in the Philippines under the operation of the Torrens system. The government,

---

[42] Ibid 543.
[43] Ibid 553.
[44] *People v Cayat* (1939) 68 Phil 12, 17.
[45] *Act No 496* as originally passed was almost a verbatim copy of the *Land Registration Law* of Massachusetts.

under the authority of the *Philippine Bill of 1902*[46] set up throughout the islands land registration courts which would adjudicate land claims. Other laws were passed such as the *Cadastral Act* and the *Public Lands Act* where the State, through the government, has assumed the authority to classify and dispose of lands of the public domain.

When the 1935 Constitution was passed, the issue then was the conservation of the national patrimony for the Filipinos, which impelled the framers of the fundamental law to entrench the Regalian Doctrine,[47] wherein the State asserted ownership over lands of the public domain and all natural resources found therein, as further reiterated in the 1973 and 1987 Constitutions.[48]

Among the first acts of the American colonial administration was the establishment in 1901 of the Bureau of Non-Christian Tribes (BNCT) renamed in 1903 as the Ethnographic Survey of the Philippine Islands[49] whose mission was to support both the interests of science and of colonial legislation and administration policies:

> …to conduct systematic investigations with reference to the non-Christian tribes of the Philippine Islands, in order to ascertain the name of each tribe, the limits of the territory which it occupies, the approximate number of the individuals which compose it, their social organisations, and their language, beliefs, manners, and customs.

After the Second World War and with the grant of independence on 04 July 1946, the Philippine government created the Commission of National Integration (CNI)[50] to succeed the revived BNCT, i.e., to integrate the territories inhabited by *Moros* and indigenous tribes that were not hispanised and Christianised.

---

[46] 'An Act Temporarily to Provide for the Administration of the Civil Government in the Philippine Islands, and for other Purpose.'
[47] Adrian S. Cristobal, Jr., 'The Constitutional Policy on Natural Resources: An Overview' (1990) 3 *Phil Natural Resources L.J.* 48.
[48] *Philippine Constitution 1935* Art XIV s 1, *Philippine Constitution 1973* Art XIV s 8, and *Philippine Constitution 1987* Art XII s 2.
[49] *Act No 253* (1903).
[50] *Republic Act No 1888* (1957) entitled 'An act to effectuate a more rapid and complete manner the economic, social, moral, and political advancement of the non-Christian Filipinos or national cultural minorities and to render real, complete, and permanent the integration of all said national cultural minorities into the body politic, creating the Commission on National Integration charged with said function.'

While the BNCT's mission statement of 1916 read as follows:

> …to foster, by all adequate means and in a systematic, rapid, and complete manner the moral, material, economic, social, and political development of these regions (inhabited by so-called non-Christian Filipinos), always having in view the aim of rendering permanent the mutual intelligence between, and the complete fusion of, the Christian and Non-Christian elements populating the provinces of the archipelago.

the CNI mission statement of 1957 on the other hand duplicated that of the BNCT except for a curious but significant shift in emphasis, the excerpt of the particular segment read:

> …economic, social, and political advancement of non-Christian Filipinos who would henceforth be called the National Cultural Minorities…make real, complete and permanent the integration of all the National Cultural Minorities into the body politic.

The post-independence policy of integration, like the colonial policy of integration, was founded upon the premise that the indigenous cultural communities are culturally inferior to the mainstream society.[51] However, Casiño made a different observation. He analysed the presence of two key phrases in the 1916 and 1957 mission statements: the 'fusion of all the Christian and non-Christian elements' (1916) and 'integration of all National Cultural Minorities into the body politic' (1957) which he believed was a clear move away from mutuality towards a one-sided imposition of majority culture. While the 1916 substitution reintroduced the segmental division of the Philippine natives into Christian and non-Christians, but maintained their equality and mutuality by assuming both elements to be subsumed under a whole that is greater than any of them, Casiño declared that by 1957, this balance was distorted by presuming that the body politic was the majority (euphemism for Christian community) to which the minorities would need to adjust

[51] Cerilo Rico Abelardo 'Ancestral Domain Rights: Issues, Responses, and Recommendations' (1993) *Ateneo L. J.* 87, 119-120.

and be integrated in.[52] Nonetheless, assimilation or integration of these communities had always been understood in the context of a guardian-ward relationship.[53]

III DEVELOPMENT OF NATIVE TITLE IN THE PHILIPPINES

A *JOHNSON v MCINTOSH*

The common law first gave effect to the rights of indigenous inhabitants of settled territories in the landmark decision of Chief Justice Marshall of the United States Supreme Court in *Johnson v McIntosh*[54] which decision adopted the principle of Indian title and eventually became the foundation of jurisprudence in Canada and in New Zealand. The Supreme Court held that discovery granted the discoverers exclusive title, subject only to the Indians' right of occupancy:

> 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 Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.
>
> Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.
>
> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.
>
> While the different nations of Europe respected the right of the 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 the 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.[55]

---

[52] Eric S. Casino, *Mindanao Statecraft and Ecology: Moros, Lumads, and Settlers Across the Lowland-Highland Continuum* (2000) 11-12.
[53] See *Rubi v Provincial Board of Mindoro* (1919) 39 Phil 660.
[54] 21 U.S. 543, (1823).
[55] Ibid 573-574.

Chief Justice Marshall recognised that Native American rights were significantly diminished because they were forced to associate with England, a country that consistently asserted her discovery rights. This case set forth the common law principle that the natives could only sell their land to the crown or the United Sates and established a precedent for the federal government to justify stripping away native American rights to their land.[56] Arguably, some held the belief that the case created a landlord-tenant relationship between the federal government and the Indian tribes where the government was the tyrannical landlord possessing complete power over the lives of the Indians.[57]

Current federal Indian law embraces two contradictory doctrines[58] and this inconsistency is blamed on the vague language in judicial opinions concerning such crucial concepts as foreign nation status, ward-guardian relationships, and federal authority over native American affairs.[59] On one hand, following the decision in *Cherokee Nation v Georgia*[60] and *Worcester v Georgia,*[61] this doctrine recognises tribal sovereignty and considers tribes domestic, dependent nations.[62] These jurists continually interpret ambiguous treaty language in favour of the Native Americans and place the burden of proof and the standard of good faith[63] on the federal government.[64] The other trend of jurisprudence reflects the legitimacy of congressional plenary power over the Native Americans and their status as 'wards'.[65]

B *CARIÑO v INSULAR GOVERNMENT*

---

[56] Ibid 574.
[57] David E. Wilkins, American Indian Sovereignty and the U.S. Suprme Court: The Masking of Justice (1997), 31.
[58] Jill Norgen, The Cherokee Cases: The Confrontation of Law and Politics (1996), 151-152.
[59] Ibid 151.
[60] 30 U.S. (5 Pet.) 1, (1831).
[61] 31 U.S. (6 Pet.) 515, (1832).
[62] Norgren, above n 57, 151.
[63] In *U.S. v Sioux Nation of Indians* 448 U.S. 371, (1980), the Supreme Court analysed the good faith test and rejected it for a more difficult standard of 'good faith effort' test. The focus is not on the economic losses and hardships suffered by the Native Americans but whether the government was legitimate in its exercise of plenary power over the Indian land. In applying this test, the reviewing judge must evaluate the relevant legislative history along with the surrounding circumstances to determine whether Congress made a good faith effort in giving the Indians the full value of their lands.
[64] Norgen, above n 57, 151.
[65] Ibid 152.

