

Whose Nature? Whose Rights? Criminalization of Social Protest in a Globalizing World

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Abstract

This introductory essay provides a reflection on the historical configuration of law and its relationship with nature's exploitation. In doing so, it seeks to highlight the epistemic foundations surrounding the criminalization of social protest in today's globalized world. The essay revolves around the question of why the law has historically disregarded both environmental and social harm. Finally, the discussion concludes by suggesting a paradigm shift in the fields of criminology and legal theory.

Key words

Social and environmental harm; legal history; knowledge production

Resumen

Este ensayo desarrolla una reflexión acerca de la configuración histórica del derecho y su relación con la explotación de la naturaleza. Al hacer lo anterior se busca resaltar los fundamentos epistémicos en torno a la criminalización de la protesta social en el mundo globalizado contemporáneo. El ensayo intenta entender por qué el derecho ha excluido históricamente el daño social y ambiental.

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Finalmente, el análisis concluye sugiriendo un cambio paradigmático en criminología y teoría jurídica.

Palabras clave

Daño social y ambiental; teoría jurídica; producción de conocimiento

Table of contents

1. Introduction.....	4
2. The politics of Plunder: understanding the histories of nature's extraction	5
3. Scrutinizing the School of Salamanca's legacy.....	6
3. From empire to globalization: the trajectories of knowledge production in the law.....	7
4. Dams, territory and rights adjudication	8
5. Cochabamba's water war	9
6. Concluding thoughts	10
Bibliography	10

“The Indians, Las Casas says, have no religion, at least no temples. They live in communal bell-shaped buildings....They prize bird feathers of various colors, beads made of fish bones, and green and white stones with which they adorn their lips but they put no value on gold or other precious things”

Howard Zinn 2003 *A people's history of the United States*.

1. Introduction

When writing this introductory essay I came across *Even the Rain* (Bollaín 2010), a film about the so called Water War in Cochabamba Bolivia in 2000 (Olivera and Lewis 2004). The film illustrates how the extraction of natural resources emerged as a colonial practice which has persisted and become dominant in today's global world. Throughout the film two historical events interweave with one another: Firstly, the conquest of the Americas, and secondly, the people of Cochabamba's recent struggle against the Neoliberal policies promoted by the Bolivian government, which in the late nineties legalized the privatization of state drinking water.

I was particularly interested in the film's portrayal of these two events, given that they show how in two different periods of history the prevailing legal structures legitimized the extraction of natural resources without any consideration for environmental or social harm. The latter prompted the following questions: Why has the law historically taken both social and environmental harm for granted? Who has benefited from the historical silences of the law in regard to social suffering and environmental harm? The answer to these questions, while not straightforward, lies largely in the restricted way in which nature's relationship with human beings has been theorized by social science and legal scholarship.

Legal positivism, perhaps the most influential doctrine in legal theory conceives nature as nothing more than a lifeless, inert object whose existence is dependent upon the needs, desire and greed of human beings (Burdon 2013). This conceptualization of nature is historically rooted in the European Renaissance and the Enlightenment, and goes hand in hand with a concept of humanity that separates human beings from nature (Mignolo 2012). Thus the exploitation of nature is legitimized by a restricted conceptualization of humanity which, despite solely representing the historical experience of the West/Europe, becomes universal by systematically denying other forms of knowledge related to nature (Grosfoguel 2013). Since the Sixteenth century, from Francisco Vitoria to Locke and the Universal Declaration of Human Rights, nature has been presented as something that must be controlled by man (Mignolo 2012).

Even the Rain's plot provides an opportunity to reflect upon some of the central issues addressed in the workshop: Whose natural resources? Criminalization of social protest in a Globalizing world. The papers presented at the workshop broadened my interest in the study of the relationship between law, nature and social mobilization. Although in different ways and from different analytical standpoints, the resulting articles included in this journal draw attention to two issues which I will discuss in the remaining paragraphs of this essay. On the one hand, the historical processes surrounding the increasing criminalization of social protest regarding the ownership of natural resources; and on the other, the epistemic foundations of criminalization related to the contestation of the extraction of natural resources. My discussion will be based on the aforementioned historical events portrayed in *Even the Rain*: the conquest of the Americas and Cochabamba's water war. In addressing these events I seek to expand the academic discussion on the relationship between Colonial and Modern law. Despite significant efforts, the study of this intricate relationship remains largely ignored in the field of legal theory and other related disciplines such as criminology, Human Rights and International law (Anghie 2004, Fitzpatrick 2011, Barreto 2012, Suárez Krabbe 2013).

