G.R. No. 181284 – LOLOY UNDURAN, BARANGAY CAPTAIN ROMEO PACANA, NESTOR MACAPAYAG, RUPERTO DOGIA, JIMMY TALINO, ERMELITO ANGEL, PETOY BESTO, VICTORINO ANGEL, RUEL BOLING, JERMY ANGEL, BERTING SULOD, RIO BESTO, BENDIJO SIMBALAN, and MARK BRAZIL, *petitioners*, v. RAMON ABERASTURI, CRISTINA C. LOPEZ, CESAR LOPEZ JR., DIONISIO A. LOPEZ, MERCEDES L. GASTON, AGNES H. LOPEZ, EUSEBIO S. LOPEZ, JOSE MARIA S. LOPEZ, ANTON B. ABERASTURI, MA. RAISSA A. VELEZ, ZOILO ANTONIO A. VELEZ, CRISTINA ABERASTURI, EDUARDO LOPEZ, JR., ROSARIO S. LOPEZ, JUAN S. LOPEZ, CESAR ANTHONY R. LOPEZ, VENANCIO L. GASTON, ROSEMARIE S. LOPEZ, JAY A. ASUNCION, NICOLO ABERASTURI, LISA A. ASUNCION, INEZ A. VERAY, HERNAN A. ASUNCION, ASUNCION LOPEZ, THOMAS A. VELEZ, LUIS ENRIQUE VELEZ, ANTONIO H. LOPEZ, CHARLES H. LOPEZ, ANA L. ZAYCO, PILAR L. QUIROS, CRISTINA L. PICAZO, RENATO SANTOS, GERALDINE AGUIRRE, MARIA CARMENCITA T. LOPEZ, and as represented by attorney-in-fact RAMON ABERASTURI, *respondents*.

Promulgated:

October 20, 2015

SEPARATE OPINION

BRION, *J.:*

I concur with the *ponencia*'s conclusion that the RTC has jurisdiction over the case. I write this Separate Opinion to express my own approach to the case, and to elaborate on relevant points that may need emphasis.

I base my concurrence on the following grounds:

(1) The CA correctly ruled that the RTC's February 14, 2005 order is not tainted with grave abuse;

(2) Jurisdiction over the subject matter is determined by law and the allegations of the complaint.

(3) The National Council for Indigenous Peoples' (*NCIP*) jurisdiction over disputes is limited to cases where both parties are members of the same ICC/IP.

I also concur with the *ponencia* that the NCIP has jurisdiction over adverse claims, boundary disputes, and cancellation of fraudulently issued Certificate of Ancestral Domain Titles (*CADTs*), regardless of the parties involved. But I clarify and emphasize my view that while the NCIP possesses quasi-judicial powers, its jurisdiction is only primary, and not exclusive.

The RTC's February 14, 2005 order is NOT tainted with grave abuse of discretion.

The present petition is an appeal from the CA's dismissal of the petitioner's petition for certiorari. Hence, this Court must determine whether the CA correctly ruled that the RTC did not gravely abuse its discretion in issuing the February 14, 2005 order.

The petitioners alleged before the CA that the February 14, 2005 order is tainted with grave abuse because it: (i) denied the petitioners' motion to refer the case to the NCIP; (ii) declared the petitioners in default; and (iii) issued the writ of preliminary injunction.[1]

Jurisprudence[2] has traditionally defined grave abuse of discretion as follows:

> Grave abuse of discretion is defined as capricious or whimsical exercise of judgment as is equivalent to lack of jurisdiction. The abuse of discretion must be patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion and hostility.

Based on this definition, I share the view that the RTC did not abuse its discretion, much less commit any grave abuse of discretion.

At the time the respondents amended the complaint, the petitioners had yet to file their answers to the original complaint, hence, the amendment was still a matter of right. The rule on amendments as a matter of right applies to a co-defendant who has yet to file his responsive pleading, even if his co-defendants have already done so.[3] Thus, while Macapayag and Brazil have filed their answers, the respondents still have the right to amend the complaint with respect to the rest of the petitioners.

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1 Rollo, pp. 62-63.

2 *Marcelo G. Ganaden, et al. v. The Hon. Court of Appeals, et al.*, 665 Phil. 267 (2011).

3 See *Siasoco v. Court of Appeals*, G.R. No. 132753, February 15, 1999, 103 SCAD 430, 303 SCRA 186.

Likewise, the RTC did not abuse its discretion in declaring the petitioners in default and in issuing the writ of preliminary injunction.

The RTC declared the petitioners in default only after they failed to file their answers within the period allowed. On the other hand, the writ of preliminary injunction sought to maintain the *status quo* to prevent both parties from committing further acts of violence; there is no caprice in maintaining the peace.

