Indigenizing Law or Legalizing Governmentality?
The Indigenous Peoples Rights Act and the Philippine Supreme Court
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The Indigenous Peoples Rights Act (IPRA) of 1997 and its Implementing Rules and Regulations (IRR) of 1998 legislate enormous changes in the state-building project of the Philippines. The law was meant to secure ancestral domains and a full slate of human and civil rights for the 10-12 million members of indigenous cultural communities (ICC). Rectifying "500 years of historical error," and involving 8-10 million hectares (out of a national total of 30 million) with as much as 80% of remaining natural resources, the dimensions of full implementation are staggering. The law has survived a Supreme Court challenge largely supported by mining interests. The mandated National Commission on Indigenous Peoples (NCIP) is now operating, with the additional aid of a presidential advisory office created by the present administration. Legitimated by the discourse of rights, sustainability, and cultural integrity (Niezen, 2003), IPRA consolidates a prevailing moral geography. Yet this occurs alongside globalization of market triumphalism, spurring critical inquiry into the effects of "indigenizing" state policies.

In late modern conditions of globalizing markets, we are repeatedly told that states are fading and sovereignty is giving way to some new postulate of revisable social contracts. Yet this breathless wait for the post-modern, post-sovereign world order overlooks an inner complexity of sovereignty itself. Usually attention has been paid to imperium, the plenary powers of the conquering state. But another aspect of sovereignty is dominium, the state powers of ownership. Rather than leaping beyond sovereignty to a novel neoliberal utopia, it is the shift in emphasis from imperium to dominium which plays a defining role in the commons problems of our time. This is a more complicated story than a mere evolution from conquest and booty to property law and management ensuring an automatic rise of rights and equality, because imperium and dominium interact to produce hybrid outcomes.

I will trace this interaction in the Philippine Supreme Court case of the Indigenous Peoples Rights Act (IPRA) to contrast two possible hybrids. In the first, some separation is maintained between imperium and dominium, creating a disinterested, even moral objectivity which can be recalled in an effort to redress historic grievances. In the second, opposing view, dominium substitutes for imperium, and collective national interest theoretically prevails over the property interests. Since these outcomes reached a rough balance in the court case, which ended in a tie, I shall suggest the balance may ultimately tip in yet a third direction. With the help of a Thai example, neoliberal self-regulation can be seen as a regulated exchange between imperium and dominium, supposedly devolving ruling power down to substate agents but snatching ownership away as the cost of failing self-control. Rather than the end of sovereignty, this is a kind of endless cancellation of sovereignty which is paradoxically maintained in the act of consuming or betraying itself. Put another way, the enumerated rights in instruments like IPRA that indigenize law are one side of a coin whose other face is continued denial of the popular sovereignty which could make such rights effective. The role for indigenous knowledge is to enrich, complicate, and ultimately overload the simplistic economy of imperium and dominium by re-making the sovereignty concept.

Separation or Nostalgic Imperium

The legal basis for finally granting titles to ancestral domains and lands to indigenous cultural communities in the Philippines rests on a theory of native title. IPRA derives this theory from the case of *Cariño v. Insular Government*, which was decided by the US Supreme Court in 1909. Thus instead of giving legal voice to a variety of customary law regimes for considering ownership and resources, a single doctrine of native title attempted to cover all cases. This Cariño Doctrine had to overcome the prevailing Regalian Doctrine, which holds all untitled land in the archipelago was under control of the Spanish Crown and therefore passed to the US colonial government as public lands before being entrusted in turn to the independent Philippine State.

Immediately after IPRA passage succeeded, the specter of its being some kind of upcountry land-reform-in-earnest drove Isagani Cruz and Cesar Europa to file a Supreme Court case against its constitutionality. Symbolized in Spanish form, Caesar, Europe, and the Cross all wanted to stop indigenous people's rights on the steps of the high court. Reversing Ramos support, the Estrada administration sat back to make questionable appointments to the NCIP. A social drama now unfolded in the same general period as the ouster of Estrada, climaxing in a second "people power" event ("EDSA 2") in early 2001 (the ouster of Marcos, retrospectively "EDSA 1", was in early 1986). The Supreme Court upheld IPRA by the narrowest possible margin - a tie vote that meant the constitutionality challenge failed - on December 6, 2000. Very soon after, Macapagal-Arroyo took power, issuing Executive Order 1 February 20, 2001 to create an Office of Presidential Adviser on Indigenous Peoples (OPAIP). The Supreme Court battle took place against a complex and ambiguous revolutionary backdrop, with discursive effects that register in legal rationality.

