Customary Laws, Ancestral Land Titling and the NCIP's Quasi-Judicial Powers

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ABSTRACT

The IPRA recognizes the customary laws and practices of the indigenous peoples as the basis for their judicial and political structures and institutions within their respective domains. Nonetheless, the implementation of titling as well as the performance of the quasi-judicial functions of the NCIP resulted in the strengthening of state powers within indigenous communities, through the NCIP, by consciously or unconsciously incorporating indigenous peoples within the framework of state legal system. This essay discusses how customary laws are incorporated or not into the two critical tasks of the NCIP, namely, ancestral domain titling and quasi-judicial functions. It argues that while ancestral domain titling and the NCIP's performance of quasi-judicial functions provide some benefits to the indigenous peoples, especially in granting a clear written evidence for their ownership and making legal services available to the indigenous peoples, both of these developments likewise manifest the increasing state penetration into the lives of the indigenous peoples.

Keywords: National Commission on Indigenous Peoples (NCIP); Indigenous Peoples' Rights Act (IPRA); customary laws; quasi-judicial powers; legal pluralism; ancestral domain titling; indigenous peoples; state powers.

1. Introduction

This essay evaluates the functions of the National Commission on Indigenous Peoples (NCIP) in relation to ancestral domain titling as well as the NCIP's quasi-judicial powers within the breadth of customary laws and existing state laws. It first presents Migdal's (1988) theory on state-society relations. Migdal's argument that the state is one of the many actors trying to gain social control will be used as a measure in defining how far customary laws are recognized and legitimized and how the state is able to co-opt many of the

structures, processes, and laws which are considered customary. After a brief discussion of state and customary laws, ancestral domain titling in the Philippines is examined. Contending views on ancestral domain titling are then put forth, after which the number of titles and the processes in titling (together with some of the prevalent issues regarding titling) are scrutinized. The functions of the NCIP, both as a provider of legal services and an institution performing quasi-judicial functions, form the focus of the section that follows along with the number of case and legal services that have been provided thus far. The discussion on ancestral domain titling and the quasi-judicial powers of the NCIP is then used to demonstrate the point that state powers are gathering strength within indigenous communities via the agency of the NCIP, by incorporating the indigenous peoples, consciously or unconsciously, within the framework of state legal system. The data presented here are culled from the annual reports of the NCIP from 2002 to 2010.

The administrative circular regarding the rules of procedure before the Regional Hearing Offices (RHOs) of the NCIP and before the Commissioners *en banc* is first discussed before the concluding observation that, based on the secondary data available, the "penetrative" capacity (Migdal 1988, 15) of the Philippine state seems to be firming up. A related conclusion is that "simplification" and "standardization" (Scott 1998, 2-3; 30-31) of rules among state institutions now appears to be an emerging trend.

2. State law viz. customary law

Positive state laws are generally defined as those laws which are formulated by a duly constituted state legislative body with the intent of regulating behaviors and actions. Obedience to these laws is guaranteed by "legal compulsion" and "organized boycott" (Weber 1947, 128). In general, the underlying principle that guides state laws is driven primarily by the western adversarial scheme of justice administration.

Customary laws refer to those rules of conduct emerging "outside of legal constraints and which individuals and organizations spontaneously follow in the course of their interactions" (Parisi 2001, 4). The basic characteristic of customary law is two-fold: first, it is formed out of the voluntary and "uncoerced behavior of the members of a group" and second, the concerned members of such a group believe in the "obligatory nature" of the customary law (Parisi 2001, 7-8). Customary laws are unwritten, informal, organic, or dynamic, and a result of the "direct legislation by the members of the society" (Parisi 2001, 3). Too, the formation of customary laws is dictated by

inductive processes, developed from "the ground" (Benson 2011, 11) and in turn applied to the ground spawning it.

Unlike state laws, customary laws generally acquire their legitimacy not because of some coercive powers but out of some widespread unanimity that such rule of conduct is desirable for the individual (Parisi 2001, 22). The recognition and continued existence of the customary laws rest primarily on the reciprocity of expectations and of loyalty (Benson 2011, 11 & 14). There are individuals who expect each other to behave in a particular manner, and a deviation from such expected behavior necessarily results in some corresponding punishment. Additionally, the aggrieved party expects the other members of the community to aid him or her in the rectification of a wrong in the same way that the aggrieved party is expected to provide aid to others who may be wronged. Such reciprocity, however, is not necessarily and immediately collectible upon the performance of such expected duty to provide help to the aggrieved. The obligation of reciprocity may be obtained in the present for some past or future reciprocal act; in other words, it should be "reversible" (Benson 2001, 12). The key, therefore, is that there is some collective expected desirable framework of behavior which is reciprocally demandable from one another. Deviation from such expectation would obligate all the rest to help in the restitution of such deviation. When this reciprocity among the members of the society dies out, the customary law perishes with it. This is precisely because the strength of the customary law emanates not from an outside force but from within the community that practices it. Customary law is widely practiced among societies which impose it primarily due to the functional reason for its existence and perpetuation.

Some distinctions between state law and customary law can be drawn. The former is generally underpinned by the framework of adversarial justice whereas the latter gives primacy to community and harmony. Moreover, positive state laws are indispensably inclusive, applying uniformly within the territorial jurisdiction of the country, while customary laws, by contrast, vary from one group to another. These customary laws are applicable only to "certain legal domains" (Gauri 2010, 3-4). This limitation on the applicability of the customary led Gauri (2010, 3-4) to state that customary justice systems are "almost always partial systems." Indeed, advocates for the recognition of customary laws must contend with a number of rival theories in seeking to bring customary law into mainstream consciousness.

In the Philippines, the earliest effort of the government to apply customs in dispute resolution came with the passage of the Katarungang Pambarangay Law on June 11, 1978 through the initiative of then President Ferdinand Marcos (Mangahas et al. 2003, 111). Later the provisions of the Katarungang Pambarangay Law

were subsumed by RA 7160 or the Local Government Code (LGC) which was implemented on January 2, 1992. These laws provide for the creation of the Lupong Tagapamayapa (commonly known as the Lupon), intended as the channel for the utilization of customary practices in dispute settlement and maximizing the so-called 'areglo' system or the system of mediation and arbitration so as to avoid invoking the aid of the state judicial courts. This law, however, is general in its application over the country and did not specifically recognize the indigenous judicial systems of indigenous peoples.