Nevertheless, default orders are issued on the presumption that the defendant no longer opposes the allegations and reliefs demanded in the complaint.[4] In this case, the petitioners vehemently opposed the RTC's cognizance of the complaint, and refused to file their answers because they believed that jurisdiction belongs to the NCIP.

In the interest of justice, I support the CA in lifting the order of default to allow the parties to try the case on the merits.

Jurisdiction is determined by the allegations of the complaint

Jurisdiction over the subject matter is determined by law and by the material allegations of the complaint.[5] Under these standards, the petitioner's argument, i.e., that the NCIP has jurisdiction because the case involves the rights of ICCs/IPs, is without merit.

As the *ponencia* pointed out, both the original and the amended complaints do not allege that the respondents were ICCs/IPs, or that the dispute involves an ancestral dominion.[6] Hence, on the face of the respondents' complaint, the RTC has jurisdiction over the injunction case.[7]

Neither am I impressed with the petitioners' argument that, where the actual issue is evidenced by the subsequent pleadings, jurisdiction does not depend on the complaint's literal averments. This Court has consistently ruled that jurisdiction never depends on the defenses set up in the answer, in a *motion to dismiss* or in a motion for reconsideration.[8]

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4 See *Delbros v. IAC*, G.R. No. L-72566, April 12, 1988, 159 SCRA 533.

5 *Mendoza v. Germino*, 650 Phil. 81 (2010), citing *Morta, Sr. v. Occidental*, G.R. No. 123417, June 10, 1999, 308 SCRA 167.

6 Page 12 of the *Ponencia.*

7 Section 19 (1), Batas Pambansa Blg. 129.

8 *Nuñez v. SLTEAS Phoenix Solutions, Inc*, G.R. No. 180542, April 12, 2010, 618 SCRA 142.

The NCIP's jurisdiction over *disputes* is limited where both parties are members of the same ICC/IP.

I join the *ponencia* in ruling that the NCIP does not have jurisdiction over *disputes* where one of the parties is a non-ICC/IP, or where the opposing parties are members of different ICC/IP.

My concurrence is based on the following: **(i) Section 66 contains a *proviso* that limits the NCIP's jurisdiction; (ii) the RTC, not the NCIP, has jurisdiction to adjudicate violations of ICC/IP rights; (iii) Congress had no intention to apply customary laws to non-ICCs/IPs**.

I. Section 66 contains a proviso that limits the NCIP's jurisdiction.

The NCIP's jurisdiction is outlined in IPRA's Section 66:

> SECTION 66. Jurisdiction of the NCIP. — The NCIP, through its regional offices, shall have jurisdiction over all claims and **disputes** involving rights of ICCs/IPs: Provided, however, That no such **dispute** shall be brought to the NCIP unless the **parties** have exhausted all remedies provided under **their** customary laws. **For this purpose**, a certification shall be issued by the Council of Elders/Leaders who participated in the attempt to settle the dispute that the same has not been resolved, which certification shall be a condition precedent to the filing of a petition with the NCIP. (*emphasis supplied*)

Section 66 is composed of three parts: the ***first*** states the NCIP's jurisdiction; the ***second*** requires the prior exhaustion of remedies under customary law; and the ***third*** states that a certification from the council of elders/leaders is a condition precedent to the filing of a petition with the NCIP.

The first part lays down the NCIP's jurisdiction, i.e., over all claims and disputes ***involving the rights of ICCs/IPs***. The NCIP's jurisdiction is not dependent on who the parties are, but ***on whether the dispute involves the rights of ICCs/IPs***.

However, the second part contains the *proviso "Provided, However, That no such dispute shall be brought to the NCIP unless the **parties** have exhausted all remedies provided under **their** customary laws."* The third part begins with the phrase "for this purpose"; the "purpose" referred to being the exhaustion of remedies under their customary laws.

Jurisprudence tells us that *the office of a proviso is to limit the application of the law.*[9]

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[9] *Borromeo v. Mariano*, 41 Phil. 326 (1921), citing 25 R. C. L., pp. 984, *et seq.*; and specifically, the leading cases of *McKnight v. Hodge* [1909], 55 Wash., 289, 104 Pac., 504, 40 L. R. A. [N.S.], 1207; *McCormick v. West Duluth* [1891], 47 Minn., 272, 50 N.W., 128; *Idaho Power & Light Co. v. Blomquist*

Taking these considerations into account, while the NCIP's jurisdiction is initially couched in general terms to include any and all disputes involving the rights of ICCs/IPs, the second and third parts limit the NCIP's jurisdiction to disputes where both parties have remedies to exhaust under customary laws.

