

Criminalization of Social Protest: *Future research*

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Terwindt, C., 2014. Criminalization of Social Protest: 'Future research'. *Oñati Socio-Legal Series* [online], 4 (1), 161-169. Available from: <http://ssrn.com/abstract=2384374>



Abstract

This special issue of the Oñati Socio-Legal Series is dedicated to an exploration of particular features of and analytical approaches to the criminalization of social protest about natural resources. This epilogue highlights four areas for future research: (1) the definition and use of the term 'criminalization of social protest' and the development of an analytical apparatus; (2) patterns, typologies, and legal strategies of criminalization; (3) the embeddedness of processes of criminalization in the broader political decision-making procedures about natural resources; (4) counter-strategies. In the description of these areas, the author draws on the papers in this Special Issue and the collective reflection during the workshop in 2012.

Key words

Future research; criminalization; decision-making; natural resources; social protest; social movements

Reflection for future research based on the discussions and papers presented at the workshop *Whose Natural Resources? Criminalization of Social Protest in a Globalizing World* held in the International Institute for the Sociology of Law, Oñati, Spain, 26-27 April 2012, and coordinated Gustavo Rojas-Páez (Universidad Libre Colombia) and Carolijn Terwindt (European Center for Constitutional and Human Rights).

The editors would like to thank the Max Planck Institute for Foreign and International Criminal law, section Criminology, for their institutional support in the organization of the the workshop: *Whose Natural Resources? Criminalization of Social Protest in a Globalizing World*. A great *Mila Esker* to the incredible staff from the International Institute for the Sociology of Law (IISL), whose generosity and hospitality provided the best scenario for participants at the workshop. Special *Eskerrik asko* to Malen Gordoia for her assistance in the logistics of the workshop and to Cristina Ruiz for her editorial work in the publication of the resulting articles published in this issue. Last but not least, we would like to thank all contributors, whose interests in the study of criminalization made this issue possible.

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Resumen

Este número especial de la Oñati Socio-Legal Series busca explorar elementos particulares y métodos de análisis para la comprensión de la criminalización de la protesta social originada por la disputa de recursos naturales. Este epílogo destaca cuatro áreas para futuras investigaciones: (1) Definición y uso del término "criminalización de la protesta social" y desarrollo de sus respectivos marcos de análisis. (2) Patrones, tipologías y estrategias jurídicas de criminalización. (3) Inscripción de los procesos de criminalización dentro de un marco político más amplio que aborde la toma de decisiones en torno a los recursos naturales. (4) Contra estrategias. En la descripción de estas áreas, la autora hace referencia a los artículos de este número especial y a la reflexión colectiva generada durante el workshop celebrado en 2012.

Palabras clave

Investigación futura; criminalización; toma de decisiones; recursos naturales; protestas sociales; movimientos sociales

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1. Introduction

During the past decade, activists and NGOs have raised concerns about the criminalization of protesters who stand up for their rights to natural resources, such as land, forests, and water. Increasing globalization has brought transnational companies to places like Guatemala for mining and Indonesia for palm oil production, to the dissatisfaction of some in the local communities affected by such projects. At the core of such conflicts lie competing proposals for ownership, progress and economic development. In each of these struggles, the opponents face governments and corporations who may have strong interests in ignoring local communities' relationship with the natural resources they seek to exploit.

The political and legal trajectory of such struggle and efforts to resolve the conflict often consists of failed negotiations, broken promises, and lost lawsuits. Actors with vested interests have opposed farmers or indigenous communities that demand preservation of or access to natural resources. Sometimes, protests are quashed with violent repression. Increasingly, however, activists and scholars have pointed to the language and logic of punishment as one of the tools with which challengers of mega-projects or particular property and exploitation arrangements are forced to accept them. Criminal prosecutions of protesters in these contexts have therefore led to denunciations of the 'criminalization of social protest'.

