

CONTESTED DOMAINS: THE INDIGENOUS PEOPLES RIGHTS ACT (IPRA) AND LEGAL PLURALISM IN THE NORTHERN PHILIPPINES¹

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Introduction

The increasing international concerns for sustainable use of natural resources has led to a reappraisal of local peoples' environmental knowledge and resource management skills. In the Philippines the alarming rate of forest degradation and unsustainable resource management under the centralist state control has largely influenced the granting of state recognition, and implementation of the Indigenous Peoples Rights Act (IPRA, otherwise known as Republic Act No. 8371 of 1997), governing ancestral lands and ancestral domains. The state recognition of indigenous people's rights to their ancestral lands and domains has been increasingly linked to a policy of ecological conservation and the protection of biodiversity (see F. and K. von Benda-Beckmann 1999; Prill-Brett 2000).

In comparison with neighboring countries the Philippines is relatively advanced in recognizing the rights of indigenous peoples (IPs) to their ancestral lands and domains (Aquino 2004: 116). The issuance of the Certificates of Ancestral Domain Claims (CADCs) gives IPs collective rights to a specifically delineated geographic

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space. The overall and long-term goal of the policy was based on the assumption that people, when they are given the right of tenure to the land, will be more committed and concerned for its protection and conservation (Gibbs et al. 1993; Poffenberger and McGean 1993). I argue here that the mere awarding of ancestral domain (communal) tenurial instruments does not automatically lead to sustainable environmental management, or to social justice (see also Kuper 2003; Utting 2000). By itself, land security through communal tenure or collective control may not guarantee sustainable resource use. As suggested by Colchester (1998), the control and management of resources must be vested in open, clear, and accountable institutions that respect the principle of equity. Moreover, long-term sustainable resource use is only likely to be achieved where the community members believe their future somehow lies in their continued dependence on the land for their survival.

This paper examines how the Philippine government's recognition and awarding of Certificates of Ancestral Land Claims (CALCs) and CADCs, and the implementation of the IPRA have affected the indigenous communities' resource management practices. It also looks at how the customary law governing the rules and regulations in the management of community natural resources is responding to other jural systems. Of interest are the ways by which both the state law and local law are manipulated by individuals and interest groups, who employ the discrepancy between the two competing jural systems to promote the continuing plurality of the jural system for their own ends (see F. von Benda-Beckmann 1983). Although the paper focuses on the Cordillera experience, some of the problems and issues presented here may well apply to other areas with similar conditions under the implementation of the Department of Environment and Natural Resources (DENR), Department Administrative Order No. 02, series of 1993 (DAO 02), which encompasses the identification, delineation, recognition and awarding of certificates of ancestral lands and ancestral domain claims, and the eventual awarding of Ancestral Domain Titles by the National Commission on Indigenous Peoples (NCIP).²

² The NCIP took over its functions from the DENR and now issues titles rather than Certificates. Thus for the ancestral domains a Certificate of Ancestral Domain *Title* is issued instead of a Certificate of Ancestral Domain *Claim*, and for the ancestral lands a Certificate of Ancestral Land *Title* instead of a Certificate of Ancestral Land *Claim*.

The Cordillera Region

The northern Cordillera region is a series of mountain chains located in the northern part of the island of Luzon (see Fig. 1, next page). It is bounded on the western flank by the Ilocos provinces, and the Cagayan provinces on the eastern borders. The great chain of mountains that rises abruptly from the sea on the provincial boundary between Cagayan and Ilocos Norte in the Philippines is called the Gran Cordillera Central (see Scott 1974: 1). It climbs up to altitudes of 7,000 to 8,000 feet to divide Kalinga and Apayao from Ilocos Norte. These mountain ranges continue southward through Bontoc until they reach their peak of 9,000 feet on Mount Pulag in Benguet. Then they descend to the plains of Pangasinan, through a spur about 8,000 feet in elevation called the Caraballo Sur that divides the province of Nueva Vizcaya from Nueva Ecija. Most of the major river systems of northern Luzon have their headwaters on the Cordillera.

Several ethnolinguistic groups have inhabited the Cordillera region for more than five centuries. They have developed independent communities, which are politically and economically autonomous from any other (Prill-Brett 1988). The major ethnolinguistic groups are divided into the Isneg of Apayao, Itneg Tingguian of Abra, Kalinga, Bontok, Ifugao, Kankana-ey, and Ibaloy. Other groups asserting their ethnic identities include the Kalanguya (Ikalahan, Ikadasan), Ikarao, and Bago. These mountain people resisted Spanish colonization for more than three centuries, and many continued to enjoy their relative autonomy in managing their local community resources through their socio-economic and political institutions under American colonial rule, and into the Philippine Republic. As a consequence, Filipinos who did not fall under colonial rule - such as the peoples of the Cordillera and other non-Hispanicized Filipinos who were not assimilated into the mainstream Philippine society - have been referred to under several designations such as 'non-Christian', 'pagan', 'tribals', 'natives', 'cultural minorities', 'cultural communities', and the current, more acceptable terms indigenous peoples (IPs), or indigenous cultural communities (ICCs).