Consequently, the NCIP does not have jurisdiction over disputes involving non-ICCs/IPs because non-ICCs/IPs have no customary laws to exhaust.

The limitation likewise applies to disputes where the opposing parties are members of different ICCs/IPs.

Each ICC/IP has its own set of customary laws and council of elders/leaders. To require members of a particular ICC/IP to appear before the council of elders/leaders of another ICC/IP would be to require the former to observe the customary laws of the latter. This is repugnant to the right of each ICC/IP to use its own commonly accepted justice systems, conflict resolution institutions, and peace building processes or mechanisms.[10]

II. The RTC, not the NCIP, has jurisdiction over violations of ICC/IP rights committed by Non-ICC/IP.

As I had earlier discussed, *the first part of Section 66 shows that jurisdiction is not dependent on who the parties are to the dispute, but on* ***whether the dispute involves the rights of ICCs/IPs.***

Guided by the rule that *provisos* should not be construed to limit the main provisions of the statute;[11] this Court must not read Section 66 in isolation but must read it together with the related provision. In this case, the Court must identify the rights of ICCs/IPs, and determine whether the NCIP is the proper venue for the enforcement of these rights.

The IPRA grants ICCs/IPs rights: (i) over ancestral domains/lands;[12] (ii) to self-governance and employment;[13] (iii) to social justice and human

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[1916], 26 Idaho, 222; 141 Pac., 1083, Ann. Cas. [1916 E], p. 282, where these principles concerning provisos are applied.)

[10] Section 15 of the IPRA.

[11] Supra note 9.

[12] Chapter III grants the ICCs/IPs the right to own and possess their ancestral domains/lands including the right to: claim ownership; develop; not to be relocated; be resettled, and to return in case of displacement; regulate the entry of migrants; access integrated systems for the management of inland waters and air space; claim parts of reservations; resolve land conflicts in accord with customary laws of the area; transfer lands to/among the members of the same ICCs/IPs; redeem property sold to a non-member of an ICC/IP, whenever necessary.

[13] Chapter IV grants ICCs/IPs the right to: use their own justice system, conflict resolution institutions and peace building processes; determine their priorities for development; form tribal barangays.

rights;[14] and (iv) to cultural integrity.[15] These rights are spread throughout several chapters, mainly under Chapters III to VI.

It must be noted, however, that most of these rights are state policies, and *only the following are clearly demandable and enforceable:* the rights over ancestral domains and lands;[16] the right against unlawful intrusion;[17] the right to equal protection and to nondiscrimination;[18] the right against unlawful acts pertaining to employment;[19] the rights to religious, cultural sites and ceremonies, including archaeological artifacts;[20] and the right to withhold access to biological and genetic resources.[21]

Section 72 of the IPRA provides that *any person* who violates the rights of ICCs/IPs shall be punished "in accordance with the customary laws of the ICCs/IPs concerned....*without prejudice* to the right of the ICC/IP concerned to avail of the protection of "*existing laws*...*[i]n which case*," the penalty shall be imprisonment and/or fine, and damages, "*upon the discretion of the court*."[22]

"Existing laws" refer to national laws as opposed to customary laws; while "the court" refers to the regular courts as opposed to administrative bodies like the NCIP.

Under Section 72, ICCs/IPs can avail of the protection under *national laws* and file an action before the *regular courts*, in which case, the penalty shall be imprisonment and/or fine, and damages. ***From this perspective,***

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[14] Chapter V grants the ICCs/IPs the right to: equal protection of laws; protection during armed conflicts; equal employment opportunities and benefits; associate and to collectively bargain; basic services. In addition, IPRA declares that ICC/IP women shall enjoy equal rights and opportunities with men.

[15] Chapter VI grants the ICCs/IPs the right to: preserve and protect their culture, traditions and institutions; access to education; practice and revitalize their traditions and customs; restitution of intellectual property taken without their free consent; maintain and protect their religious and cultural sites; use and control ceremonial objects; repatriate human remains; full ownership, control and protection of their cultural and intellectual rights; prevent access to biological, genetic resources and indigenous knowledge without their free and prior consent; receive from the national government funds earmarked for their archaeological and historical sites.

[16] Section 7 of the IPRA.

[17] Section 8 of the IPRA.

[18] Section 21 of the IPRA.

[19] Section 24 of the IPRA.

[20] Section 33 of the IPRA.

[21] Section 35 of the IPRA.

