SCHOLARSHIP AND SUBVERSION*

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In 1983, the PHILIPPINE LAW JOURNAL published *The Interface between National Law and Kalinga Land Law*[1] ("*Interface*"). At that time, no one could have anticipated the impact that the Article would have on the legal system and the course of Philippine history. *Interface* stands out today, not because the authors, Maria Lourdes Aranal-Sereno and Roan Libarios, became Chief Justice of the Supreme Court[2] and President of the Integrated Bar of the Philippines[3] respectively. It stands out because the Article, considering the time it was published, was a subversive project. The Article was an argument for the recognition of Kalinga land laws—a surprising suggestion to say the least. After all, colonizers and their political progeny, the Filipino elite, had carried out the colonization program for centuries by stamping out vestiges of indigenous laws and assimilating indigenous peoples into the mainstream Filipino community.

At the time, the practice of stamping out "the other" or "uncivilized" non-Christian groups was reified in the study of law.[4] Few ever challenged the unstated premise in legal education that there was one single legal system in the Philippines and that all other systems are to be subsumed thereunder. Philippine law made some concessions by recognizing Muslim Personal Laws[5] but other indigenous legal systems were extinguished. Legal education regarded these as quaint if irrelevant relics that are best left to historians' and anthropologists' analyses.

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[1] Ma. Lourdes Aranal-Sereno & Roan Libarios, *The Interface Between National Land Law and Kalinga Land Law*, 58 PHIL. L.J. 420 (1983).

[2] Chief Justice Sereno was appointed as a Justice of the Supreme Court on August 16, 2010. She was appointed as Chief Justice on August 24, 2012.

[3] Atty. Roan Libarios served as the National President of the Integrated Bar of the Philippines from 2011 – 2013.

[4] It is inaccurate to say that colonizers simply refused to recognize property rights of indigenous peoples. There would be an overwhelming, if incorrect belief that the private rights never attached to properties of indigenous peoples. *See* Lynch, *infra* note 19.

[5] Pres. Dec. No. 1083 (1977). Code of Muslim Personal Laws of the Philippines.

That subversive piece of legal scholarship in 1983 proved to be part of a larger project that rattled the legal system and ended a historical injustice.

We can appreciate the impact of *Interface* in Philippine history if we recall that law students are introduced to indigenous peoples improperly as a backward race and a burden to Philippine society. In *Rubi v. Provincial Board of Mindoro*,[6] the Supreme Court dismissed a petition from a Mangyan who challenged the validity of a law that concentrated them in civil reservations. Rubi argued that the policy of concentration, having targeted only the Mangyans, violated the equal protections clause of the Constitution. The Court, however, ruled in favor of the Provincial Board. In what is now cringe-worthy language, the Court held:

> In so far as the Manguianes themselves are concerned, the purpose of the Government is evident. Here, we have on the Island of Mindoro, the Manguianes, leading a nomadic life, making depredations on their more fortunate neighbors, uneducated in the ways of civilization, and doing nothing for the advancement of the Philippine Islands. What the Government wished to do by bringing them into a reservation was to gather together the children for educational purposes, and to improve the health and morals—was in fine, to begin the process of civilization. This method was termed in Spanish times, "bringing under the bells." The same idea adapted to the existing situation, has been followed with reference to the Manguianes and other peoples of the same class, because it required, if they are to be improved, that they be gathered together. On these few reservations there live under restraint in some cases, and in other instances voluntarily, a few thousands of the uncivilized people. Segregation really constitutes protection for the Manguianes.
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> Theoretically, one may assert that all men are created free and equal. Practically, we know that the axiom is not precisely accurate. The Manguianes, for instance, are not free, as civilized men are free, and they are not the equals of their more fortunate brothers. True, indeed, they are citizens, with many but not all the rights which citizenship implies. And true, indeed, they are Filipinos. But just as surely, the Manguianes are citizens of a low degree of intelligence, and Filipinos who are a drag upon the progress of the State.[7]

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[6] Rubi v. Provincial Board of Mindoro, 39 Phil. 660 (1919).

[7] *Id.* at 712-13. *See* further discussion in Marvic M.V.F. Leonen, Case Study, *The Irony of Social Legislation: Reflections on Formal and Informal Justice Interfaces and Indigenous Peoples in the Philippines*, *in* TOWARDS INCLUSIVE GOVERNANCE: PROMOTING PARTICIPATION OF DISADVANTAGED GROUPS IN ASIA-PACIFIC 124 (United Nations Development Programme Regional Center in Bangkok eds., 2007), *available at* www.unredd.net/index.php?option=com_docman&task=doc_download&gid=5674&Itemid=53.

We do not speak of indigenous peoples in this manner today, not because it is politically incorrect, but because it is legally incorrect to do so. The indigenous peoples' refusal to surrender has forced the national legal system to re-examine its approach to marginalized groups. The national government finally succumbed and the State now has a responsibility to protect indigenous peoples. Indigenous peoples are no longer to be regarded as chattel or savages; they are people.

Interface had an impact outside the academe as well. The article played a significant role in the recognition of indigenous peoples' rights by triggering the discourse on indigenous peoples' rights.