2. The workshop and this special issue

In April 2012, a two-day workshop took place with the title *Whose Natural Resources? Criminalization of Social Protest in a Globalizing World*. It was kindly supported both by the International Institute for the Sociology of Law in Oñati and by the Max Planck Institute for Foreign and International Criminal Law in Freiburg, Germany. The workshop aimed to advance our thinking about the global phenomenon of criminalization of social protest by zooming in on and comparing a set of cases. Furthering our understanding of the processes underlying criminalization requires both in-depth and contextualized analysis of single cases and a comparative approach in order to go beyond enumerating anecdotes and incidents. The collaborative work of the scholars and activists contributing to this special issue represent an incipient effort towards this goal. Together, the papers in this special issue offer examples of the current thinking and writing about criminalization of social protest.

The workshop participants drew from a wide variety of countries and struggles, including the struggle of farmers for land in the Philippines, the anti-mining movement in Guatemala, Mapuche activists in Chile, environmentalists in Puerto Rico, social struggles in Colombia, and the protest against a high-speed train in the Basque Country. Not all papers contributed an academic or theoretical analysis of cases. Some of the papers were written by participants in these struggles as testimonies and provide a detailed account of events. The direct exchange between scholars and activists (sometimes represented by the co-authorship of articles) enabled a reflective discussion that was rooted in the everyday experiences and relevance for the people facing criminalization. While leaving room for the development of different answers, the discussion focused on the construction of useful analytical concepts and the search for relevant questions.

3. Areas for future research

Drawing on the collective reflection during the workshop as well as the papers in this special issue, this epilogue discusses four areas for future research: (1) the definition and use of the term 'criminalization of social protest' and the development of an analytical apparatus; (2) patterns, typologies, and legal strategies of criminalization; (3) the embeddedness of processes of criminalization in the broader political decision-making procedures about natural resources; (4) counter-strategies.

3.1. *The definition and use of the term*

A few decades ago, criticism on criminal prosecutions of protesters tended to come from the human rights movement. However, some analysts have now abandoned a human rights perspective in favor of an approach that posits the 'criminalization of social protest'. Human rights analyses traditionally base their impartiality and objectivity on a separation of the denunciation of human rights violations from moral judgments regarding politics. Such de-politicized analysis, though, may impede an examination as to how human rights violations can be inextricably linked to the political and economic programs that are at the center of contestation and the context within which human rights violations occur. What is more, processes of criminalization do not necessarily violate civil or political rights, such as the right to due process. Indeed, many repressive measures can occur under the veil of the law, such as long preventive detentions, or long trials ending in acquittal. Focusing only on cases in which human rights are violated would, therefore, lead to an incomplete picture. In addition, human rights discourse is often equally employed by landowners and extractive companies, claiming to protect local communities, their workers, or themselves. Thus, this framework tends to obscure historical configurations of conflicts and the political dynamics behind the criminal prosecutions of those challenging certain property regimes or proposals for exploitation.

Recognizing the special position of those facing pressures while challenging vested interests, the human rights movement has coined the term 'human rights defender'. While going beyond cases in which civil or political rights would be violated and taking into account the human rights work of the defendant, this approach still tends to focus on individual people instead of movements and assumes or conditions such analysis on their peaceful activity. Furthermore, by framing their work in legal-speak as 'human rights defense', the political program, interests, and contestation are de-politicized.

During the past decade, an alternative approach has risen under the term 'criminalization of social protest'. This perspective takes into account the power relations between different groups and sectors in society and moves the lens from individual people to the activity or the political position that is defended. It further critically analyzes the discursive battle about what is defined as 'peaceful' and what as 'illegal' or 'violent'. Due to the overtly political stance sometimes taken by authors and activists employing this term, however, this approach, while bringing in the context and political relations behind human rights violations, sometimes lacks rigorous analysis, turning claims about criminalization into little more than rallying cries. The term is then simply used in a pejorative manner to denounce practices that are perceived to be an overly repressive response to legitimate protest. Furthermore, the term 'criminalization' is often applied to a variety of phenomena ranging from actual criminal prosecutions of individuals and excessive police violence against demonstrators to the general stigmatization of a social movement in the media. This mixture of moral and overly broad descriptive meaning hampers a clear description of and analytical comparison between different cases.