Later, however, the passage of the Indigenous Peoples' Rights Act (IPRA) in 1997 became a landmark legislation since it clearly provided for the recognition of the indigenous peoples, their ownership of their lands, and their unique justice systems within the state-sanctioned legal system in the Philippines. The IPRA made manifest the presence and continued existence of the customary laws in the midst of positive state laws. But as it appears at the moment, the implementation of the IPRA serves to introduce state laws, structures, and processes to the indigenous peoples more than to bring customary laws and practices into mainstream consciousness and institutions. The discussion below on Ancestral Domain Titling and the NCIP's quasi-judicial powers illustrates this point.

3. Ancestral domain titling

State recognition of the indigenous peoples' ownership over their lands is one of the hallmarks of the IPRA of 1997. Examining the provisions of the IPRA, it appears that it is the rights-based approach that serves as the overriding framework for land titling and registration of ancestral domains and lands. Nevertheless, one cannot totally deny that some of the IPRA provisions are closely related to the environmental approach. Later, using data on the issuances of Certificate of Ancestral Domain Title (CADT), Ancestral Domain Sustainable Development and Protection Plan (ADSDPP), and certificate of Free and Prior Informed Consent (FPIC), an attempt to comprehend the development framework that is being followed by the NCIP will be made. Although this essay does not directly identify which framework for development is predominant, some instructive data gathered from the annual reports of the NCIP may be tagged for further study and analysis towards this end.

3.1 Some theoretical considerations on land titling

Various theories abound why the state needs to recognize indigenous ownership over their lands. Plant and Hvalkof (2000, 11-

12) explain that there are three general frameworks available to justify land titling among indigenous peoples. These are the "protective, right-based and environmental approaches." The protective approach explains that the indigenous peoples must be protected from external forces, especially the "market forces." Land titling is the mechanism available to the state to shield and protect the indigenous peoples from the supposedly intrusive character of the mainstream system. The rights-based approach asserts that the indigenous peoples maintain "special rights" over their lands and the state should recognize their ownership precisely because they are the rightful owners of these lands in the first place. The environmental approach explains that the indigenous peoples are the most knowledgeable regarding the protection of the environment, hence their ownership of the lands must be recognized by the state for better protection of the environment.

These approaches, however, are not mutually exclusive; it is not hard to integrate the basic principles of each of these with those of the other, especially the last two approaches. As Plant and Hvalkof (2000, 12) put it:

> ...there are areas where environmental and rights-based approaches are now coalescing, on the grounds that the indigenous peoples are seen by some environmentalists as the best keepers or protectors of rainforests and other natural resources. But the alliance is not automatic or a necessary one.

Parenthetically, the titling and registration of indigenous lands are undertaken with the underlying reason of protecting these lands. However, there are varying rationales why there arises a need for protection. There are two schools of thought on the matter: the Property School and the Culture School. The Property School explains that indigenous properties, lands included, should be protected because the property has an "intrinsic value," whereas the Culture School asserts that protection is necessary because of the domain's cultural value and influence upon those who own and inhabit it (Wiersma 2005, 1075). The Property School gives emphasis to the thing itself as a valuable object, while the Culture School stresses the connection of the property to its owner. The concern of the Property School in protecting indigenous property is premised on its value to humankind in general, hence the need to protect the property. The Culture School advocates the protection of the property because of its intricate and integral relationship to its owner. The property is seen to influence the world views, consciousness, and value systems of its owner, and ought to be protected for the owner and not for anyone else (Wiersma 2005, 1076).

Both schools of thought advocate protection of indigenous properties and lands. But controversy arises when one asks the question: For whom is the protection and for what purpose is the protection (Wiersma 2005, 1077)? From the point of view of the Property School, the protection of indigenous land is for humanity itself so that everyone could appreciate and enjoy its value. The state, therefore, in line with the Property School, could maintain the title of the indigenous lands so long as it can protect it in its valued condition. On the other hand, the Culture School insists that since the property influences the value systems and the "group's sense of identity," the title should remain with the indigenous peoples (Wiersma 2005, 1076).

3.2 IPRA and land ownership

With the passage of the IPRA in 1997, the Philippine government has legally recognized indigenous ownership of the indigenous peoples of the parcels of land inhabited and maintained by distinct communities for generation. The law expresses a government policy shift, looking at the communities as "part of the solution, as partners, rather than the problem, in the protection and management of natural resources" (Brett 2001, 4). At present the government policy is geared toward encouraging indigenous peoples to delineate their respective territories, both those owned communally and individually, for titling.

In fact, much of the IPRA's provisions are geared toward the recognition of the ownership of indigenous peoples over their lands. To understand the basic framework of the IPRA in land titling and registration, some pertinent provisions must be cited. One provision in particular recognizes the sway of customary law:

> **Sec. 2 (b), Ch. I:** The state shall protect the rights of ICCs/IPs to their ancestral domains to ensure their economic, social and cultural wellbeing and shall recognize the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.

The IPRA likewise recognizes the rights of the indigenous peoples over the land together with the other rights that are derived from the right of ownership:

> **Sec. 7, Ch. III: Rights to Ancestral Domains:** The right of ownership and possession of ICCs/IPs to their ancestral domains shall be recognized and protected. Such rights shall include :
>
> *Right of Ownership:* The right to claim ownership over lands, bodies of water traditionallyand actually occupied by ICCs/IPs,

sacred places, traditional hunting and fishing grounds, and all improvements made by them at any time within the domains;

a. Right to develop lands and natural resources;
b. Right to stay in the territories;
c. Right in case of displacement;
d. Right to regulate entry of migrants;
e. Right to safe and clean air and water;
f. Right to claim parts of reservations;
g. Right to resolve conflict.

