



A COMPARATIVE ANALYSIS OF THE INDIGENOUS COMMUNITIES CONSERVED AREAS (ICCA) BILL AND PHILIPPINE ENVIRONMENTAL LAWS

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1 INTRODUCTION

Different international, regional, and national actors are finding ways to address biodiversity loss and global climate change. However, the endorsed ways to address these problems are usually through a singular, top-down exclusionary conservation system that is often government-led.

In the 5th World Park Congress in 2003, the largest gathering on the matter of protected areas, indigenous peoples and non-indigenous local communities came to be acknowledged as “custodians of conservation” (Jana and Paudel 2010). Together with the monumental UN Declaration on the Rights of Indigenous Peoples (UNDRIP), the intrinsic quality of environmental stewardship was recognized in different traditional knowledge and cultural practices of many indigenous peoples (IPs). Subsequently, the Convention on Diversity (CBD) and International Labor Organization (ILO) 169 further strengthened the understanding of the harmony between the IPs and local communities to their territories, lands, natural resources and knowledge.

Despite the increasing support of IPs’ and local communities’ environmental stewardship, efforts are hindered by clear separation of human rights and environmental laws in international and national legislations (Jonas, we Makagon, Booker, et al. 2012). However, because of the recognition of the values of indigenous peoples’ and local communities’ conserved territories and areas (ICCAs), there could be ways to bridge the gap.

THE CONCEPT OF ICCA

ICCAs can be considered as some of the world’s oldest conservation areas but the recognition of their values is only relatively new in formal conservation circles (Jonas, Makagon, Booker, et al. 2012).

The International Union for Conservation of Nature (IUCN) defines ICCAs as “natural and/or modified ecosystems, containing significant biodiversity values, ecological benefits and cultural values, voluntarily conserved by indigenous peoples and local communities, both sedentary and mobile, through customary laws or other effective means” (Feyerabend, 2010).

The concept of ICCA is diverse and dynamic. It is sensitive to the cultural, social, and ecological contexts of different indigenous peoples and local communities. ICCAs encompass a myriad of evolving practices that have conservation outcomes. While there is diversity in names and practices, these territories and areas have three common features (UNEP-WCMC, 2016):

1. An indigenous people or local community possessing a close and profound relation with a site (territory, area or habitat);
2. The people or community is the major player in decision-making related to the site and has *de facto* and/or *de jure* capacity to develop and enforce regulations; and
3. The people’s or community’s decisions and efforts lead to the conservation of biodiversity, ecological functions and associated cultural values, regardless of original or primary motivations.

In some countries, parameters of ICCAs are extended to non-indigenous communities “whose ways of life are based on the conservation and sustainable use of biodiversity”(Jonas, Makagon, Booker, et al. 2012). Their recognition is based on the respect for their cultural and property rights.

ICCAs significantly contribute to the protection and development of cultural diversity in addition to biodiversity (Kothari and Neumann, 2014).The histories, cultures and languages of IPs and local communities are inextricably linked to ICCAs.

It is important to note that the nature of ICCAs should be voluntary. The process of Free Prior and Informed Consent (FPIC) is vital in the formal recognition of potential ICCAs. The external agencies and government cannot assume recognition and control of pertinent areas because the IPs and local communities should exercise their right to self-determination and self-governance in the territories.

DEFINING QUALITIES AND CHALLENGES OF ICCAs AROUND THE WORLD

Understanding ICCAs can be achieved through considerable knowledge of various contexts. Indigenous peoples and local communities have different motivations and objectives to their deep links with territories and natural resources. Their diverse experiences come with different challenges and these can affect the survival of the IPs and local communities.

One the most important qualities of ICCAs is their significance to different cultures. ICCAs can be important sites of the cultural heritage of IPs and local communities. This is the case for the Dulong ethnic group in China. They live in a steeply sloped landscape for which they practice traditional rotational swidden agriculture. Their traditional farming maintains local varieties of crops, supports traditional farming knowledge and sustains collective cultivation arrangements. However, the government asked to discontinue their cultivating practice. Instead, they were pressed to plant trees in exchange for grain subsidies. This new arrangement threatened the Dulong people’s biocultural heritage and increased their dependency for subsidies (Feyerabend, 2010). Thus, the development of cultural and biodiversity was stopped short due to lack of support for their traditional practices.

ICCAs are rich in natural resources and these can be attributed to the quality of their conservation practices. Due to that fact, ICCAs also face various external threats, which some resilient communities were able to overcome. An example is the community of Mendha in India. They have successfully established a *de facto* control of forests, which the government used for revenue through logging, charcoal making, and bamboo harvesting. Mendha-Lekha established a *Gram Sabha*, a village assembly, where major local initiatives must secure their permission. In addition, they also conduct study circles to inform their decisions as they assume social and ecological responsibility to their area. By setting their own governance and moratorium policy, they stopped the logging activities, commercial exploitations of outside agencies and encroachment of forests by agriculturists. The forests were able to recover from previous exploitations (Feyerabend, 2010).

