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"Legal enclosure" and resource extraction: Territorial transformation through the enclosure of local and indigenous law

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ABSTRACT

This paper examines how extractive firms, using authority delegated by states, have developed initiatives to remake local legal spaces shaped by community-based governance, custom and indigenous law. They do so to produce territories which facilitate extraction in line with the needs and preferences of transnational business. Communities, their governance systems, and their capacity for collective action, can threaten this project. As a result, these corporate initiatives attempt to privatize, dominate and close off local legal spaces such that the populations living in extractive territories lack effective recourse to alternatives when they seek to access to justice in relation to claims involving resource extraction. The article develops the concept of "legal enclosure" to describe this phenomenon. Drawing on the academic and grey literature, this article examines three strategies used in community relations practice in the extractive sector. An illustrative case involving each strategy is outlined and discussed. The cases support a longstanding theme in legal pluralism studies suggesting that efforts to monopolize legality are never perfect or complete. Also, effective enclosure efforts require connections with external legal orders that confirm and support the validity of confining access to justice to local, private legal spaces managed by extractive firms and their agents.

1. Introduction

This paper examines the ways in which extractive firms partner with states to construct "territories of extraction" through the use of new governance initiatives. These initiatives are aimed at producing territories which prioritize the smooth facilitation of resource extraction in line with the needs and preferences of transnational business. Communities, their governance systems, and their capacity for collective action, pose a threat to this project. As a result, firms and states have developed initiatives in order to remake local legal spaces that have historically been shaped by indigenous and customary law. Instead, these initiatives attempt to privatize, dominate and close off these local spaces in ways such that the populations living in extractive territories lack recourse to other legal spaces when they seek to access to justice in relation to claims involving resource extraction.

The paper identifies three categories of these initiatives. First, states delegate substantial *de facto* authority over corporate-community relations to extractive firms. Second, states develop highly constrained channels for including local normative influence in decision making affecting extractive territories (e.g. indigenous consultation). This often entails the criminalization of attempts to influence decision making in ways outside of these channels. Third, extractive firms administer their authority over corporate-community relations using new forms of transnational private governance, such as certification schemes, CSR policies and sustainability reporting. These firms have pioneered new forms of governmentalized community relations and dispute management which aim to contain and process local justice claims.

Together these various processes seek to transform and subordinate local legal spaces in private structures managed by extractive firms. Just as the production of extractive territories requires the enclosure of common property and resources, it also involves a form of legal enclosure in which local and collective forms of authority are subordinated to private governance initiatives managed by extractive firms. This results in the creation of enclosed, substantially privatized legal spaces which offer local actors very limited opportunities to press for claims against the firm.

I will begin by elaborating the conceptual framework used in this article, which draws upon both political ecology and legal pluralism, and by discussing how this framework can provide new insights into processes of territorial transformation associated with resource extraction. Next I use this framework to discuss the idea of "legal enclosure" before moving to an analysis of contemporary community relations practice in the extractive sector. Drawing on the academic literature, I examine three common strategies used in the extractive sector and discuss an illustrative example for each. This is then used to show and explore how extractive firms pursue the goal of legal

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enclosure in their relations with local communities.

2. Linking political ecology with global legal pluralism

This paper adopts an approach that brings together the insights of political ecology with those of global legal pluralism. Political ecology (PE) has been the dominant framework in the critical social sciences used to understand socio-environmental issues and conflicts, particularly those involving industrial resource extraction (Bebbington, 2012; Escobar, 2006; Horowitz, 2010; Le Billon, 2001; Perreault et al., 2015; Watts, 2016). This approach focuses on the exercise of power in relation to the political, economic, social and cultural dimensions of these conflicts (Walter and Martinez Alier, 2016). PE studies have not always shown the same insight in approaching the legal dimensions of these conflicts. Fay, for example argues that many PE studies have failed to pay attention to judicialization as an important feature of neoliberalizing processes that are shaping socio-environment conflicts, particularly in relation to conservation (Fay, 2013 drawing on Comaroff and Comaroff, 2009). Socio-environmental conflicts involving extraction have of course very significant multi-scalar legal dimensions. These include the legal recognition (or lack thereof) of indigenous governance systems, the invocation of international human rights in these conflicts, and the extensive, multi-jurisdictional, public-private legal machinery designed to facilitate industrial extraction. In order to capture and integrate these developments into a political ecology analysis, it is helpful to turn to legal pluralist approaches.

Legal pluralism is a perspective on normative ordering that has emerged initially from anthropology and its early interest in how social groups generate binding norms and ordering processes (Malinowski, 1926; Pospisil, 1958). Legal pluralists apply the term law to both state and non-state ordering in an effort to capture the complex dynamics of legality without making *a priori* assumptions about the source and nature of normative ordering. They refuse to assume a hierarchical relationship between different forms of legality—whether state or non-state, codified or customary. This has been an effective framework for examining sites featuring overlapping legal systems and for examining the complex interactions of these systems. Early legal pluralists studied colonial arrangements where imperial legal systems were layered onto indigenous systems (Llewellyn and Hoebel, 1941; Pospisil, 1958). By the 1970s, scholars began to apply their insights to postcolonial contexts and industrialized societies. They noted that the same forms of interactions between official and unofficial norm generating and enforcement processes could be observed in these new contexts (Moore, 1973; Galanter, 1981; Merry, 1988).