Against the backdrop of the early judicial involvement of the 'white man's courts' in Native American affairs, specifically with respect to their land[66] and the 'ward-guardian relationship' concept espoused by the American colonial government in its treatment of the inhabitants of the Philippines following the doctrine first established in *Johnson v McIntosh*, the concept of 'native title' in the Philippines was first advanced in *Cariño v Insular Government.*[67] The case was decided by the U.S. Supreme Court upon appeal to review the decision of the Philippine Supreme Court,[68] which affirmed a judgment of the Court of First Instance of the province of Benguet, dismissing an application for the registration of certain land.[69] Mateo Cariño, a member of the Igorots,[70] filed a petition pursuant to the Philippine Commission's[71] *Act No. 496 1902* for the registration in his name of a 146-hectare land. The evidence showed that Cariño and his ancestors occupied and used the land since time immemorial through cultivation and holding of cattle, although no document of title had been issued by the Spanish colonial government in their favour.[72] The U.S. Government opposed the petition, and argued that as a successor to Spain, which adhered to the Regalian Doctrine, the U.S. acquired title over all lands in the Philippines except over those to which the Spanish Government had granted private titles.[73] In a unanimous decision penned by Justice Oliver Wendell Holmes, the U.S. Supreme Court held:

> It is true that Spain, in its earlier decrees, embodied the universal feudal theory that all lands were held from the Crown, and perhaps the general attitude of conquering nations toward people not recognised as entitled to the treatment accorded to those in the same zone of civilisation with themselves. It is true, also, that, in legal theory, sovereignty is absolute, and that, as against foreign nations, the United States may assert, as Spain asserted, absolute power. But it does not follow that, as against the inhabitants of the Philippines, the United States asserts that Spain had such power. When theory is left on one side,

---

[66] Amy Sender, 'Australia's Example of Treatment Towards Native Title: Indigenous People's Land Rights in Australia and the United States' (1999) 25 *Brook. J. Int'l L.* 521, 551-552.
[67] 212 U.S. 449, (1909).
[68] (1906) 7 Phil 132.
[69] Indigenous peoples rights advocates have asserted that 'native title' which referred to Cariño's title is conceptually similar to 'native title' or 'aboriginal title' in common law jurisdictions. However, the U.S. Supreme Court only used the term 'native title' once in the entire length of the *Cariño* decision and referred to a concept of private land title that existed irrespective of any royal grant from the State.
[70] An indigenous cultural community occupying the Cordillera highlands in Luzon, the largest island in the Philippines.
[71] During the early days of the American colonial government, the Philippine Commission was responsible for passing legislation applicable to the Philippine Islands.
[72] *Cariño v Insular Government* 212 U.S. 449, 456 (1909).
[73] Ibid 457.

> sovereignty is a question of strength, and may vary in degree. How far a new sovereign shall insist upon the theoretical relation of the subjects to the head in the past, and how far it shall recognise actual facts, are matters for it to decide.[74]

The U.S. Supreme Court further held that:

> The acquisition of the Philippines was not like the settlement of the white race in the United States. Whatever consideration may have been shown to the North American Indians, the dominant purpose of the whites in America was to occupy the land. It is obvious that, however stated, the reason for our taking over the Philippines was different. No one, we suppose, would deny that, so far as consistent with paramount necessities, our first object in the internal administration of the islands is to do justice to the natives, not to exploit their country for private gain. By the organic act of July 1, 1902, chap. 1369, § 12, 32 Stat. At L. 691, all the property and rights acquired there by the United States are to be administered 'for the benefit of the inhabitants thereof.' It is reasonable to suppose that the attitude thus assumed by the United States with regard to what was unquestionably its own is also its attitude in deciding what it will claim for its own. The same statute made a bill of rights, embodying the safeguards of the Constitution, and like the Constitution, extends those safeguards to all. It provides that no 'no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws' § 5. In the light of the declaration that we have quoted from § 12, it is hard to believe that the United States was ready to declare in the next breath that 'any person' did not embrace the inhabitants of Benguet, or that it meant by 'property' 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.[75] (Emphasis provided)

Considering that the *Cariño* decision heavily relied on the due process clause of the U.S. Constitution, the reasons advanced for upholding Cariño's title over the lands claimed by him have given rise to two interpretations.

First, *Cariño* is considered to have adjudicated native title on the basis of Spanish land laws. Subsequent cases cited *Cariño* as authority for interpreting confirmation of title provisions of public lands laws similarly worded as arts 4 and 5

---

[74] Ibid 457-458.
[75] Ibid 458-459.

of the *Spanish Royal Decree of 1880*.[76] This interpretation posits that all lands, at one time or the other, have been part of the public domain. But lands possesses by private individuals for the required period ceases to be part of the public domain *as provided by law*.

On the other hand, *Cariño* is viewed as standing for the proposition that lands in the possession of private persons since time immemorial are private and are considered never to have been part of the public domain.[77] This interpretation is considered the basis for the argument that private ownership over forest lands[78] may be established by showing time immemorial possession.

The rationale to the recognition given by the U.S. Supreme Court to the 'native title' claim in *Cariño* appeared to be based on indigenous peoples 'first possession' of the lands they occupy or have occupied which is a time-honoured source of rights under property law. This rationale is the most basic reason for recognising rights of indigenous peoples as the land was their first and is particularly central to the claim for recognition of native title.[79] Property rights attaching to possession are theoretically equivalent in all respects to a title based on a Crown grant and perhaps the highest-order rights known to private law, attracting the full range of proprietary remedies.[80] Notwithstanding the fact that 'native title' appeared to have been first established in *Cariño*, the claim appeared to have been grounded on possessory rights and not on the concept of occupation by indigenous peoples as described by Professor McNeil as:

> relative, depending on all the circumstances including the nature and custom on the land, and the condition of life, habits and ideas of people living there. On this basis, nomadic hunters and gatherers have been found to be in occupation of lands in the United Sates and Canada. Moreover, even in England, fishing in

[76] See *Susi v Razon* (1925) 48 Phil 425, *Herico v Dar* (1980) 95 SCRA 437, *Director of Lands v Intermediate Appellate Court* (1986) 146 SCRA 509, *Director of Lands v Court of Appeals* (1992) 205 SCRA 486.
[77] *Oh Cho v Director of Lands* (1946) 75 Phil 890, *Heirs of Amunategui v Director of Forestry* (1983) 126 SCRA 69.
[78] Under the Philippine Constitution, forest lands are inalienable public lands and private ownership over these lands cannot be established through acquisitive prescription.
[79] Andrew Lokan, 'From Recognition to Reconciliation: The Functions of Aboriginal Rights Law' (1999) 23 *Melb. U. L. Rev.* 65, 71.
[80] See Guido Calebresi and A. Douglas Meland, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harvard L. Rev.* 1089.

> bodies of water and hunting on land are evidence of occupation. Thus it is clearly not necessary for lands to be cultivated, fenced, built on or the like to be occupied.[81]

The possessory right on which the 'native title' claim has been established in *Cariño* has always operated on an individualistic and value-laden basis, with strict doctrinal controls on the powerful proprietary remedies identified by Lokan[82] as: first, the need to establish 'possession' in the legal sense—that is, acts showing a sufficient assertion of physical dominion over the land, together with the requisite intent, to be the basis for the legal reward of property rights. This standard is inherently highly flexible, comprising value-based judgments about the desirability of clearly communicating claims to land, and the 'efficient use' of land as a resource.[83] Secondly, is the potential need for a claimant to show that such possession has been continuous as against the Crown, from a time predating Crown's sovereignty. In a case where the Aboriginal claimants are currently in occupation of the land, since the Crown is not in possession, it 'must prove its present title just like everyone else'[84] in order to prevail over the claimants.

European colonising nations have traditionally placed a high value on land cultivation in the context of property rights because it has been thought to imply investment of personal labour, as well as identification with and commitment to a specific piece of land.[85] If traditional precedents about fences, cultivation of crops or grazing of animals, and other signs of continuous 'productive' occupation of land were applied, it is possible that many specific Aboriginal claims to prior possession of land would fail because the claimants had not invested sufficient labour, or derived sufficient production, from the land to 'deserve' property rights in it.[86] The attachment to land exhibited by the petitioner in *Cariño* clearly coincided with non-

---

[81] Kent McNeil, 'A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals' (1990) 16 *Monash U. L. Rev.* 90, 103-104.
[82] Lokan, above n 78, 74-76.
[83] Carol Rose, 'Possession as the Origin of Property' (1985) 52 *University of Chicago L. Rev.* 73, 77-87; Thomas Merrill, 'Property Rules, Liability Rules and Adverse Possession' (1984-1985) 79 *Northwestern University L. Rev.* 1122, 1130-1.
[84] See Kent McNeil, Common Law Aboriginal Title (1989) and authorities cited therein, 85.
[85] Melissa Manwaring, 'A Small Step or a Giant Leap? The Implications of Australia's First Judicial Recognition of Indigenous Land Rights: Mabo and Others v. State of Queensland, 107 A.L.R. 1 (1992) (Austl.) (1993) 34 *Harv. Int'l L.J.* 177 citing Nancy M. Williams, 'The Yolngu and their Land: A System of Land Tenure and the Fight for its Recognition' (1986).
[86] Lokan, above n , 75.