In terms of formal recognition, many communities long for the government to also acknowledge their conservation management systems. Due to the lack of thorough understanding on their type of governance, recognitions are often limited to the protection of the territory. It is not extended to the rights of the IPs and communities living within and near the area. In Vietnam, local communities in Van Long have extensively managed the wetland and freshwater system. It is where one of the world's highly endangered primate species, Delacour's Langur, lives. With the discovery of Delacour's Langur, Van Long was officially designated as a Nature Reserve under the control of the Provincial Government Tourism. The local communities, who have long conserved the area, were disenfranchised and prohibited from managing the area. Due to commodification of the Van Long, the reserve came to face disintegration (Feyerabend 2009). A similar situation was also experienced by the Batwa people in Rwanda. The Rugezi marsh is where the Batwa people get their source of wildlife and fish and small-scale marketing of grasses, clay, and medicinal plants. Despite the area's significance to the aboriginal inhabitants, engineering works and conservation initiatives prohibited their access to resources for traditional use. As a result, a large part of the wetland habitat was destroyed while the community was left impoverished (Feyerabend, 2009).

There are also instances where governments only recognize customary governance institutions if they fit into the mainstream and "standardized blueprint forms". In occasions like these, the authority of the communities to the area can be diluted (Feyerabend, 2009). These can be in form of "democratic election" of local leaders to take charge of the ICCAs and having experts delineate their area and improve their management practices, all without consulting their customary governance. In such cases, IPs and local communities do not wish for the impositions of certain practices and political systems when they already have an existing and effective type of governance.

Due to the assertion of other communities, they were able to exercise their self-rule and self-governance. Take for example the success of *fokonolona*, the traditional organization in Madagascar. They have managed to conserve their sacred forests without unnecessary outside interventions that could disempower them. They have their traditional chiefs that facilitate the decision-making of their peoples (Feyerabend, 2009). Another example is of Sherpa indigenous peoples from the Khumbu region in Nepal. Their economic practices are informed by their customary laws such as the rotational zone grazing systems, which is guided by their *shingginawa*, a community forest management system. Village officials are given the responsibility to oversee as to when a specific zone would be opened and restricted for grazing (Jana and Paudel, 2010).

In other countries where options for recognition of ICCAs do not exist, some communities assert local governance through the association of their cultural heritage to the area (Feyerabend, 2009). In Kenya, there is no provision for ICCAs. Local people in the country's coastal area asked the government to help maintain their traditional *kaya* forests which are important sites for biodiversity. Although local elders were able to conserve the forests, they still needed an endorsement from the National Museum of Kenya for them to be able to manage the area (Feyerabend, 2009).

ICCAs across the globe have their successes, as well as challenges. With the growing recognition of ICCAs in the international discourse, it is also important that this acknowledgement is manifested in the regional and national legislations. This can enable effective protection of

biodiversity without disregarding the rights of the indigenous peoples and local communities conserving these areas through their own specific practices and governance.

ICCAs IN THE PHILIPPINES

The Philippine Archipelago is considered as one of the richest in terms of biodiversity. Its archipelagic nature has allowed for the evolution of more than 52,177 described species, making the Philippines one of the 17 biologically richest and megadiverse¹ countries in the world. It is of the 25 biodiversity hotspots and, unfortunately, it is considered a global biodiversity disaster area (Pedragosa, 2012).

High biodiversity areas are generally located within ICCAs. Their traditional systems of stewardship have effectively enabled conservation and protection of ecosystems, habitats and species within their domains (2012: 11). Despite these existing traditional implements, ICCAs are increasingly under threat. While various laws have been enacted to institutionalize policies for the protection and conservation of biodiversity there is still no specific policy that articulates the recognition and protection of ICCAs and the essential role and contribution of indigenous peoples and local communities for the protection and conservation of these areas. That is the objective of the Act Recognizing the Declaration of ICCs/IPs of Indigenous Cultural Communities/Indigenous Peoples Community Conserved Territories and Areas Act (ICCA) within their Ancestral Domains (ICCA Act).

The proposed ICCA Act (House Bill 115) introduces a new physical and legal space within the scope of rights and responsibilities of Indigenous Cultural Communities (ICCs)/IPs. This is operationalized in the Act through the establishment of the National ICCA Registry, which contemplates the voluntary submission of ICCs/IPs of their ICCAs (Sec. 11). It shall be applicable to all ancestral domains and lands, whether held by native title or formally recognized with a Certificate of Ancestral Domain Title (CADT)/Certificate of Ancestral Land Title (CALT) and to ancestral domains and lands within National Parks or protected areas established under the National Integrated Protected Areas System (NIPAS) under the NIPAS Act of 1992 (Sec. 3). The National Commission on Indigenous Peoples (NCIP) shall be the primary government agency responsible for the full implementation of the Act² (Sec. 18).

As defined in the bill, ICCAs are areas within ancestral domains or lands that are identified, protected, conserved and sustainably used by ICCs/IPs pursuant to their indigenous knowledge systems and practices, and in accordance with customary laws and other effective means since time immemorial. They are characterized by natural or modified ecosystems containing significant biodiversity, ecological services and cultural and spiritual values; and are considered as environmentally critical areas (Sec. 5.1).