The papers in this special issue provide valuable insight into different ways to define and use the term. For example, Sibrián and van der Borgh (2014) distinguish between juridical, political, and psychosocial aspects of criminalization. Future research would be needed, though, to further develop a relevant analytical apparatus. The term criminalization could, for example, be limited to the actual initiation and development of criminal proceedings focusing on the specific details of prosecutions. Processes of criminalization, i.e. the applications of legal vocabulary and institutional criminal justice procedures to concrete actions and individuals, would then analytically be separated from public stigmatization that may precede (and follow) such criminal proceedings. By limiting the meaning in this way, a

conceptual distinction would also be made to other related phenomena, such as police violence against protesters or legislative efforts to criminalize behavior.

While thus developing clear analytical distinctions, this does not mean that criminalization can be viewed in isolation of such other processes. As all contributions to this special issue emphasize, the turn to criminal charges has to be located within a larger trajectory in which other forms of interaction including physical harassment and threats or negotiation and consultation precede, follow or accompany criminal prosecutions. More research is needed, though, to explore possible stages of and relations between stigmatization, criminalization, and other repressive efforts. For example, what is the relation between militarization (such as the role of private security firms and actual physical violence) and criminalization? It was noted during the workshop that the stigma of violence can only be neutralized through establishing a criminal norm which is perceived to be legitimate. An important question is thus: What advantages come with criminal law? And when does criminal law recede for more blatant repression?

3.2. Patterns, typologies, and legal strategies of criminalization

Several contributors to this special issue have analyzed in more detail *how* criminalization was done, paying attention to the ways in which the legal apparatus was strategically used or re-interpreted to define actions of social protest as crimes or reach higher sentences. For example, in the workshop discussions, a tactic noted to keep protesters off the streets was the application of multiple charges, which may warrant long pre-trial detention, whereas final conviction is reached only on the smallest charge. Some participants had observed the strategic expansion of the legal interpretation of existing criminal offenses such as 'extortion' or 'kidnapping' in order to include protest actions. Other contributors analyzed new laws creating criminal offenses that particularly include common social protest tactics. For example, Atilés-Osoria (2014) describes the new offense of impeding construction projects and Olarte (2014) analyzes the newly introduced disproportionate sentences for the obstruction of public roads and transport.

Workshop participants furthermore called attention to the relation between criminal offenses, (neoliberal) economic policies, and the larger (often post-colonial) legal framework, such as the Constitution, or the laws on the management of natural resources. For example, Franco and Carranza (2014) emphasized the frequent charges filed against farmers with specific offenses that can only be considered crimes because of the laws on land tenure in the Philippines.

Olarte (2014) makes an incipient effort towards a typology of criminalization (the typology is based on Sanchez and Uprimny 2010), e.g. distinguishing between direct and indirect criminalization:

Indirect forms of criminalization include (i) prosecuting activists on the grounds of criminal offences associated with armed conflict, (ii) opening criminal investigations unlikely to reach the trial stage and culminate in a prison sentence which can nevertheless disarticulate, demoralize and discourage social protest, and (iii) applying disproportionate sentences for offences that do not affect the nucleus of any fundamental right but which punish practices often deployed in social protests.

Many workshop participants agreed that indeed frequently cases are archived, dropped, or acquitted (as under (ii)) and while sometimes there is a harsh response, at other times, similar protest actions may not even be prosecuted. More research would be needed to explore such patterns and strategies by asking what the laws and provisions are that prosecutors use, how many people are subjected to criminal investigations, and how many proceedings end in convictions or whether charges are often dropped. In order to better understand the conditions under which criminalization is sought, future research could further analyze the different roles and interests of the actors that may be involved in lobbying for legal reform towards harsher laws, defamation in the media, the initiation of criminal charges,

and the actual conviction of protesters. Mella (2014), for example, has described how economic actors can put pressure on a government to file criminal charges. Further research can also explore the social roles of those selected for criminal prosecutions: are they leaders, marginal movement members, outsiders, or particularly charismatic people?