In this social context, a theory of native title contradicting the Regalian Doctrine threatened to open crucial lapses in national myths of origin and sovereignty. Forgotten in the simple handing over of owenership from one conqueror to the nest successor is the US colonial enlargement of its control through the Bureau of Non-Christian Tribes (Kingsbury, 1998: 429) and the legalistic way Marcos bolstered the doctrine to enhance his state. The Regalian Doctrine of a smooth transmission of sovereignty over the public lands also serves the national origin myth promoted in the Philippine Centennial Expo of 1999. By conflating the conflicts against Spain and afterwards the United States into a singular revolutionary origin in 1899, the myth obscures the ambiguous revolution of changing colonial masters (Bankoff, 2001), a myth requiring further suturing given the ambiguous revolutions of the two EDSA/People Power events. The NCIP in its defense of IPRA wound up unstitching these mythical sutures. As the Dean of the University of the Philippines (UP) Los Baños put it, "Land and resources that never fell under the Spanish cross or sword were never part of the archipelago that Spain ceded to the US in 1899. [They are] not encompassed by the legal presupposition of 'public lands'. They never were." (Malayang, 2001: 670) From a state viewpoint, such stark negation in the anti-Regalian argument is frightening (and might result in as much as 30 percent of the country being ancestral domain and not state property).

Against the Regalian Doctrine, the theory of native title or the Cariño Doctrine tried to shelter native lands from the sovereign power of the successive rulers - Spain, US, and the Manila-centered Philippine state. In *Cariño*, sovereignty was analyzed into imperium and dominium in

order to place the Regalian theory under the latter, thus giving scope to the former to make native title good.

> Sovereignty is the right to exercise the functions of a State to the exclusion of any other State. It is often referred to as the power of imperium, which is defined as the government authority possessed by the State. On the other hand, dominion, or dominium, is the capacity of the State to own or acquire property such as lands and natural resources. Dominium was the basis for the early Spanish decrees embracing the theory of jura regalia. The declaration in Section 2, Article XII of the 1987 Constitution that all lands of the public domain are owned by the State is likewise founded on dominium. If dominium not imperium,, is the basis of the theory of jura regalia, then the lands which Spain acquired in the 16th century were limited to non-private lands, because it could only acquire lands which were not yet privately-owned or occupied by the Filipinos. Hence, Spain acquired title only over lands which were unoccupied and unclaimed, i.e. public lands. (Kapunan Opinion, note 86)

Thus it was dominium transferred between states that gave them title to public lands, but not to privately held land, including the private but community property IPRA wanted to recognize as native title. This native land was emphatically not acquired from the state as public land turned into private property: it had always been private even though in the native concept of ownership it was also held in common and used according to custom.

> A distinction must be made between ownership of land under native title and ownership by acquisitive prescription against the State. Ownership by virtue of native title presupposes that the land has been held by its possessor and his predecessors-in-interest in the concept of an owner since time immemorial. The land is not acquired from the State, that is, Spain or its successors-in-interest, the United States and the Philippine Government. There has been no transfer of title from the State as the land has been regarded as private in character as far back as memory goes. In contrast, ownership of land by acquisitive prescription against the State involves a conversion of the character of the

> property from alienable public land to private land, which presupposes a transfer of title from the State to a private person. Since native title assumes that the property covered by it is private land and is deemed never to have been part of the public domain, the Solicitor General's thesis that native title under *Cariño* applies only to lands of the public domain into agricultural, forest or timber, mineral lands, and national parks under the Constitution is irrelevant to the application of the *Cariño* doctrine because the Regalian doctrine which vests in the State ownership of lands of the public domain does not cover ancestral lands and ancestral domains. (Kapunan Opinion, 92)