2. The politics of Plunder: understanding the histories of nature's extraction

One of Even the Rain's more disturbing scenes shows Columbus' arrival to the Americas. The scene takes us directly to the very moment of disruption, in which Columbus and his crew met the Arawak people on an island of the Caribbean. In his blunt historical analysis of the conquest of the Americas, Howard Zinn describes how Columbus, impressed by the gold ornaments worn by the Arawak people, decided to imprison some of them and subsequently force them to disclose the location of the gold (Zinn 2003).

Columbus' colonial greed was aided by the endorsement of both imperial law and its rationality, which granted him the privilege of developing punitive practices related to the extraction of gold and other minerals. A close look at these punitive practices will shed light on the economic forces surrounding the extraction of natural resources, its historicity and impact on the inhabitants of the Americas. It was on today's Haiti that the voracious extraction of nature began.

Columbus, desperate due to the failure of his second expedition in 1495 and with the burden of not having found the amount of gold he hoped to bring to Europe, ordered all inhabitants of the island age fourteen years or older to collect an amount of gold equal to that collected by the conquerors on their arrival to Haiti, which would then be collected every three months by the Spanish Army (Zinn 2003). Copper tokens were given to the "Indians" who returned with gold while the "Indians" who failed had their hands cut off and bled to death (Zinn 2003).

As gold was scarce, the Arawak could not collect all the gold they were asked to supply. Although they did engage in fierce attempts aimed at countering the colonial army, their fight was not successful due to asymmetric military might (Chambliss 1989, Zinn 2003). When taken as prisoners the Arawak were either hanged or burned to death. Since they preferred death to enslavement and deterritorilization, incidents of mass suicides occurred. Two years after the conquerors' arrival, half of the 250.000 inhabitants of Haiti were dead and by 1650 the Arawaks had been completely exterminated (Zinn 2003).

As stated earlier, the conquerors' actions were justified by legal and political discourses which would subsequently influence the theorization of International and Human Rights law. The doctrinal Principle of Discovery granted European conquerors absolute legal title and ownership over American soil and reduced "Indians" to the category of mere tenants (Wilkins 1997 cited Mattei and Nader 2008). In the same vein, the lands occupied by imperial powers were considered Terra nullius, that is, empty places, which could be used at the colonizer's disposal (Mattei and Nader 2008). Swiss scholar Emmerich de Vattel, one of the forerunners of International Law, commented in this principle:

In connection with the discovery of the New World, it is asked whether a Nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes whose small number cannot populate the whole country ...we are not departing from the intentions of nature when we restrict savages within narrower bounds (De Vattel 2005 cited Mattei and Nader 2008).

Following De Vattel's argument, the English liberal theorist John Locke in his Two Treatises of Government (1698), asserted that the appropriation of Native American land was a command of the Christian God who embodied by the British colonizers could accumulate "as much land as a Man tills, plants, improves, cultivates and use" (Locke 1698 cited Mattei and Nader 2008). More examples of the legal designs bent on the plunder and destruction of the colonial world could be provided, however, given the purposes of this writing, in what follows, I will expose the epistemic injustice embedded in the writings of the School of Salamanca and other ensuing developments of International Law such as Hugo Grotius' Laws of nations.

3. Scrutinizing the School of Salamanca's legacy

The school of Salamanca holds a privileged place in International Law's scholarship. Scholars from this school of thought set forth a milestone in the theorization of International Law, which emerged out of Colonial expansion (Suárez-Krabbe 2013). The most representative figure of the School of Salamanca was Francisco Vitoria, a Dominican priest who granted property rights to the so called Indians of the Americas. Vitoria's rationale for the recognition of property rights exemplifies the colonial bias present in both colonial and modern law (Fitzpatrick 2011). Based on the assumption that all human beings valued property in the same way presented by European/Colonial historiography, Vitoria granted rights to the so-called Indians and incorporated them into the realm of natural law (Fitzpatrick 2011, Mignolo 2012). The epistemic violence of Vitoria's decision lies in the fact that he did not bother to consider whether or not the inhabitants of the Americas were concerned with property rights and, most importantly, whether the "Indians'" relationship with the land was fully comparable to that of the Spaniards (Mignolo 2012).