¹The term megadiverse describes the presence of high number of endemic species. A megadiverse country must have at least 5,000 species of endemic plants and must border marine ecosystems (UN Environment 2014).

² The NCIP shall then be tasked to create the Ancestral Domain Protection and Sustainable Development Office, which will receive request and coordinate with DENR for all activities related to ICCA as to documentation, community conservation planning and registration (Sec. 18, par. 2).

The ICCA Act, introduced by Rep. Teddy Brawner Baguilat in 2016, is currently on its way to its second reading in the House of Representatives. In anticipation of its passage, this paper offers a comparison of the bill to other relevant laws and “green” bills. Comments and observations in this presentation are based on the current text of the bill.³

2 HOW IS THE ICCA ACT CONSISTENT WITH RELEVANT LAWS?

THE ICCA ACT AND THE INDIGENOUS PEOPLES’ RIGHTS ACT

The Indigenous Peoples’ Rights Act (IPRA) (Republic Act 8372) is a landmark law that aims to recognize, protect, and promote the rights of ICCs/IPs in the Philippines. It sought to address the historical injustices and inequalities perpetuated against ICCs/IPs. It lays down the grand framework of rights belonging to ICCs/IPs, such as the rights to their Ancestral Domains, the right to Self-Governance, Social Justice and Human Rights, and the Right to Cultural Integrity. Further, it details the process of formal recognition of Ancestral Domain and Land rights and establishes the National Commission on Indigenous Peoples (NCIP), the agency mandated to protect the interest of indigenous peoples (Muhi and Pasimio, 2009).

The main objective of the ICCA Act is the recognition of ICCAs. By recognizing this Act, the State acknowledges the significant contribution of ICCs/IPs to the country’s efforts in environmental protection, biodiversity conservation, and community resilience since time immemorial (IPRA, Sec. 2). Through the ICCA Act, the State will institutionalize ICCs’/IPs’ indigenous knowledge systems and practices in managing, maintaining, and developing natural resources within their culturally and spiritually important areas or ICCAs.

The proposed ICCA Act is consistent with IPRA in their aims to recognize, protect, and promote the rights of ICCs/IPs. The obvious difference in their objectives lies on the specific focus provided by the ICCA Act on the conservation of ICCAs, but the same spirit of self-determination and self-governance in the IPRA is found in the ICCA Act.

CONSISTENCY WITH IPRA

The IPRA is the legal foundation of ICC/IP rights. Initially, IPRA was founded on the objective to translate the recognition and promotion of all rights of ICCs/IPs enumerated within the framework of the Constitution (cf. 1987 Philippine Constitution). The ICCA Act stands on the same foundation and supplements IPRA by prescribing rights and responsibilities consistent with the latter law, albeit applied to a more specific area of coverage. This consistency in the prescription of rights naturally follows as the ICCA Act situates ICCAs within the Ancestral Domains or Lands of ICCs/IPs (Sec. 5.I). Hence, the rights of IPs/ICCs over Ancestral Domains or Lands also cover

³ Filed on June 30, 2016 during the 17th Congress, the Bill is currently in the process of review and revision through workshops convened by the DENR-BMB.

ICCAs. Moreover, the ICCA Act subscribes to the principle of native title found in the IPRA as the former covers not only ancestral domains and lands formally recognized with a Certificate of Ancestral Domain Title (CADT)/Certificate of Ancestral Land Title (CALT), but also those that have not yet been formally recognized but held by native title (IPRA, Sec. 3).

The ICCA Act mentions the IPRA and expressly claims consistency with it, along with the 1987 Constitution, and the Universal Declaration of the Rights of Indigenous Peoples (UNDRIP). In keeping with the ICCs/IPs' right to self-determination, the ICCA Act guarantees their power to define and declare the ICCAs within their Ancestral Domains/Lands in accordance with their Indigenous Political Structures (IPRA, Sec. 6). Aside from the rights of control, management, and governance, the Act also expressly mentions the right of ownership of ICCs/IPs over ICCAs (IPRA, Sec. 6). Consequently, as with the IPRA, the requirements for Free and Prior Informed Consent (FPIC) shall be strictly followed for all allowable activities within ICCAs (IPRA, Sec. 6).

IPRA generally provides for the right of ICCs/IPs to manage and conserve the areas covered by their ancestral domains.⁴ Similarly, the ICCA Act recognizes the ICCs'/IPs' rights to maintain, protect, conserve, and regulate access and exclude unauthorized intrusion into ICCAs (Sec. 4.a,b). Moreover, it recognizes the primacy of customary laws and indigenous knowledge systems and practices (IKSPs) in the governance and management of ICCAs and the ICCs'/IPs' responsibility to ensure preservation, restoration, and maintenance of ecological balance and biodiversity therein, with the assistance of government agencies (Sec. 4.c). Therefore, the ICCA Act echoes the Section 58 of IPRA which mandates the support by government agencies of ICCs/IPs in the maintenance, development, protection and conservation of Ancestral Domains or portions thereof, which are found to be necessary for critical watersheds, mangroves, wildlife sanctuaries, wilderness, protected areas, forest cover, or reforestation.