Interface contains one of the first discussions of *Cariño v. Insular Government*,[8] a US Supreme Court decision that recognized time immemorial possession as a legal basis for ownership of property.[9] The decision is overlooked in typical land titling courses that incorrectly suggested that the Regalian Doctrine[10] precludes the recognition of ancestral domain rights. There is a common misconception that because of the adoption of the Regalian Doctrine in the fundamental law, there can be no recognition of ancestral domain rights under Philippine law. The misconception stems from the misunderstanding that these ancestral domains are part of the public domain. They are not. Under *Cariño*, these are private lands. The US Supreme Court in that case held:

> [E]very 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.[11]

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[8] 212 U.S. 449 (1909).

[9] I discuss this case in greater detail in Dante Gatmaytan, *From Cariño to Central Mindanao University: The Troubled Trek of the Right to Ancestral Domains*, 36 J. INTEG. BAR PHIL. 38 (2011).

[10] Under the Regalian Doctrine, all lands of the public domain belong to the State. This means that the State is the source of any asserted right to ownership of land and is charged with the conservation of such patrimony. All lands not appearing to be clearly under private ownership are presumed to belong to the State. Also, public lands remain part of the inalienable land of the public domain unless the State is shown to have reclassified or alienated them to private persons. *See* Heirs of Malabanan v. Republic, G.R. No. 179987, 704 SCRA 561, Sept. 3, 2013. It is the applicant for land registration who has the burden of overcoming the presumption of State ownership by establishing through incontrovertible evidence that the land sought to be registered is alienable or disposable based on a positive act of the government. *See* Republic v. de Guzman, G.R. No. 163767, Mar. 10, 2014; Gaerlan v. Republic, G.R. No. 192717, Mar. 12, 2014.

[11] Cariño v. Insular Government, 212 U.S. 459, 460 (1909).

Just as significant was the Court's interpretation of the Bill of Rights in the Philippine Bill of 1902. The Organic Act provided that "no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws." The Court then explained that a "person" under the Bill of Rights included the natives of Benguet and "property" included not only that which had undergone processes "which presumably a large part of the inhabitants never had heard." In the Court's view, the United States could not have meant to regard as "public land" what the Igorots, "by native custom and by long association—one of the profoundest factors in human thought—regarded as their own."[12]

Sereno and Libarios not only elevated Kalinga law to the same level as the national legal system; they had the temerity to speak of the interface of these legal systems. They recommended ending the hostility between the national government and indigenous peoples through an approach "grounded on a holistic view of the indigenous concepts and system of land ownership and their relationship to the socio-economic and cultural life of the Kalinga and other indigenous upland communities."[13]

In particular, the authors recommended:

1. the recognition of ancestral land rights,
2. the recognition and protection of indigenous system of land ownership, and
3. the recognition and promotion of the indigenous mode of settling land dispute.[14]

These recommendations were atypical to say the least. *Interface* went against the grain when it attempted to salvage what was viewed as a stumbling block in the drive to economic development. The authors were of course aware that their recommendations may not be palatable to the policy-making institutions of the country. "As an institution, law has always been a bastion of conservatism," they wrote.[15] Four years after Interface was published, however, the Constitutional Commission appointed to draft a post-Marcos constitution wrote provisions for the protection of the indigenous peoples' ancestral domains in the Philippine Constitution. Ten years after that, Congress enacted the

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[12] *Id.* at 459.

[13] Aranal-Sereno & Libarios, *supra* note 1, at 454.

[14] *Id.* at 454-55. (Emphasis supplied.)

[15] *Id.* at 456.

Indigenous Peoples' Rights Act of 1997[16]—a landmark law that adopted their recommendations.

The State's recognition of the indigenous peoples' rights is the result of centuries of resistance by indigenous peoples which began with the colonizing powers' invasion of the Philippines.[17] But even members of the "bastion of conservatism" provided help as in this project. The Constitutional Commission that drafted the 1987 Constitution had members from civil society who had worked with marginalized groups and grafted provisions on indigenous peoples' rights onto the fundamental law.[18] Scholars like Dr. Owen Lynch re-examined history and argued that colonizers had, in fact, recognized land ownership rights of early Filipinos and unmasked the insidious side of US land laws in their colonies in a series of articles that appeared in the PHILIPPINE LAW JOURNAL.[19] He helped expose colonial legal systems as fronts for racism and commercial concerns.[20] Non-government organizations assisted indigenous communities in negotiating the official legal system. [21] All these combined to challenge conventional wisdom regarding the rights of indigenous peoples. By the time the conservative interests challenged the constitutionality of the Indigenous Peoples' Rights Act,[22] the air was sufficiently saturated with the "subversive discourse" of alternative legal systems. The Supreme Court, albeit with the slimmest of margins, decided in favor of the law.[23]

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[16] Rep. Act No. 8371 (1997).

[17] *See* Jose Mencio Molintas, *The Philippine Indigenous Peoples' Struggle for Land and Life: Challenging Legal Texts*, 21 ARIZ. J. INT'L & COMP. L. 269 (2004).