Vitoria's misrepresentation of the Indians' relationship with the land interrelates with the Valladolid debates, according to which the Indians' human condition was decided by the systems of knowledge of imperial times and by the canons of imperial thought (Barreto 2012, Suárez-Krabbe 2013). In accordance with prevailing colonial thought, inhabitants of the Americas were considered peoples without soul, savages, barbarians. For this reason, their extermination did not conflict with the rationalities of Colonial expansion (Dussel 1995, Grosfoguel 2013). This argument was upheld by jurist Gines de Sepulveda, who justified the violence towards the so-called Indians under the theory of "just war" (Anghie 1996, 2004, Suárez-Krabbe 2013).

Although Bartolomé de las Casas challenged Sepulveda's viewpoint, his argument did not fully consider the humanity and ontology of the so-called Indians. For Las Casas the Indians were incomplete humans, who, only by converting to Christianity could enter the realm of humanity. In other words, the Indians merely had the potential to be human (Suárez-Krabbe 2013).

The above representation of the inhabitants of the Americas also marked the beginning of the hierarchization of knowledge that has persisted until today's present postcolonial world (Suárez-Krabbe 2013). Through the lens of the law, the knowledge of the inhabitants of the Americas was inferior to that of the conquering powers at best, or non-existent at worst. As a consequence, to state that the systems of thought that gave way to the foundational elements of international law and human rights law are universal and represent the historical experience of the whole world would be, to say the least, misleading. Following Vitoria's *ius gentium* Dutch Jurist Hugo Grotius developed a theory of International Law, which operated only within the framework of nation states (Mignolo 2012). Since nation states were inexistent in the Colonial world, the guidelines prescribed in order to protect human life embedded in Grotius' juridical developments did not operate in the Colonial world, "owned" by many European nation states (Mignolo 2012).

Grotius work is emblematic of the relationship between Colonial and Modern law. In his reflections he does not use the Cartesian doubt -developed at the time he produced his work – to consider the human existence of the subjects inhabiting the Colonial world (Mignolo 2012). Thus, rather than uncovering the historical injustices of colonial law, modern law replicates the dynamics of inferiorization and exclusion that justified European colonial expansion. In other words, as Enrique Dussel has rightly contended, Colonialism is Modernity's dark side (Dussel 1995).

3. From empire to globalization: the trajectories of knowledge production in the law

In considering the aforementioned theoretical and historical void, Boaventura de Sousa Santos has demonstrated the epistemic bias of the systems of knowledge production entrenched in International Law and the universal characterization of humanity which informs it (Santos 2007). Western thinking emerged from the annihilation of the knowledge of the colonized peoples of the world, which Santos terms *epistemicide* (Santos 2007). In consequence, modern legal thinking reproduces the systems of colonial thought by deeming inexistent the historical experience of the colonized peoples, their knowledge and forms of political organization (Santos 2007, Grosfoguel 2011).

Santos argues that contemporary global political life can be understood by observing the fundamental differences in the ways in which conflicts are dealt with, in three interrelated realms: legality, knowledge production and social life. According to Santos, Western-based political and cultural relations and interactions emerge from three constant tensions : A) social regulation vs social emancipation, B) legal vs illegal (legality and protection vs punishment within the law) and C) true scientific knowledge vs true non-scientific knowledge.

The ways in which modern thinking relates to global problems is framed within this basic presupposition, which is taken to be universally valid. The problem however is that these dynamics, or tensions, only correspond to the reality of a small portion of the world's population. Santos' contribution is important precisely because he shows how all these principles and dynamics are suspended in relation to the vast majority of the world's population. This is what he exemplifies by using the metaphor of an abyssal line. His argument then follows that modern legal thinking presupposes that legality and illegality are valid everywhere, ignoring the fact that in many instances, people (and or their actions) are not even illegal – rather they are simply inexistent. This is what leads Santos to affirm that on one side of the abyssal line conflicts can, as a rule, be resolved by emancipation and regulation (Santos 2007). The latter refers to the existence of legal statutes for the establishment of social order and the former to the institutional discourses that allow inhabitants of that particular side of the line to vindicate their liberties and rights (Santos 1995, 2007). In stark contrast, exist those whose lives have been relegated to the other side of the line, a world within which violence and appropriation are the primary means for conflict resolution (Santos 2007). Additionally, people on this side of the line cannot participate in the production of knowledge because their rationality is not recognized by modern thought. At best, they have beliefs, opinions, intuition, subjective understandings, all of which may be raw material for scientific enquiry, but not knowledge in and or itself (Santos 2007).