The term 'indigenous cultural communities' or 'indigenous peoples' is defined in the IPRA as follows:

A group of people of homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organized community on communally bounded and defined

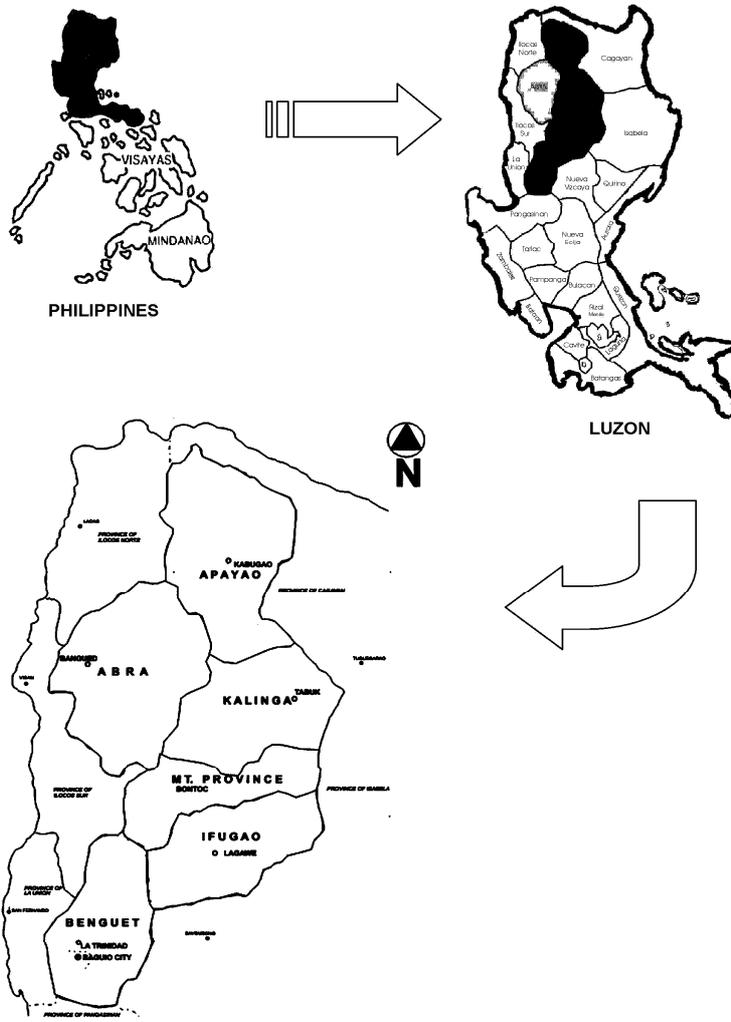


FIGURE 1
CORDILLERA ADMINISTRATIVE REGION

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territory, and who have, under claims of ownership since time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have, through resistance to political, social and cultural inroads of colonization, non-indigenous religions and cultures, become historically differentiated from the majority of Filipinos. ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonization, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains. (IPRA: Chap. II, Sec. 3 (h))

The Act defines ancestral domain and ancestral lands as follows:

Ancestral Domain ... refers 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 possessed 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 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. (IPRA: Chap. II, Sec. 3 (a))

Ancestral Lands ... refers to land occupied, possessed, and utilized by individuals, families and clans who are members of the ICCs/IPs since time immemorial, by themselves or through their predecessors-in-interest, under claims of individual or traditional group ownership, continuously, to the present except when interrupted by war, *force majeure* or displacement by force, deceit, stealth, or as a consequence of government projects and other voluntary dealings entered into by government and private individuals/corporations, including, but not limited to, residential lots, rice terraces or paddies, private forests, swidden farms and tree lots. (IPRA: Chap. II, Sec. 3 (b))

Paradigm Shift and the IPRA

The passage of the IPRA law is the result of paradigm shifts in the attitude of government agencies toward the ICCs/IPs on two counts. First is the paradigm shift in the state legal centralist ideology (Prill-Brett 2002: 3), where the state holds a monopoly on the exercise of the law, administered by a single set of state institutions (Griffiths 1986: 3). The IPRA law has finally challenged the legal fiction called the *Regalian Doctrine* (Lynch 1986: 270)³ in relation to IPs' rights to their ancestral domains and ancestral lands, as well as the customary laws that guide resource management. The state now recognizes the existence of another system of law, particularly customary law.⁴

³ The Philippine legal system of land ownership follows the principle of the *Regalian Doctrine* which embraced the feudal theory of *jura regalia*, which means that all lands were granted from the crown. The Americans adopted the principle under which the state owns all lands in a republican system and vested ownership in the state. The 1987 Constitution states:

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... (1987 Constitution of the Republic of the Philippines Article XII: section 2)

⁴ The constitutionality of the IPRA, was challenged before the Philippine Supreme Court on September 1998, by retired Supreme Court Justice Isagani Cruz and

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Second is a shift in the general perception that indigenous forest dwellers were the degraders of the natural environment through their unsustainable resource management practices, i.e., swidden farming or shifting cultivation. Indigenous people are now viewed as natural resource conservers through their sustainable indigenous knowledge practices, guided by their customary law. Therefore, their rights to the land that they have protected and managed sustainably should be recognized, and furthermore their rights should be protected by law.