[22] SECTION 72. Punishable Acts and Applicable Penalties. — Any person who commits violation of any of the provisions of this Act, such as, but not limited to, unauthorized and/or unlawful intrusion upon any ancestral lands or domains as stated in Sec. 10, Chapter III, or shall commit any of the prohibited acts mentioned in Sections 21 and 24, Chapter V, Section 33, Chapter VI hereof, shall be punished in accordance with the customary laws of the ICCs/IPs concerned: Provided, That no such penalty shall be cruel, degrading or inhuman punishment: Provided, further, That neither shall the death penalty or excessive fines be imposed. This provision shall be without prejudice to the right of any ICCs/IPs to avail of the protection of existing laws. In which case, any person who violates any provision of this Act shall, upon conviction, be punished by imprisonment of not less than nine (9) months but not more than twelve (12) years or a fine of not less than One hundred thousand pesos (P100,000) nor more than Five hundred thousand pesos (P500,000) or both such fine and imprisonment upon the discretion of the court. In addition, he shall be obliged to pay to the ICCs/IPs concerned whatever damage may have been suffered by the latter as a consequence of the unlawful act.

Section 72 is a special penal law that applies to ALL persons, including non-ICCs/IPs.

The phrase "without prejudice," however, means without limiting the course of action that one can take.[23] Thus, a recourse under customary laws does not take away the right of ICCs/IPs to secure *punishment under existing national laws.* An express caveat under the customary law option is that the penalty must not be cruel, degrading, or inhuman, nor shall it consist of the death penalty or excessive fines.[24]

Since the regular courts, not the NCIP, have jurisdiction over national laws, then the NCIP's jurisdiction is limited to punishment under customary laws.[25]

*The NCIP's power to impose penalties under customary laws presents two important issues: **first**, whether it is legally possible to punish non-ICCs/IPs with penalties under customary laws; and **second**, whether a member of a particular ICC/IP could be punished in accordance with the customary laws of another ICC/IP.*

Laws that provide for fines, forfeitures, or *penalties* for their violation or otherwise impose a burden on the people, such as tax and revenue measures, must be published.[26]

Most customary laws are not written, much less published. Hence, it is highly unlikely that the NCIP or even the regular courts have the power to penalize non-ICCs/IPs with these *penalties* under customary laws. A contrary ruling would be constitutionally infirm for lack of due process.

Similarly, an ICC/IP cannot be punished under the customary law of another. Otherwise, the former would be forced to observe a non-binding customary law.

Therefore, while the NCIP has jurisdiction over violations of ICC/IP rights, its jurisdiction is limited to those committed by and against members of the same ICC/IP.

This view does not detract from the IPRA's policy to "protect the rights of ICCs/IPs." ICCs/IPs, whose rights are violated by non-ICCs/IPs or by members of a different ICC/IP, can still file criminal charges before the regular courts. In this situation, the NCIP's role is not to adjudicate but to

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23 http://www.merriam-webster.com/dictionary/without prejudice.

24 Section 72 of the IPRA.

25 Under Section 46 (g), the NCIP-Legal Affairs Office (*NCIP-LAO*) shall conduct preliminary investigations on *violations* of ICC/IP rights and on the basis of its findings, *initiate the filing of appropriate legal or administrative action to the NCIP*. The Legal or Administrative Action that Section 46 (g) refers to is the action to enforce punishment under customary laws.

26 See *Tañada v. Tuvera*, G.R. No. L-63915 April 24, 1985, 146 SCRA 446.

provide ICCs/IPs with "legal assistance in litigation involving community interest."[27]

III. Congress had no intention to apply customary laws to non-ICCs/IPs.

Some might conceivably argue that Congress passed the IPRA and created the NCIP precisely to bind non-ICCs/IPs to customary laws.

I do not agree with this view.

The records of the Senate and the bicameral committee hearings show that the legislators focused mainly on: (i) the grant of Ancestral Domains/Lands to ICCs/IPs; (ii) the NCIP's organizational transition from its predecessor-agencies; and (iii) budgetary concerns. *Section 66's controversial proviso was not even discussed on the Senate floor or during the bicameral committee hearings.*

In the course of the bill's[28] early development, the Senate technical working group[29] realized that it would be difficult for the NCIP to adjudicate rights of non-ICCs/IPs under national laws, on one hand, and the rights of ICCs/IPs under customary laws, on the other. They were likewise concerned with the possible conflict between the customary laws of contending ICCs/IPs.

As a solution, the Senate technical working group proposed the creation of the Office on Policy, Planning and Research (*OPPR*) and a Consultative Body that will compile all customary laws, and assist the NCIP in its exercise of quasi-judicial powers:

Mr. Mike Mercado (representative of Sen. Juan Flavier):	Sir, it's over and above the customs and tradition. What I'm trying to point out is, it's the whole plan for the sector. Two *issues po ang sinasabi ko.* Number one is regarding the need to put it down because we talked about conflict of rights here…
The Presiding Officer:	…With the Non-IPs.
Mr. Mercado:	With the non-IPs possibly which would happen. It would be easy if the conflict could be between IPs of the same group. So it would be easier to resolve. But *paano po 'yung* if there would be a conflict between an IP and non-IP.