[18] CONST. art. II, § 22 mandates that the state "recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development." CONST. art. XII, § 5 more particularly commands that the state to "protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural well-being."

[19] *See* Owen Lynch, Jr., *Land Rights, Land Laws, and Land Usurpation: The Spanish Era*, 63 PHIL. L.J. 82 (1988); Owen Lynch, Jr, *The Philippine Colonial Dichotomy: Attraction and Disenfranchisement*, 63 PHIL. L.J. 112 (1988); and Owen Lynch, Jr, *Invisible Peoples and a Hidden Agenda: The Origins of Contemporary Philippine Land Laws*, 63 PHIL. L.J. 249 (1988).

[20] His dissertation has since been published as a book by the University of the Philippines College of Law. *See* OWEN LYNCH, JR., COLONIAL LEGACIES IN A FRAGILE REPUBLIC: PHILIPPINE LAND LAW AND STATE FORMATION (2011).

[21] *See* Stephen Golub, *The Growth of a Public Interest Law Movement: Origins, Operations, Impact, and Lessons for Legal Systems Development, in* ORGANIZING FOR DEMOCRACY: NGOS, CIVIL SOCIETY, AND THE PHILIPPINE STATE 254 (Lela Noble ed., 1998); MANY ROADS TO JUSTICE: THE LAW RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD (Mary McClymont & Stephen Golub, eds., 2000).

[22] For a summary of the arguments against the IPRA, *see* Philippine Center for Investigative Journalism, *New Law on Indigenous Peoples Faces Legal Challenge*, PCIJ.org, 1998, *at* http://pcij.org/stories/1998/ipra2.html.

[23] Cruz v. Secretary of Environment and Natural Resources, G.R. No. 135385, 347 SCRA 128, Dec. 6, 2000.

Interface caught the eye of the democratization movement that swept the post-Marcos landscape. It is inextricably part of the movement that helped uphold the Indigenous Peoples' Rights Act. Justice Reynato Puno's opinion in *Cruz v. Secretary* noted that *Interface* was one of the materials circulated among the Constitutional Commissioners in the formulation of Section 5, Article XII of the 1987 Constitution.[24]

The Indigenous Peoples' Rights Act is not a perfect law and does not pretend to be the magical solution to the problems that plague the lives of indigenous peoples. The Supreme Court itself may have dulled its impact with its subsequent decisions.[25] It will take time before we can rectify the wrongs inflicted on Indigenous Peoples. We have inflicted a range of sins often in the name of economic progress: from discrimination to displacement. Today, despite the advances made in securing rights for indigenous peoples, they are still the victims of violence. Those opposing mining activities in potential host communities have been killed.[26] Families of anti-mining leaders have likewise been killed in this conflict,[27] and in one example, army soldiers strafed the house of B'laan leader Dagil Capion resulting in the death of Capion's pregnant wife, and two of their children. Another child was wounded.[28] Obviously, so much more has to be done.

The fact that the law has finally caught up with the idea that indigenous peoples have rights should be celebrated. The idea that indigenous peoples have rights to their ancestral domains, an idea that was once considered blasphemous, should be celebrated. Indigenous peoples throughout the world continue their struggle for the recognition of their rights in the international arena.[29] The task

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[24] *Id.* at 203 n.142. Justice Puno cited IV RECORD CONST. COMM'N 33 (1986).

[25] *See* Gatmaytan, *supra* note 9.

[26] Artemio Dumlao, *Anti-mining activist, kin killed in Nueva Vizcaya*, Phil. Star, Dec. 10, 2012, *available at* http://www.philstar.com/nation/2012/12/10/884131/anti-mining-activist-kin-killed-nueva-vizcaya; Pia Lee Brago, *Rights group urges Noy to stop killing of anti-mining activists*, Phil. Star, July 19, 2012, *available at* http://www.philstar.com/headlines/2012/07/19/829298/rights-group-urges-noy-stop-killings-anti-mining-activists. Human Rights Watch ("HRW"), a global rights body, has urged President Aquino to stop the killings of anti-mining activists in the Philippines pushes to revitalize the mining sector. HRW said it had documented three cases anti-mining and environmental activists allegedly killed by paramilitary forces that might have links to the military.

[27] Orlando Dinoy, *Wife and 2 children of tribal anti-mining activist killed by gov't forces*, Phil. Daily Inquirer, Oct. 18, 2012, *available at* http://newsinfo.inquirer.net/291424/wife-and-2-children-of-tribal-anti-mining-activist-killed-by-govt-forces.

[28] Germelina Lacorte, *Tribal uprising feared after killings*, Phil. Daily Inquirer, Oct. 21, 2012, *available at* http://newsinfo.inquirer.net/292816/tribal-uprising-feared-after-killings.

[29] *See* Eric Dannenmaier, *Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine*, 86 WASH. U. L. REV. 53 (2008).

at hand is to try even harder, to make sure that the gains in the legal regime are translated into concrete gains.

Advocates of indigenous peoples' rights, for their part, can take their cue from the authors of *Interface*. They can educate others. They can communicate to the legal profession in a language that the profession could understand and in a medium that was comprehensible. They can use legal scholarship to subvert the legal system from the inside and forced it to change.

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