Close perusal of these provisions seems to indicate that, as a general rule, the law was passed primarily because the indigenous peoples of the Philippines possess a long standing right over their ancestral domains and lands. The IPRA is riddled with the terms "recognize" and "recognition," an apparent indication that the IPRA was passed merely to acknowledge such rights of the indigenous peoples as already existent even before the IPRA's passage. Parenthetically, it appears that the law was not passed because the state wishes to protect the indigenous peoples from external factors wrought by market forces or other elements which could be detrimental to the integrity of indigenous system of ownership. There appears to be an underlying receptiveness of the IPRA to the basic tenets of the "rights-based approach." This particular approach is, in fact, reinforced by a policy statement of the NCIP in its 2008 annual report, to wit: "the issuance of the Certificate of Ancestral Domain Title/Certificate of Ancestral Land Title (CADT/CALT) ensures the recognition of the IP's ownership of said AD/AL, hence their priority rights to develop the resources therein are duly enforced, including their right to enter into agreements with development partners to further improve their domain/land."

Additionally, some provisions of the IPRA speak of the capacity of indigenous peoples, by virtue of their local knowledge, to protect and maintain the utility of their land and natural resources. Section 9, Chapter III and Section 58, Chapter VII of the law state:

Sec. 9, Ch. III: Responsibilities of ICCs/IPs to their Ancestral Domains – ICCs/IPs occupying a duly certified ancestral domain shall have the following responsibilities:

a. Maintain Ecological Balance – To preserve, restore, and maintain a balanced ecology in the ancestral domain by protecting the flora and fauna, watershedareas, and other reserves;

b. Restore Denuded Areas – To actively initiate, undertake and participate in the reforestation of denuded areas and other development programs and projects subject to just and reasonable renumeration....

Sec. 58, Ch. VIII. 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 purpose. 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....

In light of these IPRA provisions, the government appears to realize that the indigenous peoples are more capable in safeguarding and preserving the ecological value of the land and natural resources found within their territories. These specific provisions indicate the government's partial adoption of the principles embodied in the "environmental" approach. Generally, therefore, as regards land titling and registration of ancestral domains and lands, the predominant framework being used in the IPRA is the rights-based framework but one substantially framed by the environmental protection principle.

3.3 The NCIP and land registration

The agency tasked by the IPRA to discharge this responsibility of titling and registering ancestral domains and lands is the NCIP. More particularly, the Ancestral Domains Office (ADO) of the NCIP is the office in charge for this specific function: "The Ancestral Domains Office is responsible to do the following major functions: (a) identification, delineation and recognition of ADs and ALs, (b) processing of certification precondition and the free and prior informed consent (FPIC), (c) assistance in the formulation of the Ancestral Domain Sustainable Development and Protection Plans (ADSDPP)" (NCIP Annual Report 2008).

Together with the issuance of CADTs/CALTs, the NCIP is likewise tasked to process certificates of FPIC. When any party wishes to engage with the indigenous communities in whatever manner, it must first obtain the FPIC of the community. Based on NCIP Administrative Order No. 1, Series of 2006 (AO No. 1, S. 2006), Free and Prior Informed Consent (FPIC) is defined as follows:

Sec. 5 (a), Part I: Free and Prior Informed Consent (FPIC). This is the consensus of all members of the ICCs/IPs which is determined

> in accordance with their respective customary laws and practices that is free from any external manipulation, interference and coercion and obtained after fully disclosing the intent and scope of the plan/program/project/activity, in a language and process understandable to the community. The FPIC is given by the concerned ICCs/IPs upon the signing of the Memorandum of Agreement (MOA) containing the conditions/requirements, benefits as well as penalties of agreeing parties for the consent.

Finally, the NCIP through the ADO also assists the indigenous communities in the preparation of their ADSDPPs. NCIP Administrative Order No. 1, Series of 2004 defines ADSDPP in this fashion:

> **Sec. 6 (a), Art. I: Ancestral Domains Sustainable Development and Protection Plan (ADSPP) –** refers to the consolidation of the plans of ICCs/IPs within an ancestral domain for the sustainable management and development of their land and natural resources as well as the development of human and cultural resources based on their indigenous knowledge, systems and practices. Such plan shall be the basis of the Five Year Master Plan for ICCs/IPs.

To distinguish among these three types of documents: the CADTs/CALTs refer to those documents evidencing the ownership of the particular indigenous person or community over a particular land and its resources; FPIC is the consent or permission given by the indigenous communities to a specific activity to be conducted within their territory; and ADSDPP refers to the five-year plan of the indigenous communities in the management of their domains. The ADO is not only responsible for the processing and issuance of these documents but also for assisting indigenous communities to process such.

By virtue of this mandate, the NCIP has approved a number of Certificate of Ancestral Domain Titles (CADTs) and Certificate of Ancestral Land Titles (CALTs), certificates of FPIC and ADSDPPs as follows:

Region	CADTs			CALTs				ADSDPP			FPIC	
	No.	Area (in has.)	Population	No.	Area (in has.)	Population	Area per capita	No.	Area (in has.)	Population	No.	Area (in has.)
CAR	20	337,683	266,610	224	2,081	2,749	0.7570	28	312,491	262,243	37	30,111
I	6	37,079	27,075	0	0			3	30,418	9,017	16	3,101
II	11	970,853	53,238	0	0			10	271,618	39,856	9	15,908
III	12	130,513	19,594	7	1,300	418	3.11	11	38,437	12,942	36	93,888
IV	20	842,537	65,943	0	0			3	126,210	23,434	41	11,291
V	8	42,003	21,811	0	0			3	19,208	12,122	11	4,363
VI & VII	5	20,399	7,625	0	0			2	10,408	5,230	8	5,286
	11	143,110	41,760	0	0			4	68,340	15,020	11	8,016
IX	15	247,706	55,210	5	1,925	2,106	0.9140	7	128,154	29,640	31	49,125
X	14	637,862	131,516	1	701	1	701	9	424,690	112,063	34	106,169
XI	14	377,784	148,826	21	11,301	3,335	3.3886	2	49,387	20,529	27	31,058
XII	20	472,087	73,187	0	0			7	176,937	23,211	51	68,317
XIII												
Total	156	4,259,616	912,395	258	17,308	8,609		89	1,656,298	565,307	312	426,633

Table 1. CADT, CALT and FPIC accomplishments (2002-2010). **Source:** NCIP Ancestral Domain Database Information System.