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[27] Section 46 (g) of the IPRA.

[28] The IPRA is the product of Senate Bill 1728 and House Bill 9125. The bill originated from the Senate, and was the consolidation of four separate bills: S.B. Nos. 343, 618, 1476, and 1486. Then as senator, former President Gloria Macapagal-Arroyo authored Senate Bill No. 618, which proposed the creation of the NCIP.

[29] July 30, 1996 Committee on Cultural Communities; Senate Technical Working Group.

Mr. Raiz: Non-IP.

Mr. Mercado: Because the assumption *nga— oo, 'yong sa* civil law relations, *may mga* conflicts *po na* possible na mangyayari. *So, actually, sabi ko nga, maybe we can do away with it. That's one issue.* xxx

Mr. Austria: '*Yong point ni* Mike is very meritorious, *'yon dapat, Dahil unang una,* the IPs should themselves show to the other sectors *kung ano ba 'yon rule nila sa society*.xxx

Ms. Damaso: Let's go back to that discussion on the creation of a separate office on planning and policy, and research.

I think it's more germane to mention those points that Mike has enunciated earlier—that this be a primary function of that office xxx ***continuing documentation of customary laws customary law and other usage 'no for complete mediation or resolution, which would be derived from the culture base of the IPs.***

The presiding officer: You were mentioning *iyong other groups.* What about the commission? Should they be mandated to do the research and to, you know, to compile such laws. *Kasi yung nakikita ko doon sa idea ni* Mike is, like for example, kung may conflict iyong IPs and Non-IPs, *paano mo sasabihin, although sasabihin natin na yung customary law nga yung mag-go-govern, pero paano natin i-po-prove—although kailangan natin i-recognize na mayroon ganuong problem.* Sabihin natin it's an oral practice, it's an oral customary law *pero mas maganda siguro kung iyon nga kung i-compile mo tapos eto ganito yon. So mayroon tayong pang...*

Mr. Mercado: For example po on practical ground, I think ang power is lodged with the Commission which is collective in nature *iyong mga adjudicatory power*. Assuming not all of them would belong to one tribe, they would belong to a different sector or group. I know that it is being practiced and it's not written down, so I have to make decision also

as a part of that Commission—as a commissioner based on something, so I have to also acquaint myself on the practices of other groups because that is part of the power of the commission to adjudicate. For practical purposes only, how would I know the practices of the particular groupings, which I am supposed to adjudicate, assuming that we only have 113 tribes or groupings and we have five commissioners. Those other five or those other commissioners who are not aware of that particular practice, to that they will depend their judgment on. So, there is also a need for this five commissioners to be familiar with the practice of other groups because they will make decisions also.

Ms. Damaso: ***Yeah, Mike, I think your point is to compile, meaning document.***

Mr. Mercado: ***Document only, hindi ho isabatas.***

Ms. Damaso: ***But not to codify. It's a different ball game to codify.***

Mr. Mercado: Actually ginamit ko yung term, nag-usap kami ni Didith, sabi ko, "it's compile only". ***Because, it's beyond the power of this commission to make codifications.*** But 'yung point kanina ni Datu Sulang is actually going a step further. Kunwari like Muslims, bakit nare-recognize na 'yong three marriages Because there is four marriages and they have specific law for that. ***If we will not compile it, mahihirapan tayong ma-attain 'yong level na 'yon na sana mas maganda kung 'yong all practices, for example on marriage sa iba't ibang tribes ma-recognize rin ng law.*** Pero if we will not document the practices, hindi natin maa-attain 'yong level na 'yon. Kaya mas maganda kung mayroon tayong documentation that when legislators if and when they decide to make it a law, mayroon silang existing na gagamitin. xxx

Ms. Chavez ***Couldn't NCIP hire or form a consultative body from which each tribe will be represented by a co-tribal consultant aside from the documentation of customary laws?***

	Pwede ba 'yon ganoon? *Kasi kahit may documentation...* (emphasis supplied)
The presiding officer:	Baka pwede isama sa IRR, implementing rules and regulations 'yong mga tribal tribal consultancy.
Ms. Chavez:	Sa IRR.
The Presiding officer:	Pwede naman siguro 'yon gawin. Anyway, specifics na 'yon. General lang 'yong functions na ilagay natin.

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While the IPRA did create the OPPR, and directed the NCIP to form a consultative body, their functions had nothing to do with the NCIP's exercise of quasi-judicial powers.