Finally, exclusive use of resources is reserved by the Act for ICCs/IPs exercising their sustainable traditional resource rights (STRRs) (Sec. 7). Non-STRR activities and those by non-member ICCs/IPs are generally not allowed, unless permitted by the ICCs/IPs in accordance with customary laws and other strict parameters provided by the Act (Sec. 7). Customary laws, practices, structures and mechanisms are presumed to follow STRR and shall not be subject to prior approval or validation by concerned government agencies and parties. The burden of proof that certain acts or practices are not STRR shall lie with the party making the assertion (IPRA, Sec. 17).

Overall, the ICCA Act is consistent with the IPRA in its recognition of the rights of ICCs/IPs within their ancestral domains, particularly when such rights relate to ICCAs.

INTERSECTING POINT

The ICCA Act and the IPRA both assign responsibility of maintenance and conservation over critical and protected areas to ICCs/IPs. However, it begs the question: Are the critical and/or protected areas specified in Section 58 of the IPRA considered ICCAs as defined in the ICCA Act? A reading of the bill presents a possible area of tension. Section 58 of the IPRA specifies the

⁴ Indigenous People's Rights Act (IPRA), Section 7 (b) and Section 58.

responsibility over said areas may be transferred by the ICCs/IPs concerned.⁵ IPRA provides that the decision to transfer must be made in writing, with the consent of the ICCs/IPs arrived at in accordance with their customary laws without prejudice to the basic requirements of existing laws on free and prior informed consent (FPIC). The transfer must also be temporary and will ultimately revert to the ICCs/IPs in accordance with a program for technology transfer.⁶ The ICCA Act is silent on this transferability. Does this mean that the responsibility of maintenance and conservation over critical or protected areas within an ancestral domain, which qualify as an ICCA, cannot be transferred? The provision of transfer under IPRA may be read in complement with the Sections 7 and 24 of the ICCA Act; the former refers to the protection and privileges of ICCAs providing for conditions where activities which are not STRRs, and those by non-member ICCs/IPs, may be allowed in the ICCA, and the latter an enumeration of prohibited activities. As this may present some ambiguity, further refinement is suggested.

THE ICCA ACT AND THE EXPANDED NATIONAL INTEGRATED PROTECTED AREAS SYSTEM ACT (RA 11038)

The National Integrated Protected Areas System (NIPAS, RA 7586) Act was the precursor to the Expanded version or E-NIPAS Act signed into law in June 22, 2018. As early as 1992, the NIPAS Act established the classification and administration of all designated protected areas to maintain essential ecological processes and life-support systems, to preserve genetic diversity, to ensure sustainable use of resources found therein, and to maintain their natural conditions to the greatest extent possible.⁷ NIPAS provided the legal framework for the establishment and management of protected areas in the Philippines. It classified protected areas in categories such as strict nature reserve, natural park, natural monument, wildlife sanctuary, protected landscapes and seascapes, resource reserve, natural biotic areas and other categories established by law, convention and international agreements which the Philippine Government is a signatory.

The Expanded National Integrated Protected Areas System Act of 2017 (E-NIPAS) includes the protection of 92 new areas under the Philippines' current National Integrated Protected Areas System Act. This expansion also includes the recognition of ICCAs in its comprehensive system of integrated protected areas.

Compared to the ICCA Act, NIPAS and E-NIPAS laws have a broader coverage considering a wide range of areas to be protected. It encompasses exceptionally remarkable areas and biologically important public lands that are habitats of rare and endangered species of plants and animals, biogeographic zones and related ecosystems, whether terrestrial, wetland or marine, all of which shall be designated as protected areas. The ICCA concept was not included in the list of protected areas of NIPAS. This non-inclusion of ICCAs in the list of protected areas continues with E-NIPAS allows for the inclusion of additional areas into the system (E-NIPAS, Sec. 5).

The ICCA Act, on the other hand, includes under its scope and coverage ancestral domains and lands within National Parks or protected areas established under the NIPAS Act (NIPAS, Sec. 3).

⁵ IPRA, Section 58, Environmental Considerations.

⁶ Ibid.

⁷ National Integrated Protection Areas System Act (NIPAS), Section 4.

In addition, it is important to note that the ICCA Act considers ICCAs as environmentally critical areas (NIPAS, Sec. 5.I).

CONSISTENCY WITH E-NIPAS

Similar to the ICCA Act, the E-NIPAS Act includes recognition of conservation areas and management regimes of indigenous peoples.⁸ In addition to this, it provides that the state shall ensure the full implementation of the act by establishing the institutional mechanism for the mobilization of resources and providing for adequate scientific and technical support for the conservation of biodiversity and the integrity of the ecosystem.⁹

The E-NIPAS Act provides for the formulation of a management plan "...for each protected area that shall serve as the basic long-term framework plan for the management of the protected area."¹⁰ It further states that the plan shall be harmonized with the Ancestral Domain Sustainable Development and Protection Plan (ADSDPP) required under IPRA¹¹, likewise recognized by the ICCA Act.