An example of how modern thinking renders other knowledges as inexistent can be found by observing the globalization processes that uphold the neoliberal model of development, which replicates the idea of nature as private property, an idea conceived in the Colonial era. In contrast to this view of nature, indigenous peoples of the Americas consider nature to be a living organism whose existence and integrity must be respected (Rodríguez-Garavito and Arenas 2005). In accordance to indigenous peoples' worldview, land is the main source of cultural identity and not a commodity (Santos and Caló 2013). Their notion of territory entails environmental considerations for land, which they call Mother Land (Rodríguez-Garavito and Arenas 2005). Although indigenous rights have been recognized in various Latin American constitutions, and in spite of the inclusion of the rights of nature in the Ecuadorian and Bolivian legal frameworks, land grabbing remains a common practice despite its to the continued detriment to indigenous communities and the environment. This draws attention to the dynamics of legal knowledge

production and the juridification of conflicts in which the ownership of natural resources is at stake.

4. Dams, territory and rights adjudication

When opposing the drilling conducted by the U.S. transnational corporation OXY in Colombia, the U'WA people sent a declaration to the government of Colombia which stated: *In view of a secure death as a result of our lands, the extermination of our natural resources, the invasion of our sacred places, the disintegration of our families and communities, the forced silence of our songs and the lack of recognition of our history, we prefer death with dignity : the collective suicide of our communities* (Colombian Constitutional Court 1995 cited Rodríguez-Garavito and Arenas 2005).

The Uwa people's struggle is representative of the ways by which indigenous communities in postcolonial societies challenge Neoliberal development and its rationality. When opposing to the drilling of their territories, the indigenous communities strategically employ rights discourses such as prior consultation, established by the International Labor Organization (ILO) in its convention 1969/1989. Although in accordance to the ILO's convention Indigenous communities must be consulted about the economic/development projects involving their territories, in practice, consultation has become a legalistic tool which follows the rationalities of a 'private act', which primarily serves the interests of companies interested in the extraction of the natural resources (Rodríguez-Garavito 2010). The construction of the Urra dam in Northern Colombia is a very telling example of the latter (Rodríguez-Garavito 2010). The dam was constructed in the 1990's against the will of the Embera Katio, the indigenous community inhabiting the territory affected by the dam's construction. Consultation took place nearly a decade later, when 9 leaders of the community had been assassinated by the paramilitaries who strongly endorsed the construction of the dam and provided security to many of the local elites and business persons who benefited from the dam's construction (Comisión Colombiana de Juristas 2008). Thus, by the time consultation took place, opposing the dam's construction was difficult given the fragmentation of the community, caused by forced displacement and lack of guarantees of security for their mobilization (Rodríguez-Garavito 2010).

Another problem regarding indigenous communities' struggle over natural resources lies in governments that avoid abiding by the rulings of the Inter-American Human Rights Court (IAHRC). In 2008, the IAHRC ordered the State of Surinam to stop the exploitation of the territories inhabited by the Saramaka Maroons, a community of self liberated African slaves who had lived in the rainforest from more than 300 years (Pierce 2012). In spite of the ruling, the exploitation of the rainforest continues to take place and the Surinamese government has continued implementing a neoliberal model of development (Pierce 2012).

The cases above fall within Santos' metaphor concerning the abyssal line, and show how the suspension of people's rights is carried out in different ways across the Globe. They also beg the question of why the law has failed to protect nature and the worldviews concerned with it. In 1989, criminologist William Chambliss showed how Columbus' cruel deeds in the Americas exemplified the forms of crimes that escaped criminological interests, that is, the crimes committed by powerful actors such as states, which he termed 'state organized crime' (Chambliss 1989). Columbus' aforementioned punishment practices show how criminalization practices go hand in hand with the economic interests of certain historical time- frame. The increasing criminalization of social protest related to natural resources provides an opportunity to analyze the legal dynamics of globalization that affect those vast majorities who are relegated to the other side of the abyssal line or, as Fanon would put it, to the zone of nonbeing (Fanon 2010, see also Grosfoguel 2011).

In the same vein, the water war in Cochabamba, Bolivia, portrayed in “Even the Rain” is very telling of the ways in which criminal law is used to counter social mobilization and serve the economic interests of networks similar to those that emerged in colonial times. Indeed, it is important to highlight the historical continuities related to these practices of exploitation and genocide. It is, however, also significant to map the ways in which today’s practices differ from the colonial ones. The novelty of these networks and how their legal foundations have changed shall be discussed in the next section.