As seen in the table presented above, there are more titles issued to individual applicants than to communities as a whole. Of the twelve Ethnographic Regions, most of the CADTs were issued to applicants from CAR, Region IV and Region XIII. As regards CALTS, only applicants from five regions, namely, CAR, Regions III, X, XI and XII, were awarded such titles. On the other hand, no CALTs were issued to the remaining Ethnographic Regions. Most of the recipients of the CALTS issued are from the Cordillera, with 224 titles granted. Although per capita, the CALT holders from the Cordillera appear to have the least landholdings. In Region IX, there was only one CALT awarded to an individual applicant and quite interestingly, this single CALT covers a very vast expanse of land covering around 701 hectares. It is telling and unfortunate that more than a decade since the NCIP's establishment, indigenous peoples from more than half of the identified Ethnographic Regions in the country have yet to receive a single CALT.

There are more CADTs processed than ADSDPPs. This indicates that insofar as the state is concerned, so long as the title is issued, the responsibility for developing these domains is entirely left to the discretion of indigenous communities. It also suggests that the government considers the title as an end in itself. With the registration of the ancestral domains and lands as apparently the government's terminal act, both the use of the titles issued and their maintenance now become discretionary for the title holders. Even more striking is that the ADSDPP, supposedly the five year-long plan for the management of the domains, is to come into the picture only when the indigenous communities themselves seek for its formulation. Section 8 Article III

of AO No. 1, S. 2004 explicitly qualifies that: "**upon request of ICCs/ IPs,** the NCIP shall facilitate the formulation of the ADSDPP, and the planning process shall proceed..." (emphasis mine).

When one compares the number of certificates of FPIC issued with that of the ADSDPPs and CADTs, certificates of FPIC issued tend to be twice for every CADT and more than thrice for every ADSDPPs. The NCIP target regarding titling which was incorporated in the Philippine Development Program for the years covering 2011-2014 (PDP, 2011-2014) is also reflective of the priorities and capacity of the NCIP. Table 2 below shows the NCIP target for the next four years:

Year	CADTs		CALTs		ADSDPPs
	No.	Area (in has.)	No.	Area (in has.)	No.
2011	12	250,000	12	250,000	1
2012	12	250,000	12	250,000	1
2013	12	250,000	12	250,000	1
2014	12	250,000	12	250,000	1
Total	48	1,000,000	48	1,000,000	4

Table 2. Targets for 2011-2014**. Source:** PDP, 2011-2016, p. 258.

The NCIP target for the next four years is to issue 12 CADTs and 12 CALTs yearly at 250,000 hectares a year. For ADSDPP, the NCIP target is to formulate one plan per year. These targets issued by the NCIP raises a lot of questions. First, why is the target only until 2014? Does this mean that there will be no more CADTs and CALTs issued for the years 2015 and 2016? It bears stressing that the IPRA, unlike the Comprehensive Agrarian Reform Law (CARL), did not provide for a deadline for titling. Second, the target to issue 12 CADTs yearly is realistic considering that between 2002 to 2010 the average CADT issuance is seventeen (17) per year. However, the target to issue 12 CALTs yearly covering an area of 250,000 hectares seems preposterous. Based on this target, one CALT will, on the average, cover 20,833 hectares. To follow this logic, it would appear that one individual or a set of individuals could own such a sprawling parcel of lot all for their private purposes. Besides, based on Table 1, the largest ancestral land is measured at 11,301 hectares and this is covered by eleven CALTs. Too, based on the NCIP database, the highest CALT coverage was recorded in the year 2010 with twenty CALTs issued covering an area of 5,379 hectares. Third, as regards ADSDPP, the NCIP's target is to formulate one plan per year. This pales in comparison to what has been achieved from 2002 to 2010 when a total of 89 ADSDPPs were formulated covering an area of 1,656,298 hectares. This ADSDPP target reflects the poor effort that NCIP puts into the development plan for the indigenous peoples.

3.4 Issues and concerns on titling

The registration and titling of the lands of the indigenous peoples has become one of the centerpieces of the state's recognition of their autonomous existence. The IPRA's provisions regarding land ownership and the intent for which it was passed in 1997 are well-meaning. Despite its passage, however, a lot of issues concerning the structure and process of land titling, as well as the meaning and function of the title after it was already awarded, remain to be addressed. The internal struggles that indigenous peoples also experience within their own realms likewise add to the complications that attend titling and registration:

(a) Among the most cited predicaments relating to land registration is the presence of many conflicting laws regarding titling (ANGOC and ILC 2007, 29; Malanes 2002, 61; PIP-ICERD 2009, 27-30; Tuyor et al. 2007, 19-20; Wandag 2005, 30). At present, aside from the IPRA, the laws that are related to land titling and registration in the Philippines include: a) Republic Act No. 6657 or the Comprehensive Agrarian Reform Law (CARL); b) Republic Act No. 7856 National Integrated Protected Areas System Act of 1992 (NIPAS); c) Commonwealth Act No. 141 or the Public Land Act; and d) Presidential Decree No. 1529 or the Land Registration Act. This is on top of the various Presidential Decrees and Proclamations classifying indigenous lands as reservations, development estates, and resettlement areas which are specific to particular geographic locations, e.g., Presidential Proclamation No. 1955 which placed some areas in Tarlac under the Sacobia Development Authority (AHRC 2005, 37-38), and Presidential Proclamation 2282 which declared part of Bongabong, Oriental Mindoro as an agricultural and resettlement area (ANGOC and ILC 2007, 29).

The existence of various laws on titling has generated conflicting claimants over the same parcel of land. The experience of the indigenous peoples in Don Carlos, Bukidnon is instructive. In this particular case, the Manobos claim that the Don Carlos Estate forms part of their ancestral domain, but due to the Comprehensive Agrarian Reform Program (CARP) a huge chunk of this sprawling lot was awarded to Agrarian Reform Beneficiaries (ARBs). Despite the protestations of the Manobos, the Department of Agrarian Reform (DAR) remains unperturbed, insisting that the titles given to the ARBs are legal and binding (ANGOC and ILC 2007, 28). Similar predicaments were experienced by the Buhid Mangyans in Oriental Mindoro (AHRC 2005, 42-43), the B'laans in Sultan Kudarat, and the Aetas in Tarlac (LRC 2005, 52-53).