Further, the E-NIPAS Act recognizes ancestral domains and customary rights and declares that ICCs/IPs concerned shall have the responsibility to govern, maintain, develop, protect and conserve such areas, in accordance with their IKSPs and customary laws, with full and effective assistance from the NCIP, DENR and other concerned government agencies.

Addressing the situation where ICCAs overlap with Protected Areas, the ICCA Act echoes E-NIPAS by establishing that governance, management and conservation of such areas are placed in the hands of ICCs/IPs. Under ICCA Act, governance over ICCAs, however situated, is lodged with ICCs/IPs. The manner on which these areas shall be governed shall be in accordance with the ICCs'/IPs' customary laws, structures and mechanisms (NIPAS, Sec 17).

INTERSECTING POINTS

The ICCA Act prohibits development activities in ICCAs, such as heavy industries, large-scale mining, infrastructure projects and non-IP community based logging. (Sec. 24) Although such activities are also prohibited by the E-NIPAS Act in protected areas, the prohibition is not absolute. Sec. 18 of the E-NIPAS Act amending Sec. 20 of RA 7568 or the NIPAS lists prohibited acts but lays down a general exception, i.e. "Except as may be allowed by the nature of their categories and pursuant to rules and regulations governing the same." In Sec. 20 (c), the Act limits the cutting, gathering or collection of timber even from private property located within protected areas, but exempting duly recognized practices of IPs/ICCs for subsistence purposes; and (o)(v) allows for structures granted prior clearance from the PAMB and permit by the DENR. Thus, certain activities may be undertaken if requirements under the above general exception are met.

⁸ Expanded National Integrated Protected Areas System Act (E-NIPAS), Section 2.

⁹ *Ibid.*

¹⁰ Sec. 7, E-NIPAS

¹¹ *Id.*

THE ICCA ACT AND THE WILDLIFE RESOURCES CONSERVATION AND PROTECTION ACT (RA 9147)

CONSISTENT WITH THE WILDLIFE RESOURCES CONSERVATION AND PROTECTION ACT

The Wildlife Resources Conservation and Protection (WRCP) Act is a piece of legislation which provides for the conservation and protection of wildlife and their habitats. The objectives of this law are to conserve and protect wildlife species and their habitats to promote ecological balance and enhance biological diversity, to regulate the collection and trade of wildlife, to pursue with due regard to the national interest, the Philippine commitment to international conventions, protection of wildlife and their habitats, and to initiate or support scientific studies on the conservation of biological diversity. This law shall be enforceable on all wildlife species found in all areas of the country, including protected areas under the NIPAS Act and critical habitats. This Act also applies to exotic species, which are subject to trade, are cultured, maintained and/or bred in captivity or propagated in the country.¹²

Like the NIPAS Act, the WRCP Act designates critical habitats as areas of protection and conservation. Such critical habitats may overlap with ICCAs. Although the WRCP Act does not, in categorical terms, spell out the rights of ICCs/IPs over critical habitats that may overlap with ICCAs, it does provide some safeguards for ICCs/IPs. The WRCP Act recognizes sustainable resource rights of ICCs/IPs as it allows for the indigenous collection of wildlife within specific parameters, i.e. such collection must be for traditional use, not primarily for trade, and shall not cover threatened species.¹³ Further, the WRCP Act respects the killing of wildlife by ICCs/IPs when done as part of religious rituals.¹⁴ It also requires prior informed consent of ICCs/IPs before granting any permits to conduct bioprospecting.¹⁵

INTERSECTING POINT

As discussed above, ICCA Act gives exclusive use of ICCAs in favor of relevant ICCs/IPs but also gives opportunities for non-ICCs/IPs to conduct non-STRR as long as certain requirements are fulfilled. The ICCA Act, under Sec. 7, lists the following requirements:

- a. Permitted by the ICCs/IPs in accordance with customary laws;
- b. Consistent with their cultural and spiritual values;
- c. Compatible with conservation concepts; and
- d. Not among the enumerated activities found in Sec. 24, which are absolutely prohibited.

In case critical habitats are found within or overlap with ICCAs, activities described in the WRCP Act may be conducted as long as they fulfill the list of requirements above. Such activities are bioprospecting, scientific research or collection of wildlife. Bioprospecting is the research, collection and utilization of biological and genetic resources for purposes of applying the

¹² Wildlife Resources Conservation and Protection Act, Section 3.

¹³ *Id.*, Section 7.

¹⁴ *Id.*, Section 27 (a) and (i).