The Philippine government's recognition and granting of ancestral land rights and ancestral domain rights to IPs and communities through the passage of the IPRA has been the result of policy conflict over land access, use, and control. The seeming inability of government to control and manage natural resources under the classification of public domain has led to a general perception that these resources are open access resources.⁵ The resulting intensification of forest degradation and unsustainable forest extraction has prompted the government to change its policies towards IPs/ICCs that inhabit the forest.

The IPRA law also provides for the creation of the NCIP, which is an independent agency directly under the office of the President. It is the primary government agency responsible for the formulation and implementation of the policies covered by the IPRA. Among the responsibilities of the NCIP is the mandate to issue Certificates of Ancestral Land Titles (CALTs) and Certificates of Ancestral Domain Titles (CADTs) over areas that have been earlier awarded CALCs and CADCs by the DENR.⁶

another lawyer. They alleged that some of the provisions of the IPRA deprived the state of the right to own minerals and natural resources. It was argued that the right of IPs to determine claims to ancestral domains could not be superior to the right of the state itself to own minerals and other natural resources (*Peoples' Journal*, 1998). In January 2001 the Supreme Court handed down a decision upholding the constitutionality of the IPRA. It was again appealed and again the Supreme Court upheld the constitutionality of the IPRA.

⁵ Bromley and Cernea (1989: 204) do not consider 'open access' as a form of property. This is because open access institutions cannot exclude 'outsiders,' whereas communal institutions have clearly demarcated boundaries and are governed by rights and obligations of the 'owners'.

⁶ IPRA, section 11, "Recognition of Ancestral Domain Rights".

Up until this time, colonial and post-colonial governments had never recognized indigenous collective land rights, and most especially ancestral domain claims. But in fact, many ancestral lands should actually be classified as private, and should not have been designated as public lands, as was decided in a 1909 landmark decision of the United States Supreme Court⁷ (also Lynch 1986). The IPRA allows the titling of individually owned land under the provisions of the Land Registration Act No. 496 of 1902. While all lands with slopes of 18% and above are classified as Public Land, and therefore, non-alienable and non-disposable, under the IPRA, individually owned lands which are classified as agricultural, residential, pasture, and tree farming, including those with slopes of 18% or more, are alienable and disposable agricultural lands (Chap. III, Sec. 12). This law therefore allows the titling of agricultural lands such as the Cordillera rice terraces, some with slopes ranging from 60 to 80 degrees.

In the Cordillera experience a singularly important characteristic of an ancestral domain is the effective control of a distinct community over a territory (Prill-Brett 1988). However, this concept is not universal to all communities applying for a CADC.⁸ DAO 02 simply prescribes possession/occupation as the primary requisite for eligibility to a claim of ancestral domain. By itself, this provision does not distinguish indigenous communities as to levels of integration, especially as these still possess concepts of territory and territorial control –which are indicators that correlate positively with the observed sustainability of resource management.

A second important characteristic of an ancestral domain is the existence of operational concepts of territory and resource control. This is evidenced through the existence of jural rights, duties, and obligations that govern the management of

⁷ *Mateo Carino, plaintiff-in-error, vs. Insular Government of the Philippine Islands* (No. 72- February 23, 1909), *Philippine Reports* 41 (1920-1921) 935-944.

⁸ Castro (2000: 49), for example, argues that the concept of ancestral domain does not apply to all Philippine indigenous people. He states that “There is the tendency to make sweeping generalizations about indigenous peoples of the Philippines. Not all IP communities share a common notion of territory. On the one hand, there are groups such as those in the Cordillera who have concepts of ancestral domain, while on the other, the nomadic Agta of northern Sierra Madre have a fluid concept of territoriality. Their domain moves as the band transfers from place to place. There is no concept of permanent territory.

common property resources within an ancestral domain. The communities that have exercised the concept of domain include the rule of exclusion, which is evidence of territorial and cultural integrity. Sustainable indigenous resource management practices are indicators of an integrated socio-cultural system (Prill-Brett 1994). The domain historically covered only the territory of a distinct community in the Cordillera context – and most likely this is so elsewhere among most of the Philippine ICCs. Operational concepts of territory and resource control have evolved over time in the socio-ecological context of each community, but traditional ancestral domain generally covered only the territory of one distinct community, each village /community being an autonomous socio-economic and political unit.

Some Problems Arising in the Awarding of CADCs

Thus, the awarding of a CADC over an entire administrative area (i.e., a municipality or a province) has no fit with any traditional regional mechanism for managing such an ancestral domain. I have argued elsewhere that this could create serious problems of conflicting users, resource competitors, and boundary conflicts leading to weak ecological considerations in resource management practices, as well as inequity in the access and control of resources (Prill-Brett 2002: 8).