The *OPPR's* objective is to document customary laws *for monitoring, evaluation, and policy purposes to assist Congress in formulating appropriate legislations benefiting ICCs/IPs.*[30] On the other hand, the consultative body's role is to advise the NCIP on matters "*relating to the problems, aspirations, and interests of the ICCs/IPs.*"[31]

The variance between the deliberations and the law suggests that Congress passed the IPRA without considering the inevitable conflict of rights under national and customary laws. In my opinion, this casts doubt on whether Congress did give the NCIP the mandate to settle disputes between non-ICCs/IPs and ICCs/IPs.

It is true that the IPRA echoed our Constitution[32] in "***[recognizing] the applicability of customary laws*** governing property rights or relations in determining the ownership and extent of ancestral domain.[33] However, I do not subscribe to the idea that customary laws should bind non-ICCs/IPs simply because Congress ordered the NCIP to compile them.

In *Cruz v. Secretary of Environment and Natural Resources*,[34] former Associate Justice Jose C. Vitug opined[35] that customary laws should not apply to non-ICCs/IPs simply because Congress parroted the Constitution:

> The second paragraph of Section 5 of Article XII of the Constitution allows Congress to provide "for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domains." ***I do not see this statement***

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30 Sec. 46 (b) of the IPRA.
31 Section 50 of the IPRA.
32 The CONSTITUTION, Section 5, Art. XII.
33 Section 2 (b) of the IPRA.
34 G.R. No. 135385, 400 Phil. 904 (2000); In this case, the divided Court upheld the IPRA's Constitutionality.
35 Id., Separate Opinion.

> ***as saying that Congress may enact a law that would simply express that "customary laws shall govern" and end it there. Had it been so, the Constitution could have itself easily provided without having to still commission Congress to do it.*** Mr. Chief Justice Davide has explained this authority of Congress, during the deliberations of the 1986 Constitutional Convention, thus: (emphasis supplied)
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> > "**Mr. Davide**. x x x Insofar as the application of the customary laws governing property rights or relations in determining the ownership and extent of the ancestral domain is concerned, it is respectfully submitted that the particular matter must be submitted to Congress. I understand that the idea of Comm. Bennagen is for the possibility of the codification of these customary laws. So before these are codified, we cannot now mandate that the same must immediately be applicable. We leave it to Congress to determine the extent of the ancestral domain and the ownership thereof in relation to whatever may have been codified earlier. So, in short, let us not put the cart ahead of the horse."[15]
>
> **The constitutional aim, it seems to me, is to get Congress to look closely into the customary laws and, with specificity and by proper recitals, to hew them to, and make them part of, the stream of laws**. The "due process clause," as I so understand it in *Tañada vs. Tuvera* would require an apt publication of a legislative enactment before it is permitted to take force and effect. So, also, customary laws, when specifically enacted to become part of statutory law, must first undergo that publication to render them correspondingly binding and effective as such. (emphasis in the original)

I share Justice Vitug's view. Laws must be published before they take effect. The publication of all laws *"of a public nature" or "of general applicability"* is mandatory.[36] Without publication, non-ICCs/IPs would be deprived of due process of law.[37]

The NCIP has Primary Jurisdiction over Claims regardless of whether the parties are non-ICCs/IPs, or members of a different ICCs/IPs.

I note that Section 66 applies only to "disputes" and not to "claims":

> SECTION 66. Jurisdiction of the NCIP. — The NCIP, through its regional offices, shall have jurisdiction over all **claims** and **disputes** involving rights of ICCs/IPs: Provided, however, That no ***such dispute*** shall be brought to the NCIP unless the parties have exhausted all remedies provided under their customary laws. xxx xxx (emphasis and omissions supplied)

The word "claim" in section 66 relates to rights of ICC/IP over ancestral domains/lands.[38]

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36 Supra note 26.

37 CONSTITUTION, Art. III, Sec. 1.

38 The IPRA classified claims as either communal or individual. The word "claim" or "claims" appeared fifteen times in the IPRA in different sections and sub-sections, all of which are connected with

Four sections in the IPRA are dedicated to the NCIP's jurisdiction over "claims": ***first***, **Section 52** (h), which refers to the power of the NCIP Ancestral Domains Office (*NCIP-ADO*) to deny applications for CADTs; ***second***, **Section 53**, which refers to the NCIP-ADO's power to reject applications for Certificate of Ancestral Land Titles(*CALTs*); ***third,*** Sec. 54, on fraudulent claims; ***lastly***, **Sec. 62**, which refers to the resolution of adverse claims.