¹⁵ *Id.*, Section 14.

knowledge derived there from solely for commercial purposes.¹⁶ Also, scientific researches or the collection and utilization of biological resources for scientific research, not for commercial purposes, may be allowed upon execution of an undertaking/agreement with and issuance of a gratuitous permit by the Secretary of Environment and Natural Resources.¹⁷ Moreover, ICCs/IPs, in line with their STRRs, may undertake the collection of wildlife but the collection must be for traditional use and not primarily for trade.¹⁸

THE ICCA ACT AND THE MINING ACT (RA 7942)

CONSISTENT WITH THE MINING ACT

As discussed above, The ICCA Act prohibits mining in ICCAs. The Mining Act has a provision on areas closed to mining which includes old growth or virgin forests, proclaimed watershed forest reserves, wilderness area, mangrove forests, mossy forests, national parks, provincial/municipal forests, parks, greenbelts, game refuge and bird sanctuaries as defined by law and in areas expressly prohibited under the NIPAS Act.¹⁹ ICCAs, though not expressly stated in the Mining Act, seem to fall under the aforementioned closed areas.

Consistent with the ICCA Act's recognition of STRRs (ICCA, Sec. 7), traditional practice of small-scale mining by ICCs/IPs is guaranteed. The Mining Act's scope, on the other hand, only covers large scale mining though briefly refers to the People's Small-scale Mining Act of 1991 that gives priority to ICCs/IPs in the award of small-scale mining contracts.

3 HOW IS THE ICCA ACT CONSISTENT WITH OTHER GREEN BILLS PROPOSED?

THE ICCA ACT AND NATIONAL LAND USE AND MANAGEMENT ACT

The National Land Use and Management Act of the Philippines (NLUA) aims to provide for a rational, holistic and just allocation, utilization, management, and development of the country's land and water resources.²⁰ It also seeks to hold owners and users of land responsible for developing and conserving their lands thereby making these productive and supportive of sustainable development and environmental stability.²¹

¹⁶ Wildlife Resources Conservation and Protection Act (WRCPA), Section 5 (a).

¹⁷ *Id.*, Section 15.

¹⁸ *Id.*, Section 7.

¹⁹ Mining Act, Section 19 (f).

²⁰ National Land Use and Management Act (NLUA), Section 2 (a).

²¹ *Id.*, Section 2 (b).

CONSISTENCY WITH NLUA

The ICCA Act and the NLUA is consistent with each other as they both recognize the rights of ICCs/IPs. As discussed, the ICCA Act recognizes the rights of the ICCs/IPs to their ancestral domains, which include their rights to maintain, protect, and regulate access and prohibit unauthorized intrusion thereto. The Act also recognizes sustainable traditional resource rights of ICCs/IPs which refer to their rights to sustainably use, manage, protect and conserve their areas in accordance with their indigenous knowledge, beliefs, systems and practices.

The same acknowledgement of sustainable traditional resource rights of ICCs/IPs is given in Section 4 of NLUA. In its declaration of policies and principles, the NLUA recognizes traditional resource right of ICCs/IPs to their ancestral domains. Moreover, Section 2 mentions compliance with FPIC of ICCs/IPs and recognition of customary laws and traditional resource use and management, knowledge, and practices in ancestral domains. The NLUA expounds more on the right of ICCs/IPs to their ancestral domains by considering ancestral domains as a special area of concern. This is similar to the ICCA Act's recognition of ICCAs as environmentally critical areas (Sec. 5.I).

INTERSECTING POINT

Similar to IPRA, NLUA provides for the adoption of Ancestral Domain Sustainable Development Protection Plan (ADSDPP), which refers to a plan formulated and pursued in accordance with the rights of ICCs/IPs to manage and develop the land as well as natural and human resources within their ancestral domains based on their indigenous knowledge systems and practices on the principle of self-determination.²² The Act also provides that in the event the ADSDPP is still in the formulation stage or remains to be formulated, the right to self-determination, and the observance of traditional resource management systems and processes shall be upheld at all times, as provided for under IPRA. Similarly, the ICCA Act refers to ADSDPP in ICCs'/IPs' management of resources within their ancestral domains.²³

THE ICCA ACT AND FOREST RESOURCES BILL

As mentioned, the ICCA Act provides for a mechanism for the recognition and registration of ICCAs and a precise definition of the term. The Forest Resources Bill (FRB), on the other hand, recognizes the integral role of natural forests in the ecological, social, and economic development of the Philippines. The bill gives emphasis on how crucial it is to protect and conserve forest resources especially in this day and age where deforestation has become a threat to the existence of forestlands. The bill articulates the prioritization of forest management that is equitably enabling multi-sectoral participation in sustainable forestland conservation, management, and development.²⁴

²² *Id.*, Section 4 (e).

²³ Despite consistency of both bills in their provision for ADSDPP, the implementation of ADSDPP has been met with some criticism – the lack of assistance for communities as they craft their ADSDPP, and of livelihood and capacity building to operationalize their ADSDPP.

²⁴ Forest Resources Bill (FRB), Section 3 (b).

Although both Acts seek the protection and conservation of ecosystems, FRB focus areas are biodiversity in forestlands.