Another problem is the tendency for government to assume that Cordillera communities, and other Philippine IPs, are homogeneous, which then leads to problems in the awarding of the CADCs. Thus some IPs have been awarded their CADCs but the delineation process failed to include important areas within their ancestral domain. Examples include the Agta of the Cagayan, and other IPs of Palawan and the Visayas that traditionally have been coastal dwellers but who failed to gain title to coastal area settlements and to shorelines and the sea (Magana 2003). Other ancestral domains traditionally identified by the indigenous inhabitants have been permanently occupied and developed by populations composed of migrants from other Philippine ethnic groups. There is, therefore, a need for implementers to be well informed, and to have a good understanding of the historical development of the domain, and the type of property regimes and resource management practices, in order to enable government and non-government agencies to effectively assist in the identification, delineation, and awarding of the appropriate tenurial instruments. There are, for example, several distinct types of property regimes existing among the IPs that should be taken into

consideration in the identification and delineation of ancestral domains (Prill-Brett 1994; Wiber 1993: 13-15; Wiber and Prill-Brett 1988). Furthermore, it is important for organizations pushing for IP communities' ancestral domain titles to consider that the development of rights to natural resources are products of local history, ecology, changes in resource conditions and use, and the social relationships that are often the outcome of negotiation.

A distinction can be made regarding the types of communities found in the Cordillera in relation to the concept of ancestral 'domain.'

- Communities that have a homogeneous ethnic population with a long settlement history (e.g., over several centuries), allowing for the establishment of a strong attachment to a territory/domain. This includes the residential area, place names of sacred sites, burial sites, and the natural resources which have been exploited and managed through rules governing rights and obligations. Non-citizens of the community are excluded from exploiting natural resources that belong to each distinct community, without prior permission and consent. These communities are of two kinds: a) traditional swiddening (*uma*), and b) wet rice agricultural communities, usually with swiddening as a complementary livelihood activity (Prill-Brett 1994).⁹
- Communities that have been more recently established by migrants from neighboring communities, or from other places in the Cordillera. Most of these newly established communities have been created by pioneer farmers (Delson 1989) who have converted the mossy forest, second growth pine forest, or dipterocarp forest into agricultural land (e.g., Mount Data, Mount Pulag lower slopes, Mount Polis lower slopes and areas of Apayao forests). Most of these highland farms are planted with cash crops, encouraged by the market demand for temperate vegetables and high value crops. The act of clearing and improving the forest, often through permanent gardening, is a strategy used in gaining possession of what is perceived by the claimants as an 'open access' resource. The property system resulting from this activity, and the preferred tenurial security instrument is private individual right to areas where the farmers

⁹ Some communities in Benguet province have engaged in 'pocket' mining as a supplementary livelihood activity together with swidden farming.

have invested money and labor in permanent land improvements. Some of these lands have already been tax declared/registered. It has also been observed that communities engaged in truck farming usually lack the concept of common property resources, together with the absence of traditional management practices and the accompanying rituals. Also observed is the absence of the concept of ancestral domain, since these areas were only recently settled.

In the wet rice agricultural communities, especially those in the Mountain Province, southern Kalinga, and northern and eastern Benguet, the *Ili* (village) is the term that refers to a cultural-geographic area, a unit that is the appropriate entity to exercise rights over an ancestral domain. The *Ili* is historically inhabited by a homogeneous population that can trace their descent from common ancestors, who were the original founders of the village, and who share and manage common property resources, governed by rights and obligations, reinforced through myths and rituals. Within the *Ili*, people are accountable to one another through long-term associations of mutual trust. Citizenship is primarily based on relationships of birth traced through ancestors, and affinal relationships through intermarriage, including the exercise of rights and obligations in relation to shared common property resources within a well defined territory (Prill-Brett 1994, 1995). This defined physical and cultural territory is referred to as the ancestral domain of a distinct community.

While the Philippine state has been well-intentioned in the recognition and awarding of ancestral domains to indigenous communities, failure to consider cultural diversity in the identification, delineation and management of ancestral domain resources may result in unforeseen and unintended consequences.

Unintended Consequences in the Implementation of the IPRA

The enthusiasm of government and some non-government organizations (NGOs) to fast-track CADCs has resulted in some inappropriate applications of ancestral domain.¹⁰ These unintended consequences may have implications for policy making, and issues arising in the implementation of the IPRA.

¹⁰ This also applies to several cases experienced outside the Cordillera in the implementation of the IPRA.

The DENR's earlier widespread practice of giving CADCs to units larger than the traditional communities may appear to be efficient in simplifying the application process. However, this may not be an effective strategy to foster sustainable resource management. The procedure for application does not always start at the level of the specific community occupying the domain. A people's organization (see Aquino 2004, for example), or even the local government unit (LGU), can submit a claim in the name of the whole *barangay*, or even the municipality, which is not necessarily equivalent to the socio-cultural definition of the area covered by the domain.