With the rise of globalization studies, the pluralist frame has been adapted to conceptualize a world of interacting legal spaces involving overlapping legal orders operating at different scales (Berman, 2007, 1159; Santos, 2002). This last shift has been particularly important, leading to the reinvention of the field as 'global legal pluralism' (Berman, 2007; Darian-Smith, 2013; Merry, 2015; Michaels, 2009; Osofsky, 2007; Tamanaha, 2008; Teubner, 1997; Twinning, 2010). While the emerging landscape of global governance has challenged conventional state-centric perspectives, the conceptual tools developed by legal pluralists appear to fit these new circumstances remarkably well (Michaels, 2009). Phenomena such as the decentering of states, the expansion of transnational rule-making, the spread of non-state and hybrid regimes, the significance of soft law as well as hard law, and the rise of multiple centres of authority—all of these are effectively incorporated in a pluralist framework (Tamanaha, 2008; Teubner, 1997). Thus, for example, the working conditions in a garment factory may be simultaneously subject to (1) the customary norms of the shop floor, (2) national labour and employment regulation, and (3) transnational governance schemes devised by lead firms that manage the garment supply chain, including codes of conduct concerning workplace safety and labour standards. Workers may also be able to gain access to extra-local legal spaces to bring other legal orders into play. An alliance with domestic and foreign activists can help facilitate a complaint to the ILO or organize a transnational consumer boycott. The governance of conditions on a factory floor, a local legal space, is thus characterized by "interlegality", the presence of overlapping legal orders that are operating at different scales (Santos, 2002). The issue as to the relative influence of each legal order and how they interact is an empirical question.

A legal pluralist perspective is helpful in understanding the legal dimensions of socio-environmental conflicts arising from industrial resource extraction. Legal pluralism encourages an empirically informed, multi-scalar approach without preconceptions regarding hierarchy, direction of influence, degree of autonomy, or relationships among different legal orders. It provides an analytical position from which to understand the dynamics of multiple, multi-scalar (and multiplying) systems of ordering in a world of neoliberal global governance. Legal pluralists have focused on how legal orders interact, often in unexpected ways, potentially cooperating, coopting, competing or mutually constituting one another (Merry, 1988; Santos, 2002). Thus the conceptual framework of legal pluralism can be combined with that of PE to provide insight into the multi-scalar dynamics of legal ordering in extractive sites. In particular it is a useful perspective with which to examine processes of territorialisation, understood as the construction of governance spaces tied to geographic areas.

3. A legal pluralist political ecology of extraction

A legal pluralist/PE perspective helps us to understand the complex and multi-scalar construction of legal ordering within the landscapes in which industrial resource extraction takes place. Today, new extractive projects are being developed predominantly in areas that tend to be physically remote and ecologically fragile (Martinez-Alier and Walter, 2016). As the number of resource deposits that are easily accessed and exploited dwindles, extractive firms must pursue new opportunities in areas where either geography, political barriers, or the limits of technology have prevented resource exploitation in the past. In many cases, these are areas that have existed on the global periphery, distant from the global economy and marginalized within their own state societies. These are hinterlands, frontiers, or neglected zones existing in countries of both the global south and north. Such regions are predominantly rural, poor, and often inhabited by indigenous peoples or members of socially excluded populations.

Legal ordering in these spaces resembles the classic studies conducted by legal pluralists. The influence of state law historically in such regions has been partial or limited, and customary and indigenous law often play a central role in many areas of daily life. Many communities and groups maintain forms of self-regulation and organize important aspects of community life through local institutions, authorities and norms (e.g. Sieder and Barrera, 2017, 642). These local and indigenous institutions have co-evolved in an uneasy and asymmetric relationship with state centred efforts to govern rural and semi-rural territories. Governance then takes place in local spaces and through local institutions in which multiple forms of ordering exist in a historically complex and shifting relationship with one another. In some cases, state law may recognize and affirm local norms and institutions, in others it may ignore or ban them, in yet others it may seek to reshape or co-opt local governance spaces. In Moore's classic formulation, these spaces are "semi-autonomous" in that while they generate and enforce compliance with internal rules, they may also selectively adopt some state rules and exclude others (Moore, 1973). Local actors are able to maintain degrees of normative autonomy within these spaces through a variety of strategies including social solidarity and exploiting gaps and limits of state law and its enforcement.

These spaces are local in that they are tied to particular territory and geography that is bound up in diverse community concerns. This can include systems for managing common resources (such as irrigation water, pastures, fisheries and forests), for addressing local issues of