INTERSECTING POINT

Both the FRB and ICCA Act acknowledge the rights ICCs/IPs to their ancestral domains and mentions IPRA in recognition of FRBs consistency with its provisions. The ICCA Act recognizes the rights/responsibilities of ICCs/IPs in the management of ICCAs and the preservation, restoration, and maintenance of ecological balance and biodiversity therein (Sec. 4). Comparably, the FRB also gives management priority to ICCs/IPs while expanding this to include forest resident families and local communities living near forestlands. There may be a potential conflict on which group has priority in the management of forestlands found in ICCAs. In such cases, assuming the ICCA Act is successfully passed, we opine that ICCs/IPs have the priority as the ICCA Act is categorical in the recognition of management rights of ICCs/IPs over such areas.

Consistent with the ICCA Act's prohibition on large scale mining activities in ICCAs, Section 27 of FRB absolutely prohibits the same in protection forestlands, which includes areas identified as key biodiversity areas. However, Section 63 of the FRB provides that power generation activities and small-scale mining may be allowed in forestlands, except protection forestlands, provided certain requirements and processes are complied with. Although the ICCA Act likewise allows small-scale mining by ICCs/IPs, it prohibits the building of infrastructure such as major dams and power plants (Sec. 24 (c)). In case an ICCA overlaps with a forestland, a potential conflict may arise as to whether or not power generation activities may be had over such an area. It is clear, however, that only the building of infrastructure in ICCAs is prohibited by the ICCA Act. Hence, any other activities for power generation outside of building infrastructure may theoretically be allowed.

It bears noting that as forests are under threat to further national development policy, so too are the IPs/ICCs who consider them part of their ancestral domains. In 2011, Aquino's Executive Order (EO) 23 declared a moratorium on logging in natural and residual forests in the country. This was touted as imposing a "total log ban" in the country. The EO, however, allowed logging in plantation forests or forests cultivated by man.²⁵ Many of these are through various production-sharing agreements, under the Administration's public-private partnerships, such as Community Based Forest Management Agreements (CBFMAs), Integrated Forest Management Agreements (IFMAs) and Socialized Industrial Forest Management Agreements (SIFMAs). While EO 23, complemented with EO 26, popularly known as the National Greening Program (NGP), further expanded (as ENGP), and continued by the present Administration, IP lands, often covering forests, continue to be turned into plantation forests and made subject of production-sharing agreements, often without their consent.

²⁵Thus, the ban was later clarified as "selective log ban."

THE ICCA ACT AND ALTERNATIVE MINERALS MANAGEMENT BILL

The Alternative Minerals Management Bill (AMMB) seeks to replace the current Mining Act of 1995. Its aim is the promotion and development of a mining industry, which shall be geared towards national industrialization and enhanced from community-based initiatives.²⁶ It is focused on adopting ecologically-sound mining practices that will result to efficient utilization and conservation of the country's mineral resources.

CONSISTENT WITH AMMB

The ICCA Act and AMMB mention various rights and responsibilities of ICCs/IPs. The ICCA Act recognizes the rights and obligations of the ICCs/IPs to their ancestral domains as well as their rights to maintain, protect, conserve and regulate access and prohibit unauthorized intrusion thereto (Sec. 4.a). In line with these, the Act expressly declares that ICCs/IPs shall have a fair and equitable share in the ecosystem services provided by ICCAs in recognition and respect of the ICCs'/IPs' right to benefit and share in the profits from allocation and utilization of the natural resources found in their ancestral domains (Sec. 4.e).

Similarly, the AMMB also recognizes the right of ICCs/IPs to their ancestral domains but in addition to this is the recognition of the right of IPs to self-determination and the guarantee of their collective property rights.²⁷ Though the ICCs/IPs are not expressly mentioned as recipients of economic benefits derived from mining, Section 7 of the bill suggests that they may be considered as such when they are directly affected by mining operations.

INTERSECTING POINT

The concept of free and prior informed consent (FPIC) is mentioned in both bills. However, the AMMB provides for a more elaborate discussion of the concept. This is because it requires FPIC in all stages of mining operations and since the ICCA Act prohibits mining in ICCAs and even outside ICCAs whenever they will adversely impact the ICCA (Sec. 7), the requirement of FPIC is strictly confined with other allowable activities.

It is interesting to note that together with the recognition of FPIC, the AMMB has a specific provision that addresses issues on the legality or validity of FPIC. It lays out the process to be followed when there are questions on the validity of FPIC wherein mining operations shall not be allowed to be conducted in the ancestral domains or lands of the ICCs/IPs without the final resolution of such question.²⁸ In order to better achieve its objective to protect ICCAs from any act of desecration, the ICCA Act may also incorporate a provision similar to that of AMMB's when it comes to other allowed activities within ICCAs.

The ICCA Act presents a possible conflict on the right to self-determination of ICCs/IPs. Section 24 prohibits large scale mining in ICCAs and other destructive forms of natural resource

²⁶ Alternative Minerals Management Bill (AMMB), Section 4.

²⁷ Ibid.

²⁸ AMMB, Section 31.

exploration, development and utilization. This prohibition is absolute and does not allow for any exception even when the consent of ICCs/IPs through the FPIC is obtained (Sec. 7.d and Sec. 24.f). Unlike the ICCA Act, the AMMB allows mining projects in ancestral domains in accordance to the existing national and international policies on IPs.²⁹ This is to be read together with the AMMB's recognition of the right to self-determination of ICCs/IPs and the required FPIC of ICCs/IPs on each stage of mining operation. The AMMB only limits no go zones for mining operations to a list of specific areas, which includes key biodiversity areas.