The IPRA is intended to improve the IPs' quality of life and promote unity and justice among the indigenous groups, and thereby promote sustainability of indigenous resource management practices. However, in the implementation of the IPRA, particularly in the identification and delineation of ancestral domains, some problems have created conflict within and among the IP communities. This situation has contributed to the increasing breakdown of the internal juralty, and to the occasional invention or reinvention of custom law (see also Wiber 1993: 98-108), as well as the introduction of new structures leading to inequity in access and control of common property resources. This fosters the emergence of opportunity structures that have been used, and are being used by elites within and outside the community. Thus, the intended objectives of the awarding of ancestral domains to ICCs/IPs may not be realized due to certain erroneous assumptions. The increasing delegation of political functions to the LGUs which has been a very welcome government move has somehow affected the implementation of the IPRA on the local level as discussed below.

The decentralization and devolution programs that transferred responsibility for resource management to local government (Colongon 2001; Rood and Casambre 1994) has resulted from the central government's failure to effectively manage natural resource systems. However, with devolution, an increasing incidence of boundary conflict has been observed which involves bordering provinces, municipalities and *barangays*. These conflicts have often been caused by overlapping and conflicting programs, resulting in competition over resources, control, and management. Municipal level programs are prioritized according to the size of the target population. This encourages the community leaders to try to expand their territories to include bordering *barangays* to gain access to more government resources such as the Internal Revenue Allotment share. At the community-*barangay* level, the LGU can independently decide the course or

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direction for barangay development. Some of the powers enjoyed by such LGUs include the right to be consulted as stakeholders within their respective jurisdictions regarding development projects and programs. Thus, there is a tendency for some local government officials to make unilateral political decisions in matters concerning the ancestral domain management of resources and to thereby inadvertently undermine the awarding of Ancestral Domain titles to some IP communities. One such example is the case below as reported by the *Zig-Zag Weekly*, and the *Baguio Midland Courier*, region-wide newspapers that cover news in the Cordillera:

Bakun municipality of Benguet province is the first municipality to be awarded a Certificate of Ancestral Domain Title (CADT) under the IPRA. However, this Domain Title has been rejected by the Municipality of Bakun through a resolution by its local government officials. This development came about after the municipal-level officials passed a resolution on Dec. 20 2005, rejecting the ancestral domain title offered by the NCIP. The unilateral decision to pass the resolution was anchored on the allegation that some communities were not included in the survey conducted by the NCIP. The exclusion could affect the land area of Bakun as well as the Internal Revenue Allotment share from the national government. . . (*Zig-Zag Weekly*, Jan 8 and Feb. 26, 2006).

It has been very clearly stated in the IPRA which entity is the appropriate holder of the Ancestral Domain Title.¹¹ In the above case, however, it seems to be the Municipality of Bakun, not the traditionally autonomous communities (*Ili*) discussed earlier in this paper. It appears that the municipal government officials are in fact the ultimate decision-makers in relation to ancestral domain matters, since the process involves political boundary jurisdictions. In such a situation there is a prospect that the communities' ancestral domain governance and self-

¹¹ The IPRA Implementing Rules and Regulations state:

...the Commission shall direct the ADO to prepare the Certificate of Ancestral Domain Title (CADT) *in the name of the claimant IP community* in a specific location, together with all its necessary annexes ... [emphasis added] (NCIP Administrative Order No. 1, Series of 1998, Rule VIII, Part 1, section 2(o))

determination will be compromised, should the community vs. municipal government-issue not be resolved early in the process.

The above case shows some of the unforeseen and unintended consequences that have surfaced in the awarding of the CADTs on the municipal level. It has also been observed that the indiscriminate awarding of CADTs to whole municipalities could also create an opportunity structure for elites to claim land under the venue of ‘communal’ domain, and later work on privatizing the land through Tax Declarations. Since the CADT covers the domain of several communities it would be difficult for community members to police the municipal domain to prevent the encroachment of individuals who might survey unoccupied common property forestland for land registration. Thus, checks and balances need to be in place to ensure that local elites or other politically powerful groups do not monopolize benefits and community decision-making. The process should acknowledge the multiple interests among different groups and give special attention to the livelihood needs of the poor members of the community, especially since common property resources have functioned as safety nets for the poorer members.

The implementation of the IPRA appears to have intensified the problem of political boundary conflict, which deals largely with issues of overlapping claims to traditional territories versus political boundaries.¹² This has been largely brought about by resource competition leading to encroachment and shifting of boundaries by the contesting municipalities to gain more territorial jurisdiction. Under such conditions, this decentralization scheme will not necessarily be any more successful in combining the protection of forest and natural resources with the provision of sustainable livelihoods than the previously centralized system if checks and balances are not installed.