Sections 52 (h) and 53 require the NCIP-ADO to publish and post applications for CADTs/CALTs to notify *all persons*, including non-ICCs/IPs. Section 62 allows *all interested* persons, including non-ICCs/IPs, to file adverse claims over disputes arising from delineation of ancestral domains.[39]

Under Section 54, the NCIP may, upon the written request of ICCs/IPs, review existing claims and after notice and hearing, cancel CADTs and CALTs that were fraudulently acquired by *any person* or community.[40]

In these cases, the NCIP has jurisdiction even if one of the parties is a non-ICC/IP, or where the opposing parties are members of different ICCs/IPs.

The NCIP's jurisdiction is primary and not exclusive.

Finally, I wish to point out that while the NCIP possesses quasi-judicial powers, its jurisdiction is not exclusive.

The word "jurisdiction" in the first part of Section 66 is unqualified. Section 66 (then Section 71) of Senate Bill 1728 was originally worded

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ancestral domains and lands: ***First,*** under Sections 3 (a) in defining ancestral domain; ***second,*** Section 3 (b) in defining Ancestral Lands; ***third,*** Sec. 3 (e) in defining Communal Claims; ***fourth,*** in Sec. 3 (h) in classifying ICCs/IPs; ***fifth,*** in Sec. 3 (j) on defining individual claims; ***sixth,*** in Sec. 3 (l) in defining native titles; ***seventh,*** Sec. 4 on the concept of ancestral lands; ***eighth,*** in Sec. 7 (a) on the right of ownership of ancestral domains; ***ninth,*** in Sec. 7 (g) on the right to claim parts of reservations; ***tenth,*** in Sec. 52 (d) on proof of Ancestral Domain Claims; ***eleventh***, in Sec. 52 (h) discussing when NCIP can favorably endorse an action upon a claim on Ancestral Land; ***twelfth***, in Sec. 53 in the Identification, Delineation and Certification of Ancestral Lands; in sec. 54 on fraudulent claims; ***thirteenth***, in Sec. 62 on resolving adverse claims in delineated ancestral lands; ***fourteenth,*** in Sec. 63 on the applicability of laws with respect to claims of ownership of property disputes, ***and fifteenth,*** under section 66.

[39] SECTION 62. Resolution of Conflicts. — In cases of conflicting interests, where there are adverse claims within the ancestral domains as delineated in the survey plan, and which cannot be resolved, the NCIP shall hear and decide, after notice to the proper parties, the disputes arising from the delineation of such ancestral domains: Provided, That if the dispute is between and/or among ICCs/IPs regarding the traditional boundaries of their respective ancestral domains, customary process shall be followed. The NCIP shall promulgate the necessary rules and regulations to carry out its adjudicatory functions: Provided, further, That any decision, order, award or ruling of the NCIP on any ancestral domain dispute or on any matter pertaining to the application, implementation, enforcement and interpretation of this Act may be brought for Petition for Review to the Court of Appeals within fifteen (15) days from receipt of a copy thereof.

[40] Section 54 of the IPRA.

exclusive and original jurisdiction.[41] During the Bicameral Committee Conference,[42] the lower house objected to giving the NCIP *exclusive and original jurisdiction*:

Sen. Juan Flavier: (Chairman of the Senate Panel)	There is exclusive original. And so what do you suggest?
Rep. Zapata (Chairman of the Panel for the House of Representatives):	Chairman, may I butt in?
Sen. Flavier:	Yes, please.
Rep. Zapata:	This was considered. The original, we were willing in the house. But the ”exclusive”, we objected to the word “exclusive” because it would only be the commission that would exclude the court and the Commission may not be able to undertake all the review nationwide. **And so we remove the word “exclusive” so that they will have original jurisdiction but with the removal of the word “exclusive” that would mean that they may bring the case to the ordinary courts of justice.**
Sen. Flavier:	Without passing through the commission?
Rep. Zapata:	Yes. Anyway, if they go to the regular courts, they will have to litigate in court, because if its (sic) exclusive, that would be good.
Sen. Flavier:	But what he is saying is that…
Rep. Zapata:	But they may not have the facility.
Rep._____:	Senado *na lang*.
Rep. Zapata:	*Oo, iyong original na lang*.
Sen. Flavier:	**In other words, it’s not only the Commission that can originate it,**

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[41] The Commission, through its Regional Offices, shall have exclusive original jurisdiction over all claims and disputes involving rights of indigenous people: Provided, however, that no such dispute shall be brought to the NCIP unless the parties have exhausted all remedies under their customary laws. For this purpose a Certification shall be issued by the Council who participated in the attempt to settle the dispute that the same has not been resolved, which certification shall be a condition precedent to the filing of a petition with the Commission. (underscoring ours)

[42] October 9, 1997; Bicameral Conference Meeting on the Disagreeing Provisions of SBN 1728 and HBN 9125.