However, key biodiversity areas contemplated by the AMMB may be viewed as the same ICCA defined in the ICCA Act. The AMMB defines Key Biodiversity Areas as "...sites of global biodiversity conservation significance. They are defined by standardized criteria and thresholds to guide conservation interventions such as the establishment of protected areas." (Sec. 20 (ff)) On the other hand, the ICCA Act defines ICCAs as "...characterized by natural or modified ecosystems containing significant biodiversity, ecological services and cultural and spiritual values." (Sec. 5 (I))

Both bills may be referring to the same area but such an assertion is not categorically expressed. What distinguishes ICCAs from Key Biodiversity Areas is that ICCAs are within ancestral domains or lands, and are identified, protected, conserved and sustainably used by ICCs/IPs. Nonetheless, if Key Biodiversity Areas described in the AMMB are ICCAs, then there is no conflict between the two bills as far as the right to self-determination of ICCs/IPs is concerned.

4 IS THERE A NEED FOR THE ICCA ACT?

ICCAs are the oldest form of conservation (De Vera, 2013). They pre-exist the mainstream and exclusionary form of conservation. As in the case of the Philippines, ICCAs have existed since time immemorial within the ancestral domains of indigenous communities. They arise out of IPs'/ICCs' cultural traditions and customary laws, where space is not just territory, but homeland to many indigenous communities where important social, cultural and economic values are expressed. These areas are often considered as sacred by the indigenous communities. Therefore, support from external agencies and government authorities is needed to help advance IPs'/ICCs' efforts in the protection of ICCAs for the succeeding generations.

Unfortunately, control over many ICCAs has been removed from indigenous communities. Continuing threats to ICCAs are brought about by conflicting state policies, commercialization, privatization, and a lack of understanding of traditional governance systems and prejudice towards the skills of ICCs/IPs in managing the environment. The exclusive use of resources reserved by the Act for ICCs/IPs to exercise their sustainable traditional resource rights (Sec. 7) is a step towards correcting previous missteps.

Although the country already has IPRA, its implementation has proven to be insufficient to protect and conserve ICCAs. The proposed ICCA Act will add another layer of protection to IPs'/ICCs' territories apart from existing laws and policies. It is expected to strengthen the case for environmental protection and biodiversity conservation by ICCs/IPs. With the enactment of the

²⁹*Id.*, Section 6.

ICCA Act, ICCAs will be formally recognized. The Act will introduce a new conservation area into the Philippine legal system.

The concept of ICCA encompasses a wide range of rights: from human and indigenous rights to environment-related instruments (Jonas, Makagon, Booker, et al. 2012). If ICCAs in the Philippines are to be formally recognized, human and indigenous rights relative to territories and natural resources can be strengthened while segmented and conflicting environmental laws can be harmonized.

As the ICCA Act undergoes further refinement, it must take into consideration the difficulty that indigenous peoples face asserting legal recognition of their collective ownership over their ancestral lands. In some instances, more so when these have already been declared as protected territories. While it is widely recognized that indigenous territories have protected and protective features, indigenous communities may have other traditional practices that may be regarded as incompatible with conservation by other actors, thus possibly limiting ICCAs force for the full recognition of indigenous rights (Premauer 2013). The Act must seek to harmonize different and differing legislations and find complementation with conservation and forestry efforts. While the role of indigenous peoples are articulated in some of these legislations, their participation is hampered by lack of appropriate orientation on the mechanisms and systems of implementation and thoughtful consideration of their cultural practices and contributions. ICCA Act has the potential to highlight a collaborative approach to conservation that has the recognition of territorial and self-determined rights of indigenous peoples and communities at its heart while building upon new technologies and customary management practices toward a rights-based practice of conservation.

As the Philippines continues to face problems of climate change and loss of biodiversity, the existence of its ecosystems is threatened. We must thereby recognize the traditional practices and efforts of ICCs/IPs in the conservation and protection of ICCAs that have proven to be sustainable in the conservation and protection of the country's most critical areas. The recognition of other forms of conservation management, especially ICCAs, can be seen as an extension to the conservation efforts initiated by the government. This can further increase the mitigation of climate change and the protection of the country's biodiversity.

The growing support of international laws and jurisdictions to ICCAs is a positive trend.³⁰ ICCA recognition may greatly impact IP rights and conservation efforts of nations around the world. However, effective recognition also lies with the implementation of such discourses at the regional and national level. Research shows that IPs and local communities in many countries still “lack recognition of customary land rights, local collective governance institutions, and/or rights over natural resources in their territories” (Jonas, Makagon, Booker, et al. 2012). Efforts to bridge the gap in the implementation should be made.

³⁰There is in existence, a movement organization called the ICCA Consortium, which became an international association with over 109 members and 256 Honorary Members from over 70 countries. The ICCA Consortium upholds ICCAs all over the world and provides for an ICCA Global Support Initiative.

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