5. Cochabamba’s water war

In 2000 the people of Cochabamba protested against a new water law, which granted the control over the city’s rural water systems to a subsidiary of the U.S. transnational *Betchel* (Shultz 2009). For four months demonstrators demanded a change in the law and protested the extraordinary rise in the water bills they were charged by *Aguas del Tunary* –*Betchel’s* subsidiary in Bolivia (Sadiq 2002). In response to the massive demonstrations taking place throughout the country, former dictator and Bolivian president of the time – Hugo Benzer passed a declaration of “state of siege” under which constitutional rights were suspended (Olivera and Lewis 2004, Shultz 2009). Incidents of police brutality left 175 people wounded, two blinded by tear gas and a 17 year-old boy shot dead (Frontline 2002). Because of these figures, added to the strong mobilization of the Bolivian people, on April 9 2000, *Betchel* withdrew from Bolivia and the water law was revoked (Shultz 2009). The victory of the social movement which mobilized around *Kucha Pampa* (*water in indigenous language Quechua*) was a blow to the neoliberal practices on development promoted by both Bolivian ruling classes and the international institutions such as the IMF and the World Bank.

President Benzer’s declarations of state of siege is representative of the emergency criminal law, which over the past two decades has gained worldwide popularity (Iturralde 2009). In many Latin American countries the legal mechanism is implemented to counter social mobilization and legitimizes massive incarcerations (Iturralde 2010). With the complicity of elite controlled media, protest is presented as a security threat and prison sentences are justified institutionally to the detriment of the political cohesion of social movements. The imprisoned protesters of the Bolivian water war were portrayed as outcasts without motivation for political mobilization. Protest leader Oscar Olivera was arrested in 2001 on charges of “sedition, conspiracy, and instigation of public disorder and criminal association” (Sadiq 2002). Olivera was the coordinator of the Coalition in the Defense of Water and Life, a grassroots organization which emerged in order to confront the neoliberal policies of the Bolivian Government (Shultz 2009). Olivera was released the very same day on the condition that he reported to the police every 72 hours (Sadiq 2002). On November 30 2001, after having received hundreds of letters from around the world the Bolivian government dropped charges against Olivera, who would later receive the Goldman environmental prize (Sadiq 2002). He had been awarded the honor earlier in 2001, but could not accept due to being hiding from Bolivian authorities.

The Bolivian experience of resistance to neoliberal policies shows how subalternized peoples’ mobilization can bring about social change. This change has reached the realm of law as demonstrated by the Bolivian constitution of 2009, which granted rights to nature *Pacha Mama* (*Mother Land*). Despite the difficulties that the implementation of the constitution may entail, the recognition of rights to nature challenges the colonial/ modern representation of human beings as separated from nature. The constitution also challenged the dominant framework of the nation state by establishing a plurinational state. To a large extent, the collective action which led to the enactment of the Bolivian constitution represents a form of overcoming the epistemicide of approximately 8 million enslaved Bolivian

indigenous people who lost their lives during the colonial era (Mattei and Nader 2008).

6. Concluding thoughts

The articles included in this issue touch upon some of the common elements in the criminalization of social protest related to the ownership of natural resources in today's globalized world: individual responsibility, imprisonment and state definitions of crime. As shown in this introductory essay, these elements of criminalization are embedded in Modern/Colonial epistemology, an epistemology that disregards social or environmental harms. Furthermore, the papers also show that the criminalization of social protest effectively permits that the motivations that bring about social discontent and mobilization remain unaddressed.

The global phenomenon of prison overcrowding and the unmitigated suffering caused by the imposition of neoliberal notions of development call for a change in the prevailing paradigms of legal theory and criminology. In regard to the latter, as recent contributions in criminology suggest, the study of crime should be based on social harm and not on state definitions of crime (Chambliss *et al.* 2010). In regard to the former, legal theory should pay close attention to the experience of injustice of historically subalternized subjects and overcome its obsession with the presumed universality, which characterizes the mono-cultural legal theory that emerged out of Continental and Common law systems. This is not meant to dismiss the contributions of these systems of legal thinking. Rather, it is a call for a horizontal dialogue among legalities seeking to understand the historical human suffering and injustice of which the universal character of modernity's knowledge production is complicit. After all, as Boaventura de Sousa Santos maintains: 'there will no be social justice without epistemic justice' (Santos 2007). In bringing together the insights of activists and committed scholars the articles of this issue may meet Santos' proposal.

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