Thus a separation was set up between Regalian Doctrine, public lands, and dominium, on one hand, and the Carino Doctrine, private but common property, and imperium, on the other. For the source of the recognition for native title was located in imperium by the very appeal to the precedent set by the imperial power. The recognition derived from the right of a conqueror to make rules, for the benefit of the inhabitants or otherwise, even for those groups and areas to which the imperial might of the toppled predecessor had never extended. Those places unconquered by vanquished Spain could still be liable to the judgments of the US victor. In *Cariño*, the US Supreme Court said the old principle (read Regalian Doctrine) was but theory and discourse, and as the new sovereign, the US could base their approach on actual fact. Their imperium could separate the dominium of the insular government from native ownership.

> It is true that Spain in its earlier decrees embodied the universal feudal theory that all lands were held from the Crown, and perhaps the general attitude of conquering nations toward people not recognized as entitled to the treatment accorded to those [*458] in the same zone of civilization with themselves. …[But] When theory is left on one side sovereignty is a question of strength and may vary in [**336] degree. How far a new sovereign shall insist upon the theoretical relation of the subjects to the head in the past and how far it shall recognize actual facts are matters for it to decide.
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> The Province of Benguet was inhabited by a tribe that the Solicitor General, in his argument, characterized as a savage tribe that never was brought under the civil or military government of the Spanish Crown. It seems probable, if not certain, that the Spanish officials would not have granted to any one in that province the registration

> to which formerly the plaintiff was entitled by the Spanish laws, and which would have made his title beyond question good. Whatever [***597] may have been the technical position of Spain, it does not follow that, in the view of the United States, he had lost all rights and was a mere trespasser when the present Government seized his land. The argument to that effect seems to amount to a denial of native titles throughout an important part of the island of Luzon, at least, for the want of ceremonies which the Spaniards would not have permitted and had not the power to enforce.
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> The acquisition of the Philippines was not like the settlement of the white race in the United States. Whatever consideration may have been shown to the North American Indians, the dominant purpose of the whites in America was to occupy the land. It is obvious that, however stated, the reason for our taking over the Philippines was different. No one, we suppose, would deny that, so far as consistent with paramount necessities, our first object in the internal administration of the islands is to do justice to the natives, not to exploit their country for private gain. By the organic act of July 1, 1902, c. 1369, § 12, 32 Stat. 691, all the property and rights acquired there by the [*459] United States are to be administered "for the benefit of the inhabitants thereof."
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> …We hesitate to suppose that it was intended to declare every native who had not a paper title a trespasser and to set the claims of all the wilder tribes afloat. ... But there still remains the question what property and rights the United States asserted itself to have acquired.
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> …every presumption is and ought to be against the Government in a case like the present. It might, perhaps, be proper and sufficient to say that when, as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest, and never to have been public land.

To summarize, IPRA tried to effect a separation between imperium and dominium. Spanish dominium did indeed pass public land to the conquering US and thence to the Philippine

government. But US imperium was recalled with a certain nostalgia as the redress of the indigenous peoples historic grievances of dislocation, expropriation, and disenfranchisement was staged as a legal precedent from 1909 calling on the 1999-2000 court "to do justice to the natives." Such nostalgic imperium found its sovereign prerogative need not stop at the Regalian theory of vanquished Spain, and could even limit dominium by positing an exempt class of property held under "native title".

Substitution or Nationalist Dominium

But if Carino and native title were elevated and validated in upholding IPRA, a new twist to Regalian theory was enshrined as well. For judicial opinions on both sides accomplished the strange feat of shrinking the contentious issue of ancestral domains down to a mere surface. The judgment produced a curiously layered or laminated situation where native title could apply to ancestral domains that were never public lands, but state ownership must apply to all natural resources below or above this surface level property by sovereign prerogative. Alongside this compression of domain to mere surfdace was an expansion of emphasis, not on the enumerated rights of the law, but on the duties of the indigenous to act as ecological managers who would protect, maintain, and steward the riches they do not, legally cannot, own. Flattened domains, fattened duties. How did the court arrive at such conclusions?

The meaning of ancestral domain clustered around notions of land is life and included the material, natural resources.