Aboriginal values because there was established by his family, a precise demarcation of boundaries and manifestation of exclusive control (clear manifestations of property rights under both traditional civil law or common law systems). In fact, the petitioner sought to have the lands registered under his name by filing a petition to allege ownership under the mortgage law.[87] It is then inappropriate to equate 'aboriginal title' (the Indian right of occupancy declared by the court in *Johnson v McIntosh,* which is a burden on the absolute title of the crown)[88] with the 'native title' advanced in *Cariño.*[89]

C *FIDUCIARY RELATIONSHIP*

While the fact that the concept of 'native title' as set out by Justice Holmes in *Cariño* is similar to 'aboriginal title' in common law is highly debatable, still it has been established that there was established a fiduciary relationship between the State and the indigenous people similar to the U.S. government policy towards the Native Americans[90] which was clearly demonstrated in the case of *Rubi v Provincial Board of Mindoro*[91] where the Supreme Court through Justice Malcolm held that:

> Reference was made in the President's instructions to the Commission to the policy adopted by the United States for the Indian Tribes. The methods followed by the Government of the Philippine Islands in its dealings with the so-called non-Christian people is said, on argument, to be practically identical with that followed by the United States Government in its dealings with the Indian tribes. Valuable lessons, it is insisted, can be derived by an investigation of the American-Indian policy.

---

[87] *Cariño v Insular Government* (1909) 212 U.S. 449, 456.
[88] 21 U.S. 543, 588, (1823).
[89] The U.S. Supreme Court did not actually create an unequivocal definition of aboriginal title (or native title) in *Cariño* purportedly as '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.' The definition clause, which is found in p 460 of the decision is sought to define the term 'native titles' found in p 458. The widespread used of the term 'native title' in *Cariño* may be traced to Owen James Lynch , Jr., a Visiting Professor at the University of the Philippines College of Law from the Yale University Law School. In 1982, Prof. Lynch published an article in the *Philippine Law Journal* entitled 'Native Title, Private Right and Tribal Land Law' (1982) 57 *PLJ* 268, where he discussed *Cariño* extensively and used the term 'native title' to refer to Cariño's title.
[90] The fiduciary relationships between the United States Government and the Native Americans comes out of the judicial declaration that the nature of the latter as a 'domestic dependent nation,' a doctrine first set out by Chief Justice Marshall in *Cherokee Nation v Georgia* (1831) 30 U.S. (5 Pet.) 1, 16-7, which imposes a duty on the U.S. government to act in the best interest of the natives.
[91] (1919) 39 Phil 660.

> From the beginning of the United States, and even before, the Indians have been treated as 'in a state of pupillage.' The recognised 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.

The fiduciary relationship between the Crown and indigenous peoples has been extensively discussed in cases decided in common law. In *Mabo v Queensland [No 2],*[92] Toohey J used international case law to show that, by assuming sovereignty over native lands, the Crown assumes a fiduciary relationship to native peoples to protect their interests[93] but he particularly relied on *Guerin v The Queen,*[94] in which the Canadian Supreme Court declared that the Canadian government and natives relationship was 'trust-like,' imposing a fiduciary duty on the Government to protect native interests. However, the fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native, or Indian title. In general terms, 'where by a statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary,'[95] and as set out in *Guerin*, the fiduciary obligation is restricted to specific surrender situations in which the Crown acquires the discretionary power to affect adversely the surrendering party's interests.[96] The fact that the Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. As initially recognised in *Guerin,* the fiduciary duty was predominantly a private law concept in character, though the basis on which it was said to arise by various members of the Court left room for its development as a public law right.[97] The Supreme Court further upheld *Guerin* in the more recent case of *Sparrow v The Queen*[98] by formally adopting the fiduciary status recognised in the United States. Furthermore, the public law aspect of the Crown's fiduciary duty was also endorsed on this occasion but has most recently been analysed and applied by the

[92] (1992) 107 ALR 1.
[93] Ibid 156-159.
[94] (1984) 2 SCR 335, 375-376.
[95] Ibid 380.
[96] Ibid 385.
[97] Lokan, above n 78, 104.
[98] (1990) 3 CNLR 160, 180.

Supreme Court in *R v Gladstone*[99] and *Delgamuukw v British Columbia*.[100] However, while the court endorses an expansive notion of the fiduciary duty which appears to encompass the entire relationship between the government and Aborigines, the same duty has also been turned around to become an instrument of legitimation of the infringement of constitutionally guaranteed Aboriginal rights.[101] According to the Supreme Court in *Delgamuukw*, the test where Aboriginal rights could be infringed by justified government regulation has two parts. First, the infringement of the aboriginal right must be in furtherance of a 'compelling and substantial' legislative objective.[102] These are objectives which are directed at either the recognition of prior Aboriginal occupation, or the reconciliation of that occupation with Crown sovereignty; more typically the latter.[103] These objectives include conservation, the pursuit of economic and regional fairness, and a wide range of other typical government objectives. Second, the infringement must be consistent with the 'special fiduciary relationship between the Crown and aboriginal peoples.'[104] The scrutiny with which government measures are analysed will be heavily dependent on the nature of the right asserted and the legal and factual context.[105] In the specific context of Aboriginal title, compelling and substantial objectives are said to include such diverse matters as the development of agriculture, forestry, mining and hydro-electric 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 these aims.[106] As to whether the limitation on the right is consistent with the 'special fiduciary relationship,' that will depend on such matters as whether the government, infringing Aboriginal title, has sought to accommodate and give priority to Aboriginal interests; whether the Aboriginal group has been consulted; and whether compensation has been paid.[107] In most cases, the involvement of aboriginal people in decisions taken about their land will be significantly deeper than mere consultation and may even require the full

[99] [1996] 2 SCR 723; 137 DLR (4th) 648.
[100] [1997] 3 SCR 1010; 153 DLR (4th) 193. For a detailed analysis of this decision see: Case Note: Maureen Tehan, Delgamuukw v British Columbia (1998) 22 *Melb. U. L. Rev.* 763.
[101] Lokan, above n 78, 109.
[102] Ibid 1107.
[103] Ibid 1107-1108.
[104] Ibid 1108.
[105] Ibid 1108-1111.
[106] Ibid 1111.
[107] Ibid 1111-1114.

consent of the aboriginal nation.[108] The Supreme Court referred to the 'inescapably economic aspect'[109] of aboriginal title, which suggests that the payment and level of compensation are relevant to the justification test, although the Court did not discuss the level of that compensation.

IV *INDIGENOUS PEOPLES RIGHTS ACT 1997* (IPRA)

Indigenous peoples face two primary land tenure problems: whether the government recognises their land claims, and assuming that there is such recognition, whether there is such a process to demarcate the traditional lands subject of such claims.[110] The establishment of a more permanent framework in the form of a statute, for the recognition of title to indigenous lands as a legal entitlement is heavily reliant not only on the government enacting such a statute but honouring the framework the statute provides.[111] Nevertheless, while this alternative is considered tenuous, a formal and statutory process for recognition and demarcation will best secure indigenous land tenure.[112]

The *Indigenous Peoples Rights Act 1997*[113] (IPRA) was signed into law on 29 October 1997 and became effective on 22 November 1997 upon completion of the required publication. The law seeks to put into legislation the significant constitutional provisions pertaining to the protection of the rights of indigenous cultural communities to their ancestral lands and the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.[114] It was also passed in recognition of the international principles, under ILO Convention 169 and the UN Declaration on the Rights of Indigenous

---

[108] Ibid 1113.
[109] Ibid.
[110] Beth Ganz, 'Indigenous People and Land tenure: An Issue of Human Rights and Environmental Protection,' (1996) 9 *Geo. Int'l Envtl. L. Rev.* 173, 176.
[111] Ibid 178.
[112] Ganz discusses three other avenues to secure land rights for indigenous peoples: negotiation with the government for control or input into particular decisions made on indigenous lands; a challenge to the unsolicited activity undertaken on indigenous land made on domestic courts; and upon failure of these domestic remedies, elevating the matter to an international tribunal.
[113] *Republic Act No. 8371*.
[114] See note n 1 for an enumeration of these constitutional provisions.