The implementation of the IPRA has brought about both negative and positive consequences. Some of these consequences have been triggered by several factors impinging on these communities, such as the introduction of new structures and rules with the introduction of new technologies, the increasing commercialization of agriculture and forest resources, the introduction of commercial crops (replacing subsistence crops), infrastructures, different conservation views, often

¹² Examples include the boundary conflict between the municipality of Tuba, in Benguet Province and La Union; Tadian, in Mountain Province and Cervantes, Ilocos Sur; Barlig in Mountain Province, and Banaue, Ifugao, among several others.

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with conflicting policies introduced by national and international conservation agencies, and the superimposition of nationalization policies interacting with population increase. These factors are contributing to the breakdown of traditional institutional arrangements.

Conflicting Perspectives from Natural Resource Conservation and Protection Agencies

The DENR and the Department of Agrarian Reform (DAR), have both been involved in the implementation of DAO 02, on the State's recognition of ancestral lands and ancestral domains, with the DENR as the lead agency. This has inadvertently created problems with the awarding of overlapping claims to indigenous communities by both departments (NIPAP 2000; Prill-Brett 2002). Even among the government departments themselves, policy formulation is most often uncoordinated because each department wants to assert its institutional competence and bureaucratic expertise. However, this appears to be changing with the integrated development approach, and different government departments appear to have welcomed a collaborative and integrative process.

National and international sustainable forest management and biodiversity conservation programs and projects have been introduced to areas that have been claimed by indigenous communities as falling within their ancestral domains. Although most of these programs and projects are well meaning, problems are often approached exclusively with regard to their national and international dimension, and the resulting policies thus often fail to consider existing indigenous resource management practices. Often objectives come into conflict with the indigenous communities' common property resource management (Prill-Brett 2002). Under such conditions, some indigenous claimants have invoked both the customary and national laws to gain new access to natural resources, which results in inequity amongst indigenous community members and non-sustainable resource management. This resulting discrepancy between indigenous resource management practices and actual management practices such as commercial logging and the shift from swidden to commercial farming in mossy forests is illustrated by the following cases.

Issues in the Recognition and Use of Customary Law and the Emergence of Legal Pluralism

The State law has been criticized for being too general in its applicability and often failing to address the diversity of issues existing in the indigenous communities. The premise of any national law is that it can meet local problems with a generalized solution. However, with the implementation of the IPRA, the state now recognizes the existence of another legal system within the Philippine state, defined as *customary law*.

‘Customary law’, as defined in the IPRA, refers to a body of written or unwritten rules, usages, customs, and practices traditionally observed, accepted and recognized by the respective ICCs/IPs. The law provides that:

The state shall protect the rights of ICCs/IPs to their ancestral domains to ensure their economic, social, and cultural well-being and shall recognize the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain. (IPRA, section 2(b))

and declares that their right to Ancestral Domains include:

Right of the IPs to resolve land conflicts in accordance with the customary laws of the area where the land is located, and only in default thereof shall the complaints be submitted to amicable settlement and to the Courts of Justice whenever necessary. (IPRA, section 7(h))

Customary law evolved locally, largely in response to the management of natural resources and in resolving conflicts that arose. It responds to the different property regimes existing within the particular community¹³ and the social relationships that revolve around these (Wiber and Prill-Brett 1988). It encompasses the rights and responsibilities of individuals and groups involved in the management of resources and the rules governing conflict management, including conflict arising from within the community or across communities such as those pertaining to boundary disputes, ownership of hunting grounds, forest stands, irrigation water and

¹³ These property regimes refer to *communal, indigenous corporate, and individual* rights.

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pasturelands, inheritance disputes, murder, theft, destruction of property, and violation of sacred sites (Prill-Brett 1995).

Customary law is found to be strong in its application to communities with the following characteristics: practicing a subsistence economy with a simple technology, maintaining a population balance in relation to resources, and being culturally homogeneous, with minimal exposure to commercial farming and a cash economy, and with a low out-migration record. On the other hand customary law is found to be weak, or virtually absent in relatively new communities that have shifted to commercial crop production and that depend largely on interaction with the cash economy. The latter communities often exhibit natural resource management practices that are non-sustainable.¹⁴

Customary law is able to adjust to gradual changes in resource management, but is unable to adapt quickly in cases of abrupt changes brought about by government policies that are incompatible with the existing conditions within the traditional system.

Customary law governing resource management is not uniform for all IPs, since the rules on property regimes differ according to the economic context (i.e., livelihood strategies such as hunting and foraging, agriculture involving swidden or irrigated farming, cash crop production, cattle grazing, or fishing). In the central Cordillera, communal resources such as swidden land have been the safety net for community members who do not have enough inherited irrigated rice land (see Prill-Brett 1994, 2002). Thus, usufruct right is generally the rule in common property resource management. However, with the identification and delineation of ancestral domains it is the 'communal'/common property resources that are being contested and claimed by no less than the IPs within the political boundaries of several municipalities.

As the national law interacts with customary law it in one way or another transforms both. Legal pluralism results in what F. von Benda-Beckmann (1983) has called a 'jural jungle' where people are influenced in complex ways by different legal conceptions and in which they use these conceptions in various purposive strategies, as is illustrated in some of the cases below.