Such conflicting claims of ownership and conflicts in titling prompted different social sectors to call for the harmonization of these laws and for better coordination between and among government agencies responsible for issuing titles (ANGOC and ILC 2007, 72-73; PIP-CERD 2009, 93; Tuyor et al. 2007, 40). The Report of the United Nations Committee on the Elimination of Racial Discrimination (CERD Report 2008, 31) claims that there were efforts made by the NCIP in harmonizing these apparently inconsistent laws:

> The National Commission on Indigenous Peoples also endeavored to harmonize its policy vis-à-vis the policies of the Department of Environment and Natural Resources (DENR), Department of Agrarian Reform (DAR), and the Land Registration Authority (LRA) to address overlapping concerns. These policy harmonization initiatives include: (a) Harmonization of the implementation of IPRA and DENR policies through Joint DENR-NCIP Memorandum Circular No. 1, Series of 2003; (b)Temporary Suspension of Land Acquisition and Distribution and AD/AL Titling Activities in Contentious Areas through DAR-NCIP Memorandum Circular No. 15, Series of 2003; and, (c) Supplemental Guidelines on the Delineation, Titling and Registration of CADTs and CALTs through LRA-NCIP Memorandum Circular No. 1, Series of 2007.

Responding to this claim, the Philippine Indigenous Peoples International Convention for the Elimination of All Forms of Racial Discrimination (PIP-ICERD) has reported that to date, there are still a number of indigenous peoples who find themselves at the losing end, given the continued lack of coordination and harmony of the various laws and government institutions. For example, the problems of the Buhid Mangyans regarding their ancestral domain claim vis-à-vis the ARBs have yet to be resolved (PIP-CERD 2009, 29).

(b) Another issue that confronts indigenous peoples' efforts to register their ancestral domains and lands has to do with the complexities of bureaucratic processes as well as the financial cost required before the titles are issued (see Appendix A). There are multi-layered procedures that an applicant must undergo for titling. In the case of Bakun, Benguet which is the first recipient of a CADT, it took them three years before the title was issued—they applied for a CADT in 1999 and obtained it only on July 20, 2002 (Boquiren 2007, 69). The financial outlay required of the Bakun claimants for their CADT issuance—an estimated amount of PhP 128,721,561—proved to be equally burdensome (Wandag 2005, 22).

It appears that some positive steps have been undertaken to remedy this situation. In 2008 the Commission on Audit (COA) Report found the NCIP efficient in its ancestral domain titling project

in Region I. In a year, the titling of an area covering 28,593.10 hectares was completed on a budget of PhP 1,497,888, even realizing a savings of PhP 37,752 (see Table 3):

Location	Tribes	Area (in has.)	Cost
Pugo, La Union	Bago and Ibaloi	8,711.75	PhP 614,120.00
San Felipe, East; San Nicolas, Pangasinan		2,378.35	PhP 145,846.00
San Gabriel, La Union	Kankanay and Bago	17,503	PhP 700,170.00
		28,593.10	PhP 1,460,136.00

Table 3. Region I delineation and titling activities in 2008.

For the year 2008, NCIP Region I reported that the average cost of delineation and titling amounted to PhP 51 per hectare with the maximum cost being PhP 70.50 per hectare and the minimum cost PhP 40 per hectare. This is far less expensive than the financial cost incurred by the Bakun applicants. It is hoped that the standard set by Region I is replicated nationwide in the coming years.

The 2009 COA Report points out that varying durations of time were required for the conversion of the CADC to CADT in Region V. To complete the seven steps toward the issuance of a CADT, to wit: 1) social preparation; 2) research; 3) establishment of project control; 4) perimeter survey; 5) data processing and preparation of reports; 6) publication; and 7) finalization of claim book, it has taken anywhere from 4.25 months to 10.5 months for the conversion to succeed (see Table 4).

Among the factors hindering project implementation are: 1) lack of surveyors as Region V has only one resident geodetic engineer; 2) absence of survey instruments; 3) non-grant of the authority to conduct perimeter survey from the central office due to the absence of guidelines; and 4) difficulty in the retrieval of documents from the DENR as reference in perimeter surveys. Some of these problems have been identified as early as 2002 when the NCIP started issuing CADTs/CALTs.

(c) Yet another issue confronting indigenous peoples after the titles are issued to them involves claims of "midnight titles" and fraudulent titles. Allegations that the titles awarded by the NCIP did not really go to the rightful owners have emerged as frequent sore points in ancestral land registration. Such is reflected by the number

Location	Time Frame	Estimated Completion	Status
PDAP Sorsogon	20 wks or 5 mos.	March 2009; started social preparation in October 2008	Final step was finished in January 2010
PDAP-CADC 144-145 Sagay I & II Cam. Sur	42 wks or 10.5 mos.	June 2007; started social preparation in July 2006	Final step was finished in September 2009
PDAP Osmeña, Jose Panganiban, Cam Norte- Direct application	17 wks or 4.25 mos.	September 2008; started social preparation in April 2008	Final step was finished in August 2009

Table 4. Region V PDAP activities in 2009. **Source:** NCIP CAAR 2009, p. 47.

of cases being heard by the Commission en banc. As of 2010, there are 80 cases in the docket of the Commission, 40 of these or 50% of the total cases filed pertains to cancellation of titles. For comparison purposes, these 40 petitions for cancellation of title represent around 10% of all the CADTs and CALTs issued (see Table 5).

On the face of it and without pre-empting the resolution of these cases, the fact that half of the total cases filed before the Commission en banc is concerned with the cancellation of NCIP-issued titles tends to be counterproductive. Considering that a huge amount of energy is spent in the issuance of CADTs and CALTs and that the major aspiration of the IPRA is to recognize the titles of the indigenous peoples, it is simply not a promising sign that the Commission is handling cases that concern the cancellation of the same titles which the NCIP has tried hard to distribute. The filing of cancellation cases may not be indicative of the validity of the issued CADTs and CALTs. This is a crucial situation that needs further examination.

(d) Finally, there are also internal issues that indigenous peoples face. Delineation of territories has contributed to the emergence of boundary disputes with neighboring communities. The case of the Tuwalis in Kiangan, Ifugao is indicative. The Tuwalis were able to obtain their Certificate of Ancestral Domain Claim (CADC) over their Ancestral Domain on May 5, 1996. But to date they have yet to apply for a CADT because of the on-going boundary dispute with an adjoining town (Dunuan 2007, 56).