Peoples, of the condemnation of social and racial discrimination and acknowledgement of inherent native title to land.[115] The law seeks to implement these by:

- Enumerating the civil and political rights[116] of indigenous cultural communities/indigenous peoples[117];

- Enumerating the social and cultural rights[118] of indigenous cultural communities/indigenous peoples;

- Establishing a legislative regime for the protection of cultural heritage[119];

- Recognising a general concept of indigenous property right and granting title thereto[120]; and

- Creating a bureaucracy[121] with administrative,[122] quasi-legislative,[123] and quasi-judicial[124] functions to coordinate implementation of the law and adjudicate matters involving the recognition of indigenous cultural communities'/indigenous peoples' property rights over ancestral lands and ancestral domains.

The law was based on the legal concept of 'native title' as enunciated in *Cariño* and justified under the principle of *parens patriae* inherent in the supreme power of the State and deeply embedded in Philippine legal tradition which declares that persons suffering from serious disadvantaged or handicap, which places them in a

[115] Guide to R.A. 8371 prepared by the Coalition for Indigenous Peoples' Rights and Ancestral Domains in cooperation with the International Labour Organisation and BILANCE-Asia Department.
[116] *IPRA* ss 13-28.
[117] Under s 3(h) of IPRA, the term refers to homogenous societies identified by self-ascription and ascription by others, who have continuously lived as a community on communally bounded and defined territory, sharing bonds of language, customs, traditions and other distinctive cultural traits, and who have, through resistance to political, social and cultural inroads to colonisation, non-indigenous religions and culture, become historically differentiated from the majority of Filipinos.
[118] *IPRA* ss 29-36.
[119] *IPRA* ss 32, 33, and 37.
[120] *IPRA* ss 51-64.
[121] The National Commission on Indigenous Peoples.
[122] *IPRA* ss 44(a), (b), (c), (d), (f), (g), (h), (l), (j), (k), (l), (m), (n), and (p).
[123] *IPRA* s 44(o).
[124] *IPRA* ss 44(e), 51, 52, 53,54, and 62.

position of actual inequality in their relation or transactions with others, are entitled to the protection of the State.[125]

The law recognises the right of indigenous peoples to 'self governance'[126] and the principle of self-delineation in the identification and delineation of ancestral lands.[127] It also recognises the limited use of customary laws to resolve disputes involving indigenous peoples,[128] as a set of norms that would be used in case of conflict about the boundaries and the tenurial rights with respect to ancestral domains,[129] and the option of using customary processes by an offended party for offences under the law so long as it does not amount to cruel, degrading or inhuman punishment.[130]

A most important provision in the law is its recognition of the right to non-discrimination of indigenous peoples[131] where ethnicity becomes an unacceptable basis for classification unless it is in 'due recognition of the characteristics and identity' of a member or a class of indigenous peoples and classification is allowed only to provide affirmative action in their favour.[132] The cultural identity rationale for recognising indigenous peoples rights, which has deep philosophical and historical roots, is based on the perspective that aboriginal societies are definable groups, with definable cultures, whose members have a moral and legal right to such legal recognition and protection as may be necessary to allow their culture to survive and flourish.[133] Acknowledging that the law of native title is as much about preserving indigenous peoples' cultural identity as it is about remedying dispossession, or enhancing equality in an abstract sense, makes it easier to understand why it should be

---

[125] Juan M. Flavier, 'Sponsorship Speech of the Indigenous Peoples' Rights Act' (1996). Senator Flavier is the principal sponsor of Senate Bill No. 1728 and chaired the Committee on Cultural Communities, which together with the Committees on Environment and Natural Resources, Ways and Means, and Finance, submitted joint Committee Report No. 236 re: Indigenous Peoples' Rights Act of 1996 under the substitute bill – Senate Bill No. 1728.
[126] *IPRA* s 13.
[127] *IPRA* s 51.
[128] *IPRA* s 65.
[129] *IPRA* s 63.
[130] *IPRA* s 72.
[131] *IPRA* s 21.
[132] Marvic M.V.F. Leonen, 'The Indigenous Peoples Rights Act of 1997 (Republic Act No. 8371): Will this Legal Reality Bring Us to a More Progressive Level of Political Discourse?' (1998) 9 *Phil. Nat. Res. L.J.* 7, 9.
[133] Lokan, above n 78, 85.

regarded as sui generis, and (at times) deserving of special treatment in its intersection with other branches of law such as the law of evidence or possession.[134]

There are however, countervailing values raised by the 'cultural identity' rationale which are: first, the equality claims of competing non-indigenous groups and second, the potential threat to state sovereignty (i.e. majoritarian rule). At any time that a particular group or individual is given special status or treatment, there is perceived to be an equality-based claim (in the formal equality sense) by non-recipients. As far as the dominant non-indigenous culture is concerned, such claims can be answered by the contrast between the precarious position of the indigenous minority, which must consistently struggle to survive in a cohesive form, and the more secure position of the majority, whose culture is continually reflected, reproduced and reinforced in majoritarian institutions.[135] The second countervailing value, that of state sovereignty, is intractably in conflict with the cultural identity rationale. Any legal recognition of Aboriginal custom will involve some dilution of the state's power to determine and enforce norms, just as Aboriginal submission to state sovereignty (i.e. government by the majority, according to the majority's norms) inherently qualifies the expression of Aboriginal identity. For this reason, while Aboriginal rights and native title may be grounded in part in Aboriginal custom, the legal acceptance of these rights is somewhat grudging and limited, and hedged by doctrinal devices designed to allow state sovereignty to be (re)asserted at critical moments.[136] Thus the foundation of Aboriginal rights on the value protecting cultural identity runs directly into the countervailing value of acknowledging state sovereignty and any concession to Aboriginal self-government must, at some level represent a diminution of state sovereignty.[137] More tellingly, it appears that even the initial recognition of custom-based native title may be conditional on the specific customs not infringing the core values of the majority.[138]

---

[134] Ibid 90.
[135] Ibid 90-91.
[136] Ibid 91-92.
[137] Ibid 102.
[138] In the Philippine context, custom from which customary law is derived from, is given recognition by the *Civil Code* as a source of law but it shall not be countenanced if contrary to law, public order or public policy (Art 11) and must be proved as a fact, according to the rules of evidence (Art 12).

The most ambiguous provisions of the law pertain to the rights of ownership over natural resources found in ancestral domains[139] *vis-a-vis* the Regalian Doctrine.

[139] The sections are enumerated as:

> 3(a) *Ancestral Domains* – Subject to Section 56 hereof, refer to all areas generally belonging to ICCs/IPs comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possesses by ICCs/IPs, by themselves or through their ancestors, communally or individually since time immemorial, continuously to the present except when interrupted by war, *force majeure* or displacement by force, deceit, stealth or as a consequence of government projects or any other voluntary dealings entered into by government and private individuals/corporations, and which are necessary to ensure their economic, social and cultural welfare. It shall include ancestral lands, forests, pasture, residential, agricultural, and other lands individually owned whether alienable and disposable or otherwise, hunting grounds, burial grounds, worship areas, bodies of water, mineral and other natural resources, and lands which may no longer be exclusively occupied by ICCs/IPs but from which they traditionally had access to for their subsistence and traditional activities, particularly the home ranges of ICCs/IPs who are still nomadic and/or shifting cultivators.
>
> 3(e) *Communal Claims* – refer to claims on land, resources and rights thereon, belonging to the whole community within a defined territory.
>
> 3(o) *Sustainable Traditional Resource Rights.* – refer to the rights of ICCs/IPs to sustainably use, manage, protect and conserve a) land, air, water, and minerals; b) plants, animals and other organisms; c) collecting, fishing and hunting grounds; d) sacred sites; and e) other areas of economic, ceremonial and aesthetic value in accordance with their indigenous knowledge, beliefs, systems and practices.
>
> 5. *Indigenous Concept of Ownership.* – Indigenous concept of ownership sustains the view that ancestral domains and all resources found therein shall serve as the material bases of their cultural integrity. The indigenous concept of ownership generally holds that ancestral domains are the ICC's/IP's private but community property which belongs to all generations and therefore cannot be sold, disposed or destroyed. It likewise covers sustainable traditional resource rights.
>
> 7. *Rights to Ancestral Domains.* – The rights of ownership and possession of ICCs/IPs to their ancestral domains shall be recognised and protected. Such rights shall include:
>
> a) *Right of Ownership* – The right to claim ownership over lands, bodies of water traditionally and actually occupied by ICCs/IPs, sacred places, traditional hunting and fishing grounds, and all improvements made by them at any time within the domains;
>
> b) *Right to Develop Lands and Natural Resources* – Subject to Section 56 hereof, right to develop, control and use lands and territories traditionally occupied, owned, or used; to manage and conserve natural resources within the territories and uphold the responsibilities for future generations; to benefit and share the profits from allocation and utilisation of the natural resources found therein; the right to negotiate the terms and conditions for the exploration of natural resources in the areas for the purpose of ensuring ecological, environmental protection and the conservation measures, pursuant to national and customary laws; the right to an informed and intelligent participation in the formulation and implementation of any project, government or private, that will affect or impact upon the ancestral domains and to receive just and fair compensation for any damages which they may sustain as a result of the project; and the right to effective measures by the government to prevent any interference with, alienation and encroachment upon these rights;
>
> 52(i) *Turnover of Areas Within Ancestral Domains Managed by Other Government Agencies.* – The Chairperson of the NCIP shall certify that the area covered is an ancestral domain. The secretaries of the Department of Agrarian reform, Department of Environment and Natural