¹⁴ This is the case among the newly opened farms on the slopes of the mossy forests in the Buguias, Benguet area.

The Breakdown of Communities' Internal Jurality in Natural Resource Management

I have argued elsewhere (Prill-Brett 1994: 11) that the increasing marginalization of sustainable traditional common property institutional arrangements, and their substitution by inefficient government control, has further aggravated the degradation of forest resources. The superimposition of national law on customary law, not only in the Cordillera but elsewhere in the Philippines, has resulted in the breakdown of internal jurality, especially in communities that have shifted from subsistence to a cash economy. Thus, for the period during which these resources degrade into open access, major depletion and destruction occurs before any internal jurality has a chance to develop (see also Bromley and Cernea 1989; Berkes 1986). Furthermore, with the existence of an external market, a single user may exhaust much of the common property resources, defying community sanctions in order to obtain greater cash returns. One example is the commercial vegetable farming of parts of the Mount Data National Park, where farmers have converted the mossy and pine forests into commercial temperate vegetable gardens to satisfy a market demand (see Delson 1989). The myths, rituals, and taboos that reinforced the sacredness of the forest have been discarded by such people. This is also occurring in the lower slopes of the Mount Pulag National Park and Protected Area, where vegetable farmers engage in individually rational but ecologically unsustainable activities. Another case where indigenous resource management rules have been undermined is recounted by Jessie Manuta (1993) in his study on tenurial arrangements and resource management in Halliap, Ifugao. He argues that the inability of the villagers to enforce their customary rules and the inability of the local government to protect the indigenous community or enforce the law, led to the eventual breakdown of indigenous institutions that govern the utilization of forest resources of the village. This has resulted in institutional limbo, which undermines the protection of access and property rights, thus eroding the motivation to protect and maintain the indigenous *muyong* or *pinuchu* agro-forestry system.

A strategy sometimes employed by some community members, particularly in the newly established communities where the forest was originally perceived as open access (while considered to be 'public' by the government), is via the misrepresentation of local tenure in order to secure particular advantages offered by the national law. If the government believes that all IP 'communities' own ancestral domains, and are the proper entities to apply for titles through CADTs,

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then the people will use this belief as an argument to help them secure the CADT. This has been the case with the ancestral domain claims of communities along the Mt. Data National Park and the contested areas of Mt. Pulag in Benguet (see Prill-Brett 2005 a, 2002). However, community members are aware in these cases that newly established communities with migrant settlers from other parts of the Cordillera do not qualify for an ancestral domain.

In the interaction of customary law and state law, some indigenous communities have taken the opportunity to invoke the national law whenever it benefits them. Even before the IPRA was implemented the indigenous communities were already interacting selectively with the national law in some cases pertaining to resource competition as the following cases illustrate.

One interesting case comes from Halliap, Kiangan, in Ifugao, where the transition from communal forest to private property began in the mid-1970s when the price of coffee was at its peak (see McKay 1993: 53). Although the price of coffee then declined, the forest claimed during that time was still valued for logging and for future agricultural use. Young elite men went to the remote forest areas in groups and chose areas of land. Acting as witnesses for each other, they secured their claims by declaring the land for taxes in the municipal office. They planted a few coffee seedlings to mark the periphery of their claims, and since 1987 they have been cutting the trees for lumber. Other people followed their example and a race began to secure land which is now perceived to be 'open access' but which had once been perceived as 'communal'. Areas previously considered communal became private property, with or without a coffee plantation. Usually the new owners were already powerful people and they often reinforced their claim by asserting that their rights were drawn from the authority of the national, rather than the customary legal system.¹⁵ In this case, resolving the disputes over individual claims to forest land has been difficult within the community political system. The preference is usually to take the land dispute to the national courts since the customary law has been flouted. This particular case shows the role of the purposive seeking out of alternatives in the "opportunity structure" – as Franz von Benda-Beckmann (1983) has argued: plurality provides the necessary leeway for individual actors of interest groups to lift behavior out of the opportunity structure and reify it in the social structure. The case that follows further illustrates

¹⁵ However, this was a misrepresentation of Presidential Decree no. 705, since this Decree states that all forest lands are *public* – therefore non-alienable and non-disposable.

this.

In the case of Tanulong in Mountain Province, the indigenous community showed a preference for circumventing customary law in relation to resource rights conflicts by recognizing the jurisdiction of the national law. The community chose to use the national legal system to assert their right against another village in the competition for ownership of a large water source for irrigation.¹⁶ The Tanulong people sought government sanction for their irrigation system as a means of ensuring permanent control of the water source that was being contested by another community closer to the source (Bacdayan 1980).¹⁷ This case clearly illustrates how some indigenous communities employ indigenous tenure rights to gain access to land and water and then reinforce permanent rights through state-granted instruments.