> The moral import of ancestral domain, native land or being native is "belongingness" to the land, being people of the land--- by sheer force of having sprung from the land since time beyond recall, and the faithful nurture of the land by the sweat of one's brow. This is fidelity of usufructuary relation to the land--- the possession of stewardship through perduring, intimate tillage, and the mutuality of blessings between man and land; from man, care for land; from the land, sustenance for man.[1]

The legal constructions by the Supreme Court erect a distinction between such life-giving land and the natural resources contained above or below, leading to a reconfirmation of state ownership over all natural resources. Ancestral domain under the concept of "private but community property" is reduced to an ancestral surface, a mere slice of land excluding subsurface resources. Against the holding of land since time immemorial, the anti-IPRA opinion declared:

> All Filipinos, whether indigenous or not, are subject to the Constitution. Indeed, no one is exempt from its all-encompassing

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[1] Mariflor P. Pagusara, *The Kalinga Ili: Cultural-Ecological Reflections on Indigenous Theora and Praxis of Man-Nature Relationship,* Dakami Ya Nan Dagami, p. 36, Papers and Proceedings of the 1st Cordillera Multi-Sectoral Land Congress, 11-14 March 1983, Cordillera Consultative Committee [1984].

> provisions. Unlike the 1935 Charter, which was subject to "any existing right, grant, lease or concession," the 1973 and the 1987 Constitutions spoke in absolute terms. Because of the State's implementation of policies considered to be for the common good, all those concerned have to give up, under certain conditions, even vested rights of ownership.
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> In *Republic v. Court of Appeals*, this Court said that once minerals are found even in private land, the State may intervene to enable it to extract the minerals in the exercise of its sovereign prerogative. The land is converted into mineral land and may not be used by any private person, including the registered owner, for any other purpose that would impede the mining operations. Such owner would be entitled to just compensation for the loss sustained. (Panganiban opinion)

Indeed, the Carino Doctrine was supposed to have passed away in favor of a nationalistic one enshrined in Constitutions, and thus ownership is a matter of surface rights alone.

> I submit that Cariño v. Insular Government has been modified or superseded by our 1935, 1973, and 1987 Constitutions. Its ratio should be understood as referring only to a means by which public agricultural land may be acquired by citizens. I must also stress that the claim of Petitioner Cariño refers to land ownership only, not to the natural resources underneath or to the aerial and cosmic space above.
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> ...Since RA 8371[IPRA] defines ancestral domains as including the natural resources found therein and further states that ICCs/IPs own these ancestral domains, then it means that ICCs/IPs can own natural resources.
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> In fact, Intervenors Flavier et al. submit that everything above and below these ancestral domains, with no specific limits, likewise belongs to ICCs/IPs. I say that this theory directly contravenes the Constitution. (Panganiban opinion)

Calling the IPRA version of unlimited, perpetual, and exclusive ancestral domains an "outlandish contention", the thrust was to reduce domain to surface, and carve out absolute state ownership of all natural resources in the heights and depths. This runs quite counter to the separation of imperium and dominium that sought to maintain both public lands and a new concept of native title to private but common lands. It represents rather the substitution of dominium for imperium: the state owns all for the good of the nation in a conquest made by Constitutions, re-vesting the Regalian Doctrine in nationalist clothing, or an assertion of nationalist dominium.

In upholding IPRA, the Supreme Court left both theories of revisionist or nostalgic imperium and nationionalist dominium intact by severing surface (where native title held) and resources (where state prerogative overrules all). A major precedent, the case of *Republic vs Court of Appeals*, supposedly justified this weird now flattened domain, the surfacing of a distinction between land surface and subsurface resources. This surface/depth splitting was actually found to be disturbing if the original precedent is examined more closely.