***pwedeng mag-originate* sa courts.**

Rep. Zapata	Or else, we just remove "exclusive original" so that they will say, the National will have jurisdiction over claims. So we remove both "exclusive and original".
Sen. Flavier:	So what version are you batting for, Mr. Chairman?
Rep. Zapata:	Just to remove the word "exclusive original." **The Commission will still have jurisdiction only that, if the parties will opt to go to courts of justice, then this have** (sic) **the proper jurisdiction, then they may do so because we have courts nationwide.** Here there may be not enough courts of the commission.
Sen. Flavier:	So we are going to adopt the senate version minus the words "exclusive original"?
Rep. Zapata:	Yes, Mr. Chairman, that's my proposal.
Sen. Flavier:	No, problem. Okay Approved.

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The Bicameral Committee's removal of the words "exclusive and original" meant that the NCIP shares concurrent jurisdiction with the regular courts. Thus, I agree with the revised *ponencia* that it would be *ultra vires* for NCIP to promulgate rules and regulations stating that it has exclusive jurisdiction.

The NCIP's jurisdiction, however, while not exclusive, is primary.

Under the doctrine of primary jurisdiction, courts must refrain from determining a controversy involving a question which is within the jurisdiction of an administrative tribunal, where the question demands the exercise of sound administrative discretion requiring the special knowledge, experience and services of the administrative tribunal to determine technical and intricate matters of fact.[43]

On the other hand, when Congress confers exclusive jurisdiction to a judicial or quasi-judicial entity over certain matters by law, its action evinces its intent to exclude other bodies from exercising the same.[44]

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[43] *Phil Pharmawealth, Inc. v. Pfizer, Inc.*, G.R. No. 167715, November 17, 2010, 635 SCRA 140, 153.

[44] *Pua v. Citibank*, G.R. No. 180064, September 16, 2013, 705 SCRA 684.

Having primary jurisdiction is not equivalent to having exclusive jurisdiction. *Thus, to avoid confusion, and to prevent future litigants from claiming that the NCIP has exclusive jurisdiction, the Court should remind the NCIP and other administrative bodies to refrain from claiming that they have exclusive jurisdiction when no such jurisdiction is conferred by law.*

Accordingly, the NCIP's Implementing Rules and Regulations, which state that the NCIP has exclusive jurisdiction[45] should be modified to read "primary jurisdiction."

Conclusion

In sum, the law's intent is neither to grant the NCIP sole jurisdiction over disputes involving ICCs/IPs, nor to disregard the rights of non-ICCs/IPs under national laws. However, the NCIP maintains primary jurisdiction over: (i) adverse claims and border disputes arising from delineation of ancestral domains/lands; (ii) cancellation of fraudulently issued CADTs; and (iii) disputes and violations of ICCs/IPs rights between members of the same ICC/IP.

For these reasons, I vote to grant the petition. The RTC should forthwith continue with the injunction case.

ARTURO D. BRION
Associate Justice

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[45] RULE III. The NCIP shall exercise jurisdiction over all claims and disputes involving rights of the ICCs/IPs and all cases pertaining to the implementation, enforcement, and interpretation of R.A. 8371, including but not limited to the following:

A. Original and Exclusive Jurisdiction of the Regional Hearing Office: (emphasis supplied)

1. Cases involving disputes and controversies over ancestral lands/domains of ICCs/IPs, except those which involve oppositions to pending applications for CALT and CADT;
2. Enforcement of compromise agreements or decisions rendered by ICCs/IPs;
3. Actions for redemption/reconveyance under Section 8 (b) of R.A. 8371;
4. Interpretation, implementation, or enforcement of Memorandum of Agreements (MOA) entered into by parties as a result of the Free Prior and Informed Consent (FPIC) process;
5. Cases involving Projects, Programs, Activities within ancestral lands/domains being implemented without the required FPIC of the affected/host IPs/ICCs;
6. Petitions for annotation on CADTs and CALTs or cancellations thereof, except notice of *lis pendens* and those that will result to transfer of ownership;
7. Actions for damages including, but not limited to, claims for royalties and other benefits.
8. 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
9. Such other cases analogous to the foregoing.

B. **Original and Exclusive Jurisdiction of the Commission En Banc** (emphasis supplied)

1. Petition for cancellation of registered CADTs and CALTs alleged to have been fraudulently acquired by, and issued to, any person or community as provided for under Section 54 of R.A. 8371, provided that such action is filed within one (1) year from the date of registration;
2. Actions for cancellations of Certification Precondition (CP), Certificate of Non-Overlap (CNO), issued by the NCIP, as well as, rescissions of FPIC-MOA; and
3. Any other case that deems to vary, amend, or revoke previously issued rulings, resolutions, or decisions of the Commission en banc.