Where a resource or an element of the natural environment is the property of the State, property rights may be divested in accordance with a regulatory scheme where the essential requisite to the exploitation of a resource is the acquisition of a title or privilege which emanates from the State. While resource developers are accustomed to operate in a variety of political and economic environments, native title claims often couch in terms that are substantially different from land holding systems familiar to common and civil law jurisdictions, were perceived to be a cloud to title or privilege. Even if where the title to subsurface resources has been retained by the

---

Resources, Department of the Interior and Local Government, and Department of Justice, the Commissioner of the National Development Corporation, and any other government agency claiming jurisdiction over the area shall be notified thereof. Such notification shall terminate any legal basis for the jurisdiction previously claimed.

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

57. *Natural Resources within Ancestral Domains.* – The ICCs/IPs shall have priority rights in the harvesting, extraction, development or exploitation of any natural resources within the ancestral domains. A non-member of the ICCs/IPs concerned may be allowed to take part in the development and utilisation of the natural resources for a period of not exceeding twenty-five (25) years renewable for not more than twenty-five (25) years: *Provided*, That a formal and written agreement is entered into with the ICCs/IPs concerned or that the community, pursuant to its own decision making process, has agreed to allow such operation: *Provided, finally,* That the NCIP may exercise visitorial powers and take appropriate action to safeguard the rights of the ICCs/IPs under the same contract.

58. *Environmental Considerations.* – Ancestral domains or portions thereof, which are found to be necessary for critical watersheds, mangroves, wildlife sanctuaries, wilderness, protected areas, forest cover, or reforestation as determined by appropriate agencies with the full participation of the ICCs/IPs concerned shall be maintained, managed and developed for such purposes. The ICCs/IPs concerned shall be given the responsibility to maintain, develop, protect and conserve such areas with the full and effective assistance of government agencies. Should the ICCs/IPs decide to transfer the responsibility over the areas, said decision must be made in writing. The consent of the ICCs/IPs should be arrived at in accordance with its customary laws without prejudice to the basic requirements of existing laws on free and prior informed consent: *Provided*, That the transfer shall be temporary and will ultimately revert to the ICCs/IPs in accordance with a program for technology transfer: *Provided, further,* That no ICCs/IPs shall be displaced or relocated for the purpose enumerated under this section without the written consent of the specific persons authorised to give consent.

59. *Certification Precondition.* – All departments and other governmental agencies shall henceforth be strictly enjoined from issuing, renewing, or granting any concession, licence or lease, or entering into any production-sharing agreement, without prior certification from the NCIP that the area affected does not overlap with any ancestral domain. Such certification shall only be issued after a field-based investigation is conducted by the Ancestral Domains Office of the area concerned: *Provided*, That no certification shall be issued by the NCIP without the free and prior informed and written consent of ICCs/IPs concerned: *Provided, further,* That no department, government agency or government-owned or –controlled corporation may issue new concession, license, lease, or production sharing agreement while there is a pending application for a CADT: *Provided, finally*, That the ICCs/IPs shall have the right to stop or suspend, in accordance with this Act, any project that has not satisfied the requirement of this consultation process.

State, the impact of native title particularly the right to veto by aboriginal claimants may prevent exploration or halt existing operations.[140] On the other hand, indigenous peoples' rights advocates will argue that without ownership or possession rights, an indigenous community cannot exclude others from its land and therefore has no control over the development of the land's natural resources which will put the resources in jeopardy or require the resource developers to sustainably develop the land's resources.[141] At one extreme is when radical elements seeking political ascendancy in indigenous peoples' organisations will likely whip up anger and resentment against established property rights or holders of native title claims may become inflexible to reasonable demands.[142] Predictably, the newly established bureaucracy mandated to enforce the law, the National Commission on Indigenous Peoples, took a position that native title rights included rights to natural resources[143] while the agency tasked with the function prior to the law's enactment, the Department of Environment and Natural Resources, took a different view. The impact of pre-existing native title to wide ranging legislations covering resources development under the auspices of the State inevitably culminated with the constitutional challenge against the law.

V *IPRA* CONSTITUTIONAL CHALLENGE: *CRUZ v. SECRETARY OF ENVIRONMENT AND NATURAL RESOURCES*

IPRA was sieged from the very start of its implementation.[144] Following the time frame and processes provided under the law, the first set of Commissioners[145] were appointed except two who would come from the ethnographic regions of the

[140] See G.P.J. McGinley, 'Natural Resources Companies and Aboriginal Title to Land: The Australian Experience—Mabo and its Aftermath' (1994) 28 *Int'l Law.* 695.
[141] Ganz, above n 109, 176-177.
[142] McGinley, above n 139, 698.
[143] David Daoas, 'Implications of the Indigenous Peoples' Rights Act of 1997 on the Development of the Nation's Natural Resources.' Daoas was the first appointed Chair of the National Commission on Indigenous Peoples.
[144] Florence Umaming Manzano, 'An Analysis on the Current Status of the IPRA Implementation.'
[145] S 40 of *IPRA* states: The NCIP shall be an independent agency under the Office of the President and shall be composed of seven (7) commissioners belonging to ICCs/IPs, one (1) of whom shall be the Chairperson. The Commissioners shall be appointed by the President of the Philippines from a list of recommendees submitted by authentic ICCs/IPs: *Provided,* that the seven (7) Commissioners shall be appointed specifically from each of the following ethnographic areas: region I and the Cordilleras; Region II; the rest of Luzon; Island Groups including Mindoro, Palawan, Romblon, Panay and the rest of the Visayas; Northern and Western Mindanao; Southern and Eastern Mindanao; and Central Mindanao: *Provided,* That at least two (2) of the seven (7) Commissioners shall be women.

Island group and Central Mindanao. With these appointments, the NCIP and its non-governmental organisation partners conducted regional consultations for inputs from the indigenous peoples and other stakeholders in the drafting of *IPRA's* implementing rules and regulations,[146] which was eventually adopted in June 1998. The NCIP's next step then was to convene the consultative body that would establish the criteria for the hiring of NCIP personnel. The NCIP also explored the establishment of partnership with the United Nations Development Programme (UNDP) for the development of a programme towards the empowerment of indigenous peoples. With the advent of the new presidency[147] however, the position of NCIP Chair, which is a political appointment, became an issue with the appointment of a person who comes from an ethnographic region already occupied by another person. This action, together with the appointment of a non-indigenous person to the position of NCIP Executive Director,[148] was attributed by indigenous peoples' rights advocate to the intervention of the newly-appointed Secretary of Environment and Natural Resources who was perceived as anti-*IPRA* since he was one of the staunchest critic of the bill when it was being deliberated in Congress.[149] The new administration also appointed a Presidential Assistant for Indigenous Peoples whose duties and responsibilities seem to over-ride the function of the NCIP. Furthermore, the Executive Secretary issued *Memorandum No. 21,* which not only created an ad hoc committee assigned to study the issues relative to the constitution and administrative set-up and operation of the NCIP but also directed the Department of Budget and Management to withhold the release of funds for the NCIP which paralysed its operation. Some of the NCIP Commissioners also became respondents to administrative complaints, which cause the Executive Secretary to issue *Administrative Order No. 42* directing the Department of Justice to investigate these complaints.