In 1992 DENR personnel in Buguias, Benguet, interviewed Kankana-ey farmers who had converted a large part of the mossy forest to commercial vegetable farms, as to which tenurial instruments they preferred (including the choice of ancestral domain). They unanimously responded that they preferred individual titles to their farms, such as Torrens titles or Free Patents, over ancestral land and domain certificates. My own research on Ibaloy customary law on resource management (Prill-Brett 1992) showed 90% of Ibaloy elder respondents, despite being elders familiar with customary law, preferred paper titles for security purposes. Although they consider customary law to be better¹⁸ for land ownership - they reported that people today do not honor or respect the customary rules governing property systems, and land-grabbing has become the misfortune of those who do not have their land registered and titled. This is attributed to the changing context of social relations pertaining to land, as ICPs are increasingly interacting with the market

¹⁶ In the past, wet-rice terracing communities of the central Cordillera engaged in inter-village warfare due to resource competition for irrigation water, pasturelands or traditional hunting grounds (see Prill-Brett, 1988, 2005b; Wiber, 1993: 98). Recent cases of armed conflict between communities (*Dalican vs. Fedelisan*, and *Saclit vs. Sadanga*) in Mountain Province have been restricted to water rights disputes.

¹⁷ Under the customary law resources located within the territory of a community belong to that community.

¹⁸ 'Better' because they believe that the rules are more equitable, and people were afraid to grab other persons' property for fear of supernatural sanctions.

economy, where there has been an increasing incidence of land grabbing.

The preference for individual rights (titles) over collective rights has been the choice of some IPs that believe their claims to ancestral domain will not benefit them, given their present experience with land disputes. Castro (2000: 49), for example, relates the reaction of an Ayta who was critical of ancestral domain titles, preferring individual land titles. This particular Ayta group has experienced permanent occupation by lowlanders of their ancestral domain.

Summary and Conclusion

This paper began by examining the paradigm shift that has occurred in the State's position on indigenous community land tenure and natural resource management. It gave a short background to the state's recognition of ancestral land rights and the rationale for awarding CALCs and CADCs. It described the indigenous characteristics and identification of ancestral domains in the Cordillera region. It went on to look at the issues and problems arising from the implementation of the IPRA, and the awarding of ancestral domain titles to larger geographic units such as municipalities, and the unintended consequences, such as: conflict over resource ownership, boundary conflicts and conflicts between political jurisdictions involving ethnic boundaries and those having political boundaries, or between local government officials and community elders forming councils of elders; the conflicting perspectives of the different agencies involved in the identification and delineation of ancestral domains; and the breakdown of customary rules and contested rights to resources. It then examined the recognition and use of customary law as provided for in the IPRA and the question of the general applicability of customary law to IP communities given the increasing operation of legal pluralism, especially in access to land, water, and forest resources. It presented cases where individuals and groups try to manipulate the legal systems by using either the national law or the customary laws, or both. It also argues against the awarding of ancestral domains to geographic areas larger than what the community recognized and managed as their traditional domain.

I have argued elsewhere (Prill-Brett 2002, 2005a) that such awarding of ancestral domain titles to areas larger than the traditional territories of communities, will result in serious problems. This widespread practice may appear to be efficient in simplifying the application process. However, it is not matched with a traditional mechanism for managing such a supra-community domain and will not be an

effective strategy to foster sustainable resource management, community equity and social justice.

By itself, land security through communal tenure or collective control may not necessarily guarantee sustainable resource use, as observed from some of the cases presented (e.g., those of conversion of mossy forests into commercial farming communities). Successful environmental management is most likely to be found where the management of resources such as land, water, and forest are controlled by a community that exhibits traditional institutions that are accountable to its members, and that respects the principle of equity. However, these qualities are most unlikely to be found at the collective municipal level. Issues and/or problems faced by the respective communities are not uniform, and such diversity of issues should be resolved within the political, cultural and economic context of the particular community. However, under the existing conditions, it would appear that the decisions regarding resource management will increasingly be shifted to the municipal level LGUs rather than to the community, since the municipal government has its own management plans which often involve supra-community level political decisions. On the other hand, sustainable resource use and management practices in indigenous communities is most likely to be continued where community members believe their future lies in continued dependence on the land and on continued benefits derived from the land.

While some IPRA organizations have tried with varying degrees of success to use IPRA as an instrument to legalize IP claims to their ancestral lands and domain, the IPRA has been criticized for its inherent flaws and emergent implementation problems. Based on experiences in the operation of the CADCs awarded, many issues and challenges have been encountered.¹⁹ It is recommended that the IPRA should be studied seriously, in order to identify its basic weaknesses as well as strengths, and, drawing on diverse experiences on the ground, propose ways to improve, modify, and amend the law. Finally, the success or failure of the IPRA in enfranchising ICCs not only in the Cordillera, but also in similar areas elsewhere depends on the full understanding of the context of the plural jural situation surrounding the management and allocation of natural resources in changing communities. Otherwise, this law and other forms of policy on land and resource rights may miss the mark (Prill-Brett 2002: 18).

¹⁹ See for example Aquino 2003 for a good analysis of the problems and challenges encountered in the implementation of the CADCs among the Bugkalots (Ilongots) of Northeastern Luzon.

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