Kind of Case	Frequency	Percentage	Status	
1. Petition for Cancellation of CADT/CALT (original jurisdiction)	40	50%	Resolved	7
			Pending	33
2. Appealed Cases	31	39%	Resolved	14
			Pending	17
Quieting of Title	5	6%		
Reconveyance of Ownership	9	11%		
Enforcement of Rights	5	6%		
Annulment of Deed	3	4%		
Injunction/TRO	6	8%		
Others	3	4%		
3. Cases of National Significance	9	11%	Resolved	4
			Pending	5
Total	**80**	**100%**	**Resolved**	**31%**
			Pending	**69%**

Table 5. Cases filed before the Commission en banc. **Source:** NCIP, Office of the Clerk of the Commission.

4. Quasi-judicial powers of the NCIP

The NCIP is tasked by the IPRA to perform quasi-judicial functions and to offer legal services to indigenous peoples. The discussions that follow are based on the Annual Reports of the NCIP together with the Administrative Orders issued by the same office in relation to these functions.

4.1 The NCIP as a legal service provider

The IPRA has clearly mandated the NCIP to provide legal services to indigenous peoples. A Legal Affairs Office (LAO) under the NCIP was created by Sec. 46 (g), Chapter VII of the IPRA:

> ***Legal Affairs Office*** – There shall be a Legal Affairs Office which shall advice the NCIP on all legal matters concerning ICCs/IPs and which shall be responsible for providing ICCs/IPs with legal assistance in litigation involving community interest. It shall conduct preliminary investigation on the basis of complaints filed by the ICCs/IPs against a natural or juridical person believed to have violated ICCs/IPs rights. On the basis of its findings, it shall initiate the filing of appropriate legal or administrative action to the NCIP.

In the performance of this particular mandate, two divisions were created under the Legal Affairs Office (LAO), namely (a) the Litigation and Adjudication Division and (b) the Public Assistance and Legal Service Division. Under the first division, the primary services that the NCIP provides consist of representing indigenous peoples and communities in court proceedings including the preparation of legal documents and investigating and bringing legal actions against violators of customary laws. "The Litigation and Adjudication Division performs functions related to the litigation of cases in courts, offices and quasi-judicial bodies" (NCIP Annual Report 2006). Under the second division, the NCIP is expected to provide pieces of advice and offer legal counsel to indigenous peoples in need of them. In providing legal services, whether through the first or second division, it appears that the NCIP adopts, or at least works within, state-sanctioned legal institutions and processes.

Through the first division, NCIP lawyers assist or even stand as the lawyers for the indigenous peoples and/or communities before regular courts of law. Since these cases are being litigated before the regular courts, it follows that the procedures being used, as well as the basic laws that apply, would be the positive state laws. In providing services through the second division, the lawyers as a general rule would give counsel and opinions within the ambit of the general principles of positive state laws.

Table 6 below shows the frequency of legal assistance and counsel offered by the LAO through the years:

Kind of Service	Frequency	Percentage
1. Legal Assistance	9,549	88%
2. Opinions and Documents written	851	8%
3. Cases investigated/ handled	417	4%
Total	**10,817**	**100%**

Table 6. Legal services rendered. **Source:** NCIP Annual Reports 2000-2009 issues.

Most of the services provided count as legal services, to include notarial services and the provision of advisories and counsel to clients. Another kind of service refers to the issuance of legal opinion on bills, and preparation of position papers and memoranda for clients. The third refers to the number of cases handled and represented by NCIP lawyers before the courts (including investigation of cases for possible prosecution or proper filing of suits before the necessary courts of law).

4.2 Quasi-judicial functions of the NCIP

The NCIP is also conferred with quasi-judicial powers primarily exercised by the Regional Hearing Offices (RHOs) and the NCIP Commissioners *en banc*. Generally the Regional Hearing Offices function as a court of first instance, akin to the Regional Trial Courts (RTCs). The Commissioners *en banc* act as an appellate court for cases decided by the RHOs, although for petitions on the cancellation of Certificates of Ancestral Domain (CADTs) and/or Certificates of Ancestral Land Titles (CALTs) the Commissioners could directly take cognizance of the petitions without passing through the RHO.

Section 69, Chapter IX of the IPRA vests the NCIP with quasi-judicial power:

> *Quasi-Judicial Powers of the NCIP* – The NCIP shall have the power and authority:
>
> a) To promulgate rules and regulations' governing the hearing and disposition of cases filed before it as well as those pertaining to its internal functions and such rules and regulations as may be necessary to carry out the purposes of this Act.

In the furtherance of this function, RHOs are established in each Cultural Region across the Philippines. Indigenous peoples thus involved in conflicting claims are directed to file their complaints with the proper RHO, although it bears emphasizing that one cannot automatically file a complaint before the RHO at the onset of a given conflict. NCIP Administrative Circular No. 1 (AC No. 1), Series of 2003 prohibits the filing of a case before the RHO without first having "exhausted all remedies provided for under the customary laws." In fact, before someone can file a case, and as precondition, the parties filing the case must be able to demonstrate that all efforts were performed to settle the conflict the customary way. Besides, the litigant must submit a Certificate to File Action (CFA) before the RHO, as a jurisdictional requirement for the RHO to take cognizance of the case. Sections 12 and 13, of AC No. 1, S. 2003 stipulated that:

> **Sec. 12:** Failure of Settlement: Where the parties fail to settle their disputes as provided herein, the members of the indigenous dispute settlement group or council of elders shall issue a certification to the effect that all diligent efforts for settlement under customary practices failed.
>
> **Sec. 13:** Certification to File Action: Upon the request of the proper party, members of the dispute settlement group or council of elders shall likewise issue a certification to file action before the NCIP. In giving due regard to customary laws, the certification

> may be in any form so long as it states in substance the failure of settlement notwithstanding the efforts made under customary law or traditional practices.

This practice of performing all efforts to resolve the conflict before elevating it to the court of law is known in the legal profession as "exhaustion of remedies." Likewise, the imposition of the condition that a Certificate to File Action be submitted first before the RHO hears a case directly parallels the practice before regular courts of law. The difference, however, is that in regular courts, the Certification to File Action must come from the Secretary or Chairman of the *Lupong Tagapamayapa*. Nevertheless, in this aspect, the RHO adopts a process which is not dissimilar to the standard procedure employed before the regular courts of law.