The siege did not only come from the Executive branch of government but from some sectors of civil society as well. The law was seen as a compromise in a sense

---

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

[147] Joseph Estrada was elected as President of the Republic of the Philippines after Fidel Ramos and was sworn into office on June 1998.

[148] See Guide to IPRA, above at n , 24-25. While the s 49 of IPRA made no mention that the position of Executive Director be given to an IP, indigenous peoples' rights advocates believe that the balance weighs heavily in favour of appointing one from the IPs.

[149] Ma. Vicenta P. de Guzman, 'Working with Congress for the Enactment of IPRA: The NGO-PO Experience' (Paper Presented at the Seminar-Workshop on the Legislative Agenda of the New Senate for Health, Water and the Environment, Manila, July 1998).

that other political interests had to be accommodated in Congress and its language and concepts encourage litigation.[150] It was argued that even those situations where the law prescribes the use of customary law will require some form of litigation to determine for instance whether a particular norm is customary and traditional, to whom it will apply, in what situations will it be not in accordance with national law and even when the penalty provided for is 'cruel, degrading and inhuman.'[151] Some groups criticised how IPRA made the indigenous peoples as the most burdened private property owners under current Philippine laws.[152] The provision that 'property rights within ancestral domains already existing and/or vested upon effectivity of this Act shall be recognised and respected'[153] was viewed as making the law useless.

In less than a year *IPRA* was passed, a constitutional challenge was lodged with the Supreme Court by a former Supreme Court Justice who not a few would believe was fronting for the mining interest,[154] alleging that *IPRA's* provisions on ICC's/IPs ownership and control and supervision over natural resources located in ancestral domains and lands are unconstitutional in violation of the Regalian doctrine.[155] Named respondents to the case were the Secretary of Environment and Natural Resources, the Secretary of Budget and Management and the Chair and Commissioners of the NCIP.[156] In an unexpected development, the Office of the Solicitor General who represents the respondents commented that the *IPRA* provisions at issue are indeed unconstitutional.[157] As expected the NCIP filed a separate

---

[150] Leonen, above n 131, 37-45.
[151] Ibid 40.
[152] See *IPRA* s 9.
[153] *IPRA* s 56.
[154] Victoria Tauli-Corpuz, 'Igorots: In Defence of Home' *UNESCO Courier,* 1 September 2000.
[155] The case became known as *Cruz v Secretary of Environment and Natural Resources, et al.*
[156] Petitioners sought the issuance of a writ of prohibition to prohibit respondents Secretary of the Department of Environment and Natural Resources and the Commissioners of NCIP from implementing specific provisions of *IPRA and its Implementing Rules and Regulations*. Petitioners also sought a writ of prohibition to prohibit respondent Secretary of Budget and Management from disbursing funds in connection with the implementation of the unconstitutional provisions of IPRA. Finally, petitioners sought a writ of mandamus to compel the Secretary of Environment and Natural Resources to comply with the legal responsibility to carry out the State's constitutional mandate to control and supervise the exploration, development, utilisation and conservation of the country's natural resources.
[157] The Supreme Court has upheld that the Office of the Solicitor General (OSG) may take a position contrary and adverse to that of the Government on the reasoning that it is incumbent upon the OSG to present to the Court what it considers would legally uphold the best interest of the government though it may run counter to the government's position.

comment arguing for its constitutionality. Several indigenous peoples group also filed an intervention on the ground that the position taken by the Solicitor General and the NCIP 'prejudiced the legal rights of the intervenors.'[158] The constitutional challenge not only became a hotly debated subject between civil society on one hand and the government and business on the other, but also affected the then peace negotiations with the Communist Party of the Philippines.[159]

The Supreme Court[160] promulgated a resolution dated 6 December 2000 where it declared that of the fourteen (14) judges who participated in deliberating the petition, seven (7) voted to dismiss the petition[161] and seven (7) other members voted to grant the petition.[162] As the votes were equally divided (7 to 7) and the necessary majority was not obtained, the case was redeliberated upon. However, after redeliberation, the voting remained the same and thus, pursuant to *Rule 56, Section 7* of the *Rules of Civil Procedure,* the petition was dismissed and *IPRA* was declared constitutional.

The concept of 'native title' in *Cariño* was interpreted by the Supreme Court as applicable only to lands, which have always been considered as private and not to lands of the public domain.[163] The Court made a distinction between ownership of land under native title and ownership by acquisitive prescription against the State by

---

[158] The principal sponsor of the bill, which became *IPRA* filed a Comment-in-Intervention with some group of indigenous peoples represented by the Legal Rights and Natural Resources Center, the local affiliate of Friends of the Earth. The Supreme Court also allowed the intervention of the Commission of Human Rights and the Ikalahan Indigenous People and Haribon Foundation for the Conservation of Natural Resources, Inc.

[159] The members of the Government of the Republic of the Philippines Peace Panel wrote the Chief Justice of the Supreme Court to dismiss the petition because to declare *IPRA* unconstitutional will affect the outcome of the peace negotiation with the communist insurgents.

[160] The Full Bench of the Supreme Court is fifteen (15) justices. One justice has just recently retired when *IPRA's* constitutionality was decided.

[161] Kapunan J filed an opinion, which Davide CJ and Belosillo, Quisumbing, and Santiago JJ joined. Puno J also filed a separate opinion sustaining all challenged provisions of the law with the exception of s 57 of *IPRA* and certain provisions of its *Implementing Rules and Regulations*. Mendoza J voted to dismiss the petition solely on the ground that it does not raise a justiciable controversy and petitioners do not have standing to question the constitutionality of *IPRA*.

[162] Panganiban J filed a separate opinion expressing the view that ss 3(a)(b), 5, 6, 7(a)(b), 8 and related provisions of *IPRA* are unconstitutional. He reserved judgment on the constitutionality of ss 58, 59, 65, and 66 of the law, which he believed must await the filing of specific cases by those whose rights may have been violated by *IPRA*. Vitug J also filed a separate opinion expressing the view that ss 3(a), 7, and 57 of *IPRA* are unconstitutional. Melo, Pardo, Buena, Gonzaga-Reyes, and de Leon JJ join in the separate opinions of Panganiban and Vitug JJ.

[163] *Cruz v Secretary of Environment and Natural Resources, et al.*[2000] G.R. No. 135385 (Unreported, Kapunan J, 6 December 2000) [28].

holding that ownership by virtue of native title presupposes that, the land has been held by its possessor and his predecessors-in-interest in the concept of an owner since time immemorial.[164] The land was not acquired from the State, that is, Spain or its successors-in-interest, the United States and the Philippine Government, and there was no transfer from the State as the land has been regarded as private in character as far back as memory goes.[165] On the other hand, ownership of land by acquisitive prescription against the State involves a conversion of the character of the property from alienable public land to private land, which presupposes a transfer of title from the State to a private person.[166]

The Court reiterated its narration of Philippine legal history in *Cariño* by stating that the Philippines was considered as terra nullius when Spain acquired sovereignty over it in the 16th century.[167] This did not mean that Spain acquired title to all lands in the archipelago for the Spanish Crown was considered to have acquired dominion only over the unoccupied and unclaimed portions of the lands.[168] Neither was native title disturbed by the Spanish cession of the Philippine Islands to the United States because under the Treaty of Paris, the cession of the Philippines did not impair any right to property existing at that time.[169] The recognition of native title, according to the Court, continued during the American colonial regime with the *Philippine Bill of 1902* providing that property and rights acquired by the U.S. through cession from Spain were to be administered for the benefit of the Filipinos.[170] Both McKinley's Instructions and the *Philippine Bill of 1902* contained a bill of rights embodying the safeguards of the U.S. Constitution, where one of such rights was that 'no person shall be deprived of life, liberty or property without due process of law.'[171] These vested rights were in turn expressly protected by the due process clause of the 1935 Constitution.[172]

---

[164] Ibid.
[165] Ibid.
[166] Ibid.
[167] Ibid 29.
[168] Ibid.
[169] Ibid 32.
[170] Ibid 33.
[171] Ibid.
[172] Ibid.