> ...possession [by the landowners] was not in the concept of owner of the *mining claim* but of the property as *agricultural land*, which it was not. The property was mineral land, and they were claiming it as agricultural land. They were not disputing the lights of the mining locators nor were they seeking to oust them as such and to replace them in the mining of the land. In fact, Balbalio testified that she was aware of the diggings being undertaken "down below" [18] but she did not mind, much less protest, the same although she claimed to be the owner of the said land.
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> The Court of Appeals justified this by saying there is "no conflict of interest" between the owners of the surface rights and the owners of the sub-surface rights. This is rather doctrine, for it is a well-known principle that the owner of piece of land has rights not only to its surface but also to everything underneath and the airspace above it up to a reasonable height. [19] Under the aforesaid ruling, the land is classified as mineral underneath and agricultural on the surface, subject to separate claims of title. This is also difficult to understand, especially in its practical application.
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> Under the theory of the respondent court, the surface owner will be planting on the land while the mining locator will be boring tunnels underneath. The farmer cannot dig a well because he may interfere with the operations below and the miner cannot blast a tunnel lest he destroy the crops above. How deep can the farmer, and how high can the miner, go without encroaching on each other's rights? Where is the dividing line between the surface and the sub-surface rights?
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> The Court feels that the rights over the land are indivisible and that the land itself cannot be half agricultural and half mineral. The classification

> must be categorical; the land must be either completely mineral or completely agricultural.
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> …This is an application of the Regalian doctrine which, as its name implies, is intended for the benefit of the State, not of private persons. The rule simply reserves to the State all minerals that may be found in public and even private land devoted to "agricultural, industrial, commercial, residential or (for) any purpose other than mining." Thus, if a person is the owner of agricultural land in which minerals are discovered, his ownership of such land does not give him the right to extract or utilize the said minerals without the permission of the State to which such minerals belong.
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> The flaw in the reasoning of the respondent court is in supposing that the rights over the land could be used for both mining and non-mining purposes *simultaneously*. The correct interpretation is that once minerals are discovered in the land, whatever the use to which it is being devoted at the time, such use may be discontinued by the State to enable it to extract the minerals therein in the exercise of its sovereign prerogative. The land is thus converted to mineral land and may not be used by any private party, including the registered owner thereof, for any other purpose that will impede the mining operations to be undertaken therein. (GR L-43938, April 15, 1988)

Thus the survival of both Carino and Regalian doctrines after the 2000 decision on IPRA was a surface/depth split that had already been found impractical. Without drawing clear inferences, it seemed the Court was fumbling towards ancestral domains restricted not just to surfaces, but only those surfaces where no minerals had yet been found. Thus NCIP Administrative Order No. 3, dated October 13, 1998, exempted all leases, licenses, contracts and other forms of concessions within ancestral domains prior to the effectivity of NCIP AO No. 1 (IPRA's Implementing Rules and Regulations), from the coverage of IPRA's provisions on free and prior informed consent. (Mordeno, 2001) By substituting the nationalist dominium for the actual attainment of imperium, the state might recognize a native ownership from time immemorial by reserving full control of all natural resources in advance. The results were a geobody only skin deep and a nationalist pretension as devastating as any conquest. The irony may be that just as doing justice to the natives can be cited with longing once the colonial period is past, the nationalist imperative to benefit the people might also acquire the power of a retrospective ideal after it too disappears. At present, the notoriously weak Philippine state, quite unable to fulfill Constitutional priorities of land reform and stewardship, is an instrument for transferring wealth upwards to rent-seeking elites and outwards to foreign corporations. But in a future that seriously implemented the IPRA principle of working through customary laws, one can imagine

contentious tribal councils orating about a necessary spirit of public interest that grows more vivid and compelling the further the nation recedes in memory, and the more it can be nostalgically idealized as it never really was.

Regulation or Sovereignty Eats Itself

There are indications that moving past the deadlock between separation and substitution as ways to relate constituent aspects of sovereignty, imperium and dominium, involves yet another hybrid outcome, a regulated exchange between them. Imperium is given up, in the form of allowing customary law, self-governance, new rights, etc, but the cost of failing to achieve oneself the control a conqueror would impose is losing dominium back to the state. This encapsulates the paradox of granting rights while flattening domain to surface, as it has been observed "an interpretation that, indeed, ancestral domain rights are hinged on the 'IPs as stewards of the earth' concept rather than on the right to self-determination and a correction of historical injustices would nullify whatever so-called gains IPRA advocates claim as 'victories for the IP's'."(quoted in Mordeno, 2001)

There is a Thai example which shows what can happen to ICC if they somehow are measured and found to fail in duties to preserve and manage ecology. This is the draft elephant law, which proposes that Kuay people bringing elephants into Bangkok or other urban spaces are not exerting proper care of the national animal, and should have their elephants confiscated. Clearly the burden on the nation to be a steward has been transferred to the vulnerable and marginalized, overcoming at once propoerty rights and traditional relationship with the Asian elephant by subjecting these to an outside test of Kuay regulation. Indigenous knowledge is recognized as a responsibility to carry out the state's imperium oneself, or lose dominium back to the same state which acquires elephants that Kuay did not discipline adequately and confiscates these "out of place" natural resources.