As regards representations before the RHO, lawyers are the ones allowed to represent and argue for party litigants. Section 30, Rule VIII of AC No. 1, S. 2003 provides: "Lawyers and NCIP legal officers within their respective assigned jurisdictions may appear before the Commission or the RHO for any of the parties." Although this rule appears to be permissive with the use of the word "may," still there is no clear provision for elders or traditional leaders arguing for cases at the RHO. Yet again, this seems to imply that the procedure being employed at the RHO is heavily patterned after the practices in ordinary courts of law. This could be an expression of what Scott (1998, 2-3; 30-31) refers to as "bureaucratic simplification and standardization," a system where similar rules and practices between parallel systems are adapted in order to avoid and prevent possible confusion.

Per AC No. 1, S. 2003, not all cases involving indigenous peoples may be brought before the RHO. There are only selected litigable suits that could be filed with this Office. Section 5, Rule III states:

> *Jurisdiction of the NCIP*. The NCIP through its Regional Hearing Offices shall exercise jurisdiction over all claims and disputes involving rights of ICCs/IPs and all cases pertaining to the implementation, enforcement, and interpretation of R.A. 8371, including but not limited to the following:
> (1) Original and Exclusive Jurisdiction of the RHO:
>
> a. Cases involving disputes and controversies over ancestral lands/domains of ICCs/IPs;
> b. Cases involving violations of the requirements of free and prior and informed consent of ICCs/IPs;
> c. Actions for enforcement of decisions of ICCs/IPs involving violations of customary Laws or desecration of ceremonial sites, sacred places, or rituals;

d. Actions for redemption/reconveyance under Section 8 (b) of RA 8371; and
e. Such other cases analogous to the foregoing.

(2) Original Jurisdiction of the Regional Hearing Office:

a. Cases affecting property rights, claims of ownership, hereditary succession and settlement of land disputes, between and among ICCs/IPs that have not been settled under customary laws; and
b. Actions for damages arising out of any violation of RA 8371.

Suits which are criminal in nature cannot be litigated and decided by the RHO and only civil cases are recognized by it. This practice, however, is not confined only to the Philippines. In Uganda, criminal cases are also directly brought to regular courts of law (Kane et al. 2005, 7).

Theoretically, this practice could be in line with the generally accepted principle in criminal law that a crime is, in effect, a manifestation of a direct threat against the basic fabric of a civilized society and of the state itself. Parenthetically, a crime regardless of the perpetrator is a menace not only to the indigenous community but to the whole Philippine state as well, hence, the maintenance of penal institutions by state governments to segregate "criminals" from the general populace. However, this principle in criminal law does not find application before customary justice systems. The latter does not make any such distinction or comprehend a complicated determination between a civil and criminal wrong. A criminal act under the national state law is considered as a "tort" or a personal offense under customary laws (Benson 2011, 13). Its rectification is not imprisonment (as there are no penal establishments under customary justice systems) but the imposition of a fine or an equitable infliction of a similar injury.

After the RHO issues its finding, a party who is not satisfied with the decision of the RHO may opt to elevate or appeal the case to the NCIP Commissioners *en banc*. Section 47, Rule IX of the AC No. 1, S. 2003, states that: "Decisions, awards, or final orders of the RHO may be appealed to the Commission by filing a memorandum on appeal with the RHO and serving a copy thereof upon the adverse party." In hearing an RHO decision, the NCIP Commissioners *en banc* will then act as an appellate court.

There are three general categories of cases that are heard and decided by the Commissioners. First, the appealed cases as discussed above. Second, there are cases over which the Commission exercises original and exclusive jurisdiction, i.e., "Petitions for cancellation of ancestral domain titles and/or Certificate of Ancestral Land Titles" (Sec. 5 (3a), Rule III, AC No. 1, S. 2003). And third, cases which are deemed to be of "national significance or concern" shall be forwarded

by the RHO to the Commission. In the first instance, the RHO would have issued a decision over the case but one or both parties are not persuaded as to the justness of the RHO's decision, thus the appeal. In the last two instances, the RHO would not have rendered any decision on the case or even looked into the merits of the allegations (the sole decision maker, therefore, in these two sets of cases is the Commissioners *en banc).*

The difference, however, between those cases considered as falling under the original jurisdiction of the Commission and those cases considered as matters of national significance is more procedural than substantial. Cases which are within the original jurisdiction of the Commission are filed directly with the Commission, it does not pass through the RHO. In fact, an attempt to file these cases before the RHO would definitely merit dismissal for lack of jurisdiction. Cases considered to be of national significance are initially filed with the RHO, but upon the determination of the RHO of its significance, a decision is made to bring this for consideration before the Commission without the RHO issuing a judgment based on the merits of the case. The provision of Section 6, Rule III, AC No. 1, S. 2003 is instructive: "When in the opinion of the Regional Hearing Officer, the action filed involves a matter of national significance or concern, he may certify and elevate the same to the Commission for proper disposition. The Commission may, in its discretion, assume jurisdiction thereof or remand the same to the concerned RHO for hearing and proper disposition."

As of December 2010, a total of eighty cases had already been filed before the Commission as a quasi-judicial body (see Table 5). Some were either resolved by the Commission and others remained pending cases (the first cases to be submitted to the Commission were in 2004).

After the Commission issues its resolution, the parties who may not be satisfied with the resolution may still elevate the case to the Court of Appeals, and finally to the Supreme Court. To simplify, the flowchart below shows the process in the resolution of cases filed before the RHO and the Commission:

To reiterate, the processes that an indigenous litigant must undergo in dispute resolution are not substantially different from a regular non-indigenous party-litigant. In the end, the final arbiter is still a state-sanctioned court of law.

V. Conclusion

The task of the IPRA in this whole gamut of divergent law systems is to guarantee that the customary laws which are long observed by indigenous communities must be upheld; that justice may be achieved not only through the application of the positive state laws but also through customary laws. In the final analysis, what matters most is the acceptance of the party litigants that justice has been served.