The Supreme Court also declared that the provisions of *IPRA* do not infringe upon the State's ownership over natural resources within the ancestral domains. Interpreting the ambiguous provisions of *IPRA*, the Court clarified that the definition of the term 'ancestral domains' in s 3(a) of *IPRA* merely defines the coverage of ancestral domains, and describes the extent, limit and composition of ancestral domains by setting forth the standards and guidelines in determining whether a particular area is to be considered as part of and within the ancestral domains.[173] It does not confer or recognise any right of ownership over the natural resources to the indigenous peoples because its purpose is definitional and not declarative of a right or title.[174] The Court explained that the mere fact that s 3(a) defines ancestral domains to include natural resources found therein does not *ipso facto* convert the character of such natural resources as private property of the indigenous peoples.[175] Similarly, s 5 in relation to s 3(a) cannot be construed as a source of ownership rights of indigenous peoples over the natural resources simply because it recognises ancestral domains as their 'private but community property', which is merely descriptive of their concept of ownership as distinguished from that provided in the *Civil Code*.[176] Furthermore, s 7 makes no mention of any right of ownership because s 7(a) merely recognises the 'right to claim ownership over lands, bodies of water traditionally and actually occupied by indigenous peoples, sacred places, traditional hunting and fishing grounds, and all improvements made by them at any time within the domains' and s 7(b), which enumerates certain rights of the indigenous peoples over the natural resources found within their ancestral domains, does not contain any recognition of ownership *vis-à-vis* the natural resources.[177]

In relation to the concept of 'native title' in *Cariño,* the Court held that the concept of native title to natural resources, unlike native title to land, has not been recognised in the Philippines which the NCIP and some intervenors would like it to believe.[178] The Court explained that while native title to land or private ownership of land by virtue of time immemorial possession in the concept of an owner was

[173] Ibid 46.
[174] Ibid.
[175] Ibid 47.
[176] Ibid.
[177] Ibid 49.
[178] Ibid 50.

acknowledged and recognised as far back during Spanish colonisation, there was no favourable treatment to natural resources when it held:

> The unique value of natural resources has been acknowledged by the State and is the underlying reason for its consistent assertion of ownership and control over said natural resources from the Spanish regime up to the present. Natural resources, especially minerals, were considered by Spain as an abundant source of revenue to finance its battles in wars against other nations. Hence, Spain, by asserting its ownership over minerals wherever these may be found, whether in public or private lands, recognised the separability of title over lands and that over minerals which may be found therein.
>
> On the other hand, the United States viewed natural resources as a source of wealth for its nationals. As the owner of natural resources over the Philippines after the latter's cession from Spain, the United States saw it fit to allow both Filipino and American citizens to explore and exploit minerals in public lands, and to grant patents to private mineral lands. A person who acquired ownership over a parcel of private mineral land pursuant to the laws then prevailing could exclude other persons, even the State, from exploiting minerals within his property. Although the United States made a distinction between minerals found in public lands and those found in private lands, title in these minerals was in all cases sourced from the State. The framers of the 1935 Constitution found it necessary to maintain the State's ownership over natural resources to insure their conservation for future generations of Filipinos, to prevent foreign control of the country through economic domination; and to avoid situations whereby the Philippines would become a source of international conflicts, thereby posing danger to its internal security and independence.
>
> The declaration of State ownership and control over minerals and other natural resources in the 1935 Constitution was reiterated in both the 1973 and 1987 Constitutions.[179]

The Supreme Court further held that the rights given to the indigenous peoples regarding the exploitation of natural resources under ss 7 and 57 of *IPRA* only amplified what has been granted to them under existing laws[180] but the State retains full control over the exploration, development and utilisation of natural resources.[181] The rights given to the indigenous peoples are limited only to the following: 'to manage and conserve natural resources within territories and uphold it for future generations; to benefit and share the profits from allocation and utilisation of the

[179] Ibid 50-54.

[180] The *Small-Scale Mining Act 1991* provides that should an ancestral land be declared as a people's small-scale mining area, the members of the indigenous peoples living within said area shall be given priority in the awarding of small-scale mining contracts. The *Philippine Mining Act 1995* declares that no ancestral land shall be opened for mining operations without the prior consent of the indigenous cultural community concerned and in the event that the members of such indigenous cultural community give their consent to mining operations within their ancestral land, royalties shall be paid to them by the parties to the mining contract.

[181] *Cruz v Secretary of Environment and Natural Resources, et al.* 59-60.

natural resources found therein; to negotiate the terms and conditions for the exploration of natural resources in the areas for the purpose of ensuring ecological, environmental protection and the conservation measures, pursuant to national and customary laws; to an informed and intelligent participation in the formulation and implementation of any project, government or private, that will affect or impact upon the ancestral domains and to receive just and fair compensation for any damages which may sustain as a result of the project, and the right to effective measures by the government to prevent any interference with, alienation and encroachment of these rights.'[182] The Supreme Court noted that the right to negotiate terms and conditions granted under s 7(b) pertains only to the exploration of natural resources, which is merely a preliminary activity and cannot be equated with the entire process of 'exploration, development and utilisation' of natural resources which under the Constitution belong to the State.[183] The Court interpreted s 57 as only granting to indigenous peoples 'priority rights' in the utilisation of natural resources, not absolute ownership nor exclusive rights but only the right of preference or first consideration in the award of privileges provided by existing laws and regulations, with due regard to the needs and welfare of indigenous peoples living in the area.[184] The Court stressed that the grant of priority rights does not preclude the State from undertaking activities, or entering into co-production, joint venture or production-sharing agreements with private entities, to utilise the natural resources which may be located within the ancestral domains nor is there any intention, as between the State and the indigenous peoples, to create a hierarchy of values.[185] Also, the grant of priority rights to the indigenous peoples does not mean excluding non-indigenous peoples from undertaking the same activities within the ancestral domains upon authority granted by the proper governmental agency because to do so would unduly limit the ownership rights of the State over the natural resources.[186]

The Court has also effectively clipped the power of the NCIP by holding that since the natural resources which may be found within the ancestral domains belong to the State, the jurisdiction of the NCIP with respect to ancestral domains under s

[182] Ibid 60-61.
[183] Ibid 61.
[184] Ibid.
[185] Ibid 62.
[186] Ibid.

52(i) extends only to the lands and not to the natural resources therein.[187] However, the Court did not elaborate how administrative powers between the NCIP and the other government agencies will be allocated. The quasi-judicial power of the NCIP was subjected to sufficient checks because its decisions are appealable to the Court of Appeals.[188] The Court also took the opportunity to interpret Rule VII Part II s 1 of the *Implementing Rules and Regulations of IPRA,* which provides that 'the administrative relationship of the NCIP to the Office of the President is characterised as a lateral but autonomous relationship for purposes of policy and program coordination.' The Court held that though the NCIP has been characterised as an independent agency under the Office of the President, such characterisation does not remove it from the President's control and supervision. The diverse nature of the NCIP's functions renders it impossible to place it entirely under the control of only one branch of government. Nevertheless, the NCIP, although independent to a certain degree, was placed by Congress 'under the Office of the President' and, as such, is still subject to the President's power of control and supervision with respect to its performance of administrative functions.[189]

However, the Court declared the need for prior informed consent of indigenous peoples before any search for or utilisation of the natural resources within their ancestral domains is undertaken.[190] Where the State intends to directly or indirectly undertake such activities, it must, as a matter of policy and law, consult the indigenous peoples in accordance with the intent of the framers of the Constitution that national development policies and programs should involve a systematic consultation to balance local needs as well as national plans.[191] *IPRA* grants to the indigenous peoples the right to an informed and intelligent participation in the formulation and implementation of any project, government or private, and the right not to be removed therefrom without their free and prior informed consent.[192] As to non-members, the prior informed consent takes the form of a formal and written agreement between the indigenous peoples and non-members.[193]

---

[187] Ibid 54-55.
[188] Ibid 73-74.
[189] Ibid 72-74.
[190] Ibid 63.
[191] Ibid.
[192] Ibid 63-64.
[193] Ibid 64.