3.3. Exclusion from decision-making

In our discussions in Oñati, it turned out that an important angle for understanding the dynamics of criminalization is to look at the dynamics of political decision-making about economic projects and the (lack of) participation by local communities in these processes. Various contributors reflected upon the legal and political trajectory of the struggle about natural resources. In multiple cases, it was observed that criminalization tends to exclude the possibility of dialogue. For example, a participant from Indonesia described a history of failed dialogue and broken promises regarding conflicts regarding national parks, coal mines, and oil palm plantations in West Kalimantan. It was further observed, that local communities are often presented with a 'fait accompli' when, for example, mining companies simply go ahead with explorations whereas the judicial battle about the legality of such operations comes much later. The (perceived) lack of possibilities for engaging in decision-making is frequently an incentive for protesters to turn to other actions. Thus, in the Basque Country, protesters engaged in tactics such as occupation camps, demonstrations, concerts, boycotts, chaining to machinery, stripping naked in public, and throwing pies at politicians (see, for example, Alonso Ciudad *et al.* 2014) to exert influence on decision-makers.

The papers in this special issue provide valuable insight into different ways in which protesters were excluded or misled in the decision-making process. For example, Sibrián and van der Borgh (2014) show how there was systematic misinformation of community members by the government about the initiation of a mining project. Further, both the article by Alonso Ciudad *et al.* (2014) as well as Sibrián and van der Borgh (2014) point to the fact that local referenda were obstructed or not taken into account. Therefore, there is a need for more research to better understand the effects and function of criminalization on political positions and decision-making, i.e. the connection and disconnection with politics and political programs. Some participants suggested analyzing who benefits from criminalization and which arguments or positions are prevented from being voiced. Criminalizing discourses were, for example, viewed to be embedded in efforts to label opponents of energy/transportation/export projects as anti-development, anti-progress and anti-national-interest, thus discrediting their political programs.

Decision-making processes are closely related to a country's political system. Therefore, how criminalization varies in more democratic and more authoritarian regimes should be explored, particularly processes of criminalization within discourses on the rule of law and democracy, while paying attention to the relationships with specific deficiencies in democratic procedures and institutions. What are the relations between the judiciary, police, corporations and the executive government?

Exploitation of natural resources often pitches local interests (e.g. conserving the environment) against national interests (e.g. access to sources of energy). Part of the political contestation, however, turns exactly on competing definitions of 'local' and 'national'. Protests and their criminalization are, therefore, often embedded in strong conflicts about the functioning of democracies and their capacity to establish legitimate decisions. For example, Atilés-Osoria (2014) draws attention to the intertwining of claims for independence and environmentalist concerns in Puerto Rico. A proper understanding of the (lack of) access to decision-making thus involves the question of proper representation of the entire body of citizens in democratic procedures and access to alternative avenues of expressing political

positions, such as pursuing legal proceedings to stop mega-projects or engage in dialogue through round tables or lobby in parliamentary discussions.

3.4. Counter-strategies

Finally, participants in the workshop emphasized the importance of developing possible lines of action. Franco and Carranza (2014) have contributed to the development of counter-strategies with their analysis of collective 'rightful resistance', including, for example, legal and human rights education to tenant farmers and a strategic 'mass surrender'. However, more research would be needed on the impact of criminal proceedings on social movements, and the possibly de-politicizing and de-mobilizing effects, such as the frequency of intra-community disputes (e.g. Sibrián and van der Borgh 2014).

To understand the actual effect of criminalization on participation in decision-making processes and develop strategies to deal with it, future research could explore whether, how and under what circumstances criminalization fosters internal tensions, impedes solidarity, distracts attention from the original demands, or strengthens the movement. For example, Le Bonniec (2014) has analyzed the impact of criminal prosecutions and detention on Mapuche activists in Chile, drawing attention to the ways in which activists and their movements strategically re-signify such experiences, thus providing insight in possible ways to prevent demobilization. Important questions thus include: How to prevent a de-politicizing effect of criminalization on social movements and their political struggles? How to prevent criminalization from reinforcing the exclusion of communities from decision-making?

4. Conclusion

This special issue offers an exciting contribution to the emerging field of research on the criminalization of social protest by providing detailed and in-depth case studies from a variety of countries and struggles. It is clear that many questions remain to be explored and we hope that our discussions and the questions formulated herein can serve as building blocks for future research.

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