While the concept of indigenous people is especially complex in Asia, technocratic functional agencies have made the use of arrangements recognizing the indigenous into a criterion of legitimacy, as in World Bank operational directive 4.20. (Kingsbury, 1998: 445) In the Philippines, this came on the heels of the Local Government Code of 1991 that decentralized power to Local Government Units (LGUs). With IPRA, the now tax-exempt ICCs required to form Ancestral Domain Sustainable Development and Protection Plans (ADSDPPs). LGU's and ICC's thus compete for foreign investment. The LGUs are aware of the squeeze; feared one municipal assessor in Coron, Palawan, "nothing will be left for us and my office will become useless." (Arquiza, 2002) Adding to competition is the fact LGUs and ICCs often need technical assistance and external funds from Non-Governmental Organizations (NGOs), which along with community associations or people's organizations are also competing to run programs under contract. For some time, the Philippine bubble in NGOs has inflated, with "mutant NGOs" (Bryant, 2002b), including Politician Organized NGOs and Business Organized NGOs (PONGOs and BONGOs), mixed with progressive and morally idealistic groups. At the village level, infrastructural "contractors" actually do (or fail to do) much of the work formerly entrusted to government, with as much as 80% going to the contractor alone. (Hilhorst, 2001)

Being on this market for development, laws have stressed the accountability of the beneficiaries such as ICCs/IPs. "Uplanders are now being offered more control over land and natural

resources, but only on condition that in the interests of sustainability, biodiversity, and the needs of future generations, they take on the responsibility for conserving the little forest that is left and limit their economic aspirations accordingly." (Li, 2002: 270) The Community Based Resource Management (CBRM) paradigm, once authorities accept it, often becomes compulsory dogma used to make benefits dependent on passing some environmental scorecard (see Agrawal and Gibson, 1999). Accountability techniques nested in the laws accomplish Orwell's paradox of freedom as slavery. This is because for neoliberalism, political subjection coincides with formal political empowerment since practices of government "are only possible in so far as the subject is free." (Foucault, 1997: 292) This free exercise of sustainable management practices is also self-management feeding back into competition, for the inclusive law combines knowledge and social organization with territorial assets, but this totality seemingly rooted in one village community actually manifests as competing individuals or groups in relationship with the outside. (Duhaylungsond, 2001)

A productive subjection issues from a globalization of neoliberalism's cultural project that occurs as an intimate localization in human subjects. Failures only create "a dichotomy between recognized and recalcitrant indigenous subjects" (Hale, 2002) that facilitate tutelary projects targeting the community. Local society becomes recoded into a producer of appropriate conduct that conserves and sustains both nature and culture. The magic of gifting an entity - local community - with rights gives incentive for the fallacy of taking "community as an essence or starting point (for identities, rules, and notions of justice) rather than as the (provisional) result of community-forming processes." (Li, 2002: 276) Yet the community so endowed is permitted to reach recognition only through a discipline-inducing process of rules, the "conduct of conduct" Foucault dubs "governmentality." (Burchell, 1991)

The draft elephant law, inserting governmentality by threatening elephant confiscation if elephant people do not measure up, and the paradoxes of indigenizing law in the Philippine IPRA, both reflect the fact soveriegnty is not going away. Instead, as I have tried to show, the inner complexity of interacting imperium and dominium produces hybrid outcomes. Separation, substitution, and regulation are maintained in various spaces and times. The response on the part of IP movements can be to link struggles across equally diverse zones and try to import and ultimately overload the legal soverignty concept. A reworked notion of sovereignty would draw much more sensitive distinctions within both imperium and dominium so that their interaction would depend on much more than market conditions.

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