The ruling of the Supreme Court to dismiss the petition was due to the fact that the justices were unable to break the deadlock twice and the resolution, which in effect was a 'decision without a decision' suffers from an inherent instability and may not prevent other aggrieved parties from lodging a similar challenge to *IPRA*. In fact, the Petitioners have filed a Motion for Reconsideration which is expected to be denied by the Supreme Court. But the decision itself suffers from certain legal inconsistencies.

The Supreme Court's declaration that the Philippine archipelago was terra nullius when Spain acquired sovereignty can be analysed using the pre-*Mabo* description of Australia whose indigenous inhabitants were people described as too low in the scale of social organisation to be acknowledged as possessing rights and interests in land. If we are to apply the doctrine of expanded terra nullius, it would undoubtedly involve the presumption that the native inhabitants were not sufficiently advanced in Western terms to possess a modicum of property law. It then defeats the pre-conquest title of this people because terra nullius is in fact a declaration that the only law is the law brought by the Spaniard *conquistadores.* If such was the case, then Spain acquired both imperium and dominium over the whole Philippines or to put it in common law, there were no antecedent rights and interests in land possessed by the indigenous inhabitants of the territory which survived the change in sovereignty that constituted a burden on the radical title of the Crown.

The decision no doubt placed the lingering debate in the interpretation of *Cariño* to rest with a Court declaration denying the premise that the Igorot established acquisitive prescription, and title to his ancestral land was transferred from the State, as original owner, to him by virtue of that prescription. The only burden to any applicant who may want to use this precedent and which may constrain the Court to apply the doctrine in this ruling is the fact that when the Igorot demarcated the boundaries to the land and manifested exclusive control by introducing improvements thereto, similar signs of continuous 'productive' occupation of the land will have to be shown by the applicant. It is then possible that traditional pattern of land holdings e.g. non-exclusive access to communal hunting grounds or sacred sites under customary law may fail to establish 'native title' as recognised in *Cariño* if the Court resorts to a

restrictive application of 'occupation by individuals under a claim of private ownership' denoting exclusive possession.

It is worth pointing out in the separate judgment of Puno J where he held that the rights of the indigenous peoples to their ancestral domains and ancestral lands is not only acquired by native title but by operation of the Torrens titling system as well.[194] He basically upheld s 12 of *IPRA* by explaining that the latter is possible for ancestral lands that are owned by individual members of the indigenous cultural communities who, by themselves or through their predecessors-in-interest, have been in continuous possession and occupation of the same in the concept of owner since time immemorial[195] or for a period of not less than 30 years, which claims are uncontested by the members of the same communities, may be registered under the *Public Land Act*[196]or the *Land Registration Act*.[197] For purposes of registration, the individually-owned ancestral lands are classified as alienable and disposable agricultural lands of the public domain so long as they are agricultural in character and are actually used for agricultural, residential, pasture and tree farming purposes and regardless of whether they have a slope of 18% or more. The implication is that it negates s 8(a) of *IPRA,* which describes ancestral lands as the private properties of families, groups of families or clans and the transfer of rights over ancestral lands is governed by customary law, and such transfer or alienation is to/among members of the same community. By giving an imprimatur to Torrens titling of ancestral lands, indigenous peoples are encourage not only to sell them but sell them to non-indigenous peoples as well.

This is in stark contrast to the communal basis of native title in common law. Property law is generally highly individualistic and fragmented, yet in this area rights are primarily held at the level of the community (though individual members may have derivative rights). By defining native title rights primarily at the level of the community, native title doctrine reinforces the community's identity. At a practical

---

[194] See separate opinion of Puno J, 41-42.
[195] 'Time immemorial' refers 'to a period of time when as far back as memory can go, certain indigenous cultural communities/indigenous peoples are known to have occupied, possessed in the concept of owner, and utilised a defined territory devolved to them, by operation of customary law or inherited from their ancestors, in accordance with their customs and traditions.' [*IPRA*, s 3(p)]
[196] *Commonwealth Act No. 141.*
[197] *Act No. 496.*

level, it further provided an incentive for the community to remain cohesive, since members who leave the community may lose their ability to enjoy the rights and benefits that are associated with membership.[198]

While the Court allowed the use of customary laws in determining the ownership and extent of ancestral domains on the basis of Art XII s 5 par 2 of the *Constitution*, it declared that the use of customary laws under *IPRA* is not absolute, for the law spoke merely of primacy of use and only prescribes their application where these present a workable solution acceptable to the parties, who are members of the same indigenous group.[199] The application of customary law is limited to disputes concerning property rights or relations in determining the ownership and extent of the ancestral domains, where all the parties involved are members of indigenous peoples, specifically, of the same indigenous group and does not apply when one of the parties to a dispute is a non-member of an indigenous group, or when the indigenous peoples involved belong to different groups.[200] Again the Court is not clear on this because it introduced a new term - 'indigenous groups' rather than referring to 'indigenous cultural communities' as used in the law. This restrictive application of customary laws basically forecloses any further inquiry into the interpretation of traditional resource rights since it is nothing but an aid to the mediation or dispute resolution process among indigenous peoples and not a reference for ascertaining the nature and incidents of their native title. For this reason, the contrast between the western idea of law and the concept of law in traditional indigenous culture can be easily delineated and since they exist rather separately, the stability of Philippine contemporary law is preserved and the recognition for customary law becomes functional. The functional approach of recognition has been discussed in the Australian Law Reform Commission Report on the Recognition of Aboriginal Rights (1986). The Commission believed that a functional approach of recognition allows Aboriginal people to maintain control over their customary laws, involves minimum interference with the way Aborigines choose to live their lives and leaves the way open for further change and adjustment when necessary.[201] It reduces the problems of translation and

---

[198] Lokan, above n 78, 89.
[199] *Cruz v Secretary of Environment and Natural Resources*, 69-70.
[200] Ibid 70-71.
[201] Australian Law reform Commission, *Recognition of Aboriginal Customary Law* (ALRC 31, 1986) par 209.

enables the use of informal methods of adjustment and accommodation, while at the same time allowing for specific incorporation where appropriate. The Commission admitted that functional forms of recognition have been criticise because they do not involve any genuine recognition with the general legal system dictating the extent of accommodation rather than allowing full recognition. The Commission's rejection of categorical forms of recognition is in response to the difficulties involved, not the least of which is the danger of loss of control of Aboriginal customary laws, to the detriment of the Aboriginal people.[202]

VI CONCLUSIONS

Recognition of the rights of native inhabitants has been a moral issue since the Age of Discovery but this interfered with the politics of expansion by European colonisers. Time immemorial possession as the basis of native title was recognised in the Justinian Code and continued under feudalism in common law. For Spain who brought the civil code to the Philippine Islands, idealistic royal intentions has to give way to the imperatives of mercantilism and commercial advantage. England, the source of common law, utilised the expanded doctrine of terra nullius to occupy land already inhabited by native people.

While there are significant differences in the architecture of the legal structure between the Philippines and common law countries like the U.S., Canada and Australia, parallelisms in the recognition of native title can be drawn from their experiences. The decision of the U.S. Supreme Court in *Johnson v McIntosh* legitimised government's power over indigenous peoples in the concept of guardian-ward subsequently introduced to the Philippine legal system under its ruling in *Cariño v Insular Government*. However, this fiduciary duty of the government to indigenous people as expounded in the decisions of the Canadian High Court legitimises infringement of constitutionally guaranteed aboriginal rights. Both the Philippine Supreme Court and Australian High Court have at one time or another declared their countries as terra nullius before the advent of Europeans to their shores. While the Australian High Court have already rejected the notion that their country was terra

[202] Ibid.

nullius when it was occupied by European settlers in its decision in *Mabo v Queensland [No 2]*, the Philippine Supreme Court has erroneously declared this doctrine in its recognition of 'native title' rights.

The Philippine legislature pursuant to the Constitution has passed a law recognising aboriginal rights particularly recognising rights to ancestral lands and domains but the executive branch has been reluctant to implement it, which eventually led to the constitutional challenge to the law. The Supreme Court while affirming its constitutionality by a mere technicality nevertheless, ruled that native title does not include rights to mineral resources, clipped the powers of the government agency tasked to enforce it, and allowed a functional approach of recognition in the application of customary law.