This essay has argued that in situations where legal pluralism is existent, the state is only one of the actors in society attempting to direct the "ball game" (Migdal 1988, 39). The success or failure of that actor trying to impose social control could be measured if there is a "subordination of people's own inclinations of social behavior … in favor of the behavior prescribed by that who sought to prescribe it" (Migdal 1988, 22).

The indigenous peoples are not customarily familiar with written titles as evidence of their ownership over their lands. But with the mandate of the IPRA, land titling and registration became primary instruments for indigenous peoples' right to land ownership. As a basic requirement, customary laws are formed out of the voluntarily acquiescence by the members. Besides, customary laws are generally unwritten and organic. With the passage of the IPRA, ancestral lands are treated in a manner similar to that of other ordinary lands where a title is construed as the evidence of ownership. Consequently, customary laws are themselves subjected to the standardization of all processes and structures operative within the Philippine state.

Additionally, based on existing literature, titling and registration of indigenous peoples lands and natural resources could be framed within three possible frameworks, namely, the rights-based, protective, and environmental approaches (Plant and Hvalkof 2000, 11-12). In using these frameworks to analyze the IPRA and the performance of the NCIP, the dominant titling structure at work appears to be the rights-based approach alongside, but not on an equal plane with, the environmental approach. The assertion that the issuance of CADTs/CALTs is seen as an end in itself attests to this prevailing conception of rights. The state issues CADTs and CALTs so as to recognize the long existing rights of the indigenous peoples over their land. Too, there appears to be a realization that the indigenous communities have better knowledge and capacity to maintain and sustain their environment.

Understanding the framework for titling and registration of ancestral domains and lands becomes important not only because it guides the implementing arm (the NCIP) in executing its functions but, equally, because it serves as a standard for measuring if indeed the raison d' etre of the law has been fulfilled.

The development framework being used for the issuance of these titles requires deeper analysis. Admittedly, the data set available poses more questions than answers. It is certainly important to emphasize that there are two general development frameworks used in land titling and registration of ancestral domains and lands: 1) the tailoring of any development activity to the local and traditional economic and social needs of the communities (Leonen 2007, 38), and 2) seeing land titling and registration as a mechanism to "promote more efficient operation of market forces in agriculture" (Plant and Hvalkof 2000, 1). More imperative than choosing which framework is being applied in the Philippines is dealing with the questions asked by Plant and Hvalkof (2000, 1): a) Are market forces and indigenous economic and social systems mutually exclusive? b) What supervision should be made to ensure that the land registration and titling are considerate of the social and economic needs of indigenous peoples?

In the relationship between the three certificates issued by the NCIP particularly the ADO, namely CADT, ADSDPP and FPIC, it is imperative to ask why the number of FPICs issued far exceeds the CADTs and ADSDPPs, considering that all of these are mechanisms for indigenous peoples to exercise their rights. It is also of equal importance to know what this situation says about NCIP and its priorities as well as what it says about IPs and their own priorities.

Examination of the quasi-judicial powers of the NCIP shows that state powers are becoming stronger and pervasive within indigenous communities. Looking at the kind of services being offered by the LAO as well as the processes being employed by the RHOs in adjudicating the disputes involving indigenous peoples, it appears that these are heavily similar to those processes at work in regular courts. The hearing officers stationed at the RHOs are lawyers schooled under the auspices of state- sanctioned justice systems. Moreover, counselors who appear before these RHOs to defend indigenous peoples are also state-registered lawyers. In consequence, the RHOs do not appear to be an indigenous court for dispute resolution. With this structure not privy to customary laws or cognizant of them, it does appear to be an additional layer of the bureaucracy not totally different from the RTCs except that the party litigants involve indigenous peoples.

As a creation of the national law, the NCIP, with its quasi-judicial functions, appears as if it acts as a catalyst for familiarizing indigenous peoples with the rudiments of state laws, and serves to introduce state positive laws into their customary justice systems.

As to whether there generally is resistance, or acquiescence, by the indigenous peoples to this legally pluralist situation is a matter that merits separate discussion.

This is not to say, however, that the NCIP, or its offices responsible for exercising quasi-judicial functions, is remiss in doing its work. Given its responsibilities as provided by law, there appears to be no violation or neglect of its duties. Although there is a clear recognition by the IPRA that one cannot take away the customary laws and integrate them uncritically into the mainstream legal system, it is equally clear that it neither directs the state judicial systems to recognize customary laws nor provides for the creation of indigenous courts and counselors.

In this context, it would be short-sighted to task the NCIP exclusively with the recognition and promotion of customary laws. State courts too must evince a high degree of recognition of customary law. Only when the state judicial system recognizes custom laws will there finally be a sincere legitimation of these various traditional justice systems. One way to make this happen is to begin with the documentation of case laws. Note, however, that what should be documented are case laws and not the codification of customary laws itself. The claim that codification of customary laws would obliterate its organicism, that it would destroy its responsive capacity and flexible nature is noteworthy (Gatmaytan 2000, 46). The compilation of the NCIP of case laws is a positive step towards this goal of making customary law operative beyond its local jurisdiction. The NCIP, through its legal officers, compiled ten different cases where customary laws were used in conflict resolution. This NCIP compilation, *What About Us?* (Gasgonia n.d.), is a commendable example of documented case laws that could be used as a reference if not as a precedent for future resolution of conflicts. Efforts of similar import should be undertaken at the grassroots. As a matter of fact, it is helpful for purposes of legitimation that these cases be given judicial notice by the Philippine regular courts.

Seen from this perspective, one could argue that the consolidation or strengthening of state powers is readily manifest in these particular circumstances. State powers have grown; at the same time the indigenous peoples are becoming more aware of the state's existence and its institutions. Indigenous peoples who were previously ignorant of the state judicial institutions and processes are now represented by the NCIP in regular court proceedings, and rules and procedures being applied in the RHOs are patterned from procedures of state courts. In view of this, the indigenous peoples would necessarily be introduced and even encouraged to work within the bounds of state-sanctioned positive laws. Moreover, when the available institutions that are now being approached by the indigenous people to ventilate

their grievances, like the RHOs, work in similar mold as that of other state institutions, Scott's (1998) contention regarding bureaucratic simplification and standardization of structures and processes, a characteristic which is common among modern societies, could be considered as an emerging trend insofar as justice administration in the Philippines is concerned.

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