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# LEGAL PLURALISM AND FRAGMENTED SOVEREIGNTIES

## Legality and Illegality in Latin America

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Legal pluralism – the existence of multiple legal systems or normative orders within the social field – has long been a central concern of law and society studies. In Latin America, contemporary debates and anthropological-legal perspectives on the phenomenon of legal pluralism have focused principally on the legal norms, practices, and authorities of indigenous people – their *derecho propio* – and latterly on the challenges of recognizing indigenous jurisdictions, rights, and ways of life within dominant legal orders following the regional turn to "multicultural constitutionalism" (Van Cott 2000) and the codification of indigenous peoples collective rights in international and regional human rights law. Although shifting dynamics between legality, illegality, and violence are widely understood to negatively affect indigenous people, these have not tended to be a central subject of enquiry for studies of legal pluralism in the region. My aim in this chapter is to encourage greater dialog between the regional literature on legal pluralism and analyzes of the role played by various non-state forms of law or para-legalities in securing order in contemporary Latin America. Although they consider different processes, making reference to distinct empirical and conceptual problems, I argue that the study of legal pluralism in the region has much to gain from engaging with contemporary anthropological debates on sovereignty and i/llegality in order to consider not just the relationship between subaltern legal orders and state and supranational legalities, but more broadly the changing nature of what Franz and Keebet von Benda-Beckmann and Julia Eckert refer to as "plural constellations of governance" (2009b, 3). What role do non-state forms of law or paralegal orders play in securing different forms of rule in Latin America? I argue below that one productive way to think about the multifaceted and dialectical relationship between the legal and the illegal in Latin America's plural legal orders – and the claims of subaltern groups for recognition of their forms of law or *derecho propio* – is with reference to the concept of overlapping, fragmented sovereignties. In what follows, the first section of this chapter signals the limited recognition legal pluralism and subaltern legalities that occurred with the constitutional transformations of the 1980s and 1990s and then briefly reviews the Latin American literature on legal pluralism and its key conceptual debates. A second section addresses the dynamic interplay between law and illegality in the constitution of the region's plural constellations of governance. I suggest a heuristic distinction between different types of illegality, pointing to the conceptual, and empirical issues these signal. A third section advances the concept of fragmented sovereignties as a means of reconceptualizing legal pluralities. This recognizes subaltern struggles and the roles that law plays in these, at

the same time as situating them within broader transformations in configurations of governance and rule that point to the ever greater blurring of the legal and the illegal, where criminalization and suppression of subaltern claims for citizenship underlines the gap between the promises of multicultural constitutionalism and the experiences of indigenous peoples across the region.

## Legal Pluralism and Subaltern Legalities in Latin America

### *Legally Plural States: From De Facto to* De Jure

In contrast to other colonial and postcolonial contexts, where referents such as kinship or war were the principal organizing categories of politics, in Latin America claims to legitimacy, calls to action, and political pacts to establish or refound the nation-state have typically been staked in the language of the law (Salvatore, Aguirre, and Joseph 2001). Dominant narratives conceive of law and the legitimacy it confers in largely formal terms, generally centered within a unitary state and flowing downwards to society. In large swathes of Asia and Africa officially sanctioned legal pluralism involving distinct legal jurisdictions and codes for different racial, ethnic, or religious groups was a central part of the colonial and postcolonial state compact. In Latin America, Spanish colonial rule was similarly characterized by hierarchical and racialized legal pluralism (the *Leyes de Indias*). However, following independence in the nineteenth century the new nations by and large modeled themselves on the legal systems of the USA and continental Europe, subjecting native peoples to Liberal laws, which rejected recognition of cultural difference and promoted assimilation in theory at the same time as they reproduced exclusionary racial hierarchies in practice. These racialized hierarchies were central to the forced labor and enslavement that underpinned the plantation and *hacienda* systems, forms of coercive control effected through both law and lawlessness that revealed the limited purchase of liberal legal universality. The effect of this transformation of state law, its remaking as the antithesis of formal legal pluralism, was to marginalize and criminalize indigenous systems of justice and governance. Yet despite the absence of *de jure* legal pluralism, in many countries a de facto form of indirect rule came to characterize relations between states and indigenous peoples in the twentieth century, as the norms, authorities, and practices of native communites became intertwined and superimposed on figures of agrarian law (for example, the *ejido* in Mexico after the 1930s, or the *comunidades campesinas* and *comunidades nativas* in Peru after the 1969 agrarian reform of the Velasco Alvarado government).

The continental mobilization of indigenous peoples' social movements that occurred in the final decades of the twentieth century can be understood in one sense as part of a long tradition of subaltern groups invoking rights and citizenship. Yet as well as demanding the benefits and protections of citizenship historically denied to them in practice, these movements also called for recognition of indigenous peoples' collective rights to self-determination and difference. Framing their claims in the transnational language of human rights, activists, and advocates argued that a degree of autonomy for the norms, authorities, and practices that comprised indigenous systems of governance be guaranteed as an integral part of respect for subaltern indigenous identities, cultures, and ways of life. These demands went beyond appeals for de facto legal pluralism to be recognized *de jure*, constituting instead part of broader moves to refound national constitutions and issue new laws that would supposedly counter the systematic racist exclusion and violence suffered by the continent's native peoples. The evolution of international human rights law provided support for such claims: specific rights for indigenous peoples were recognized through International Labor Organization Convention 169 on Indigenous and Tribal Peoples (ILO C.169), approved in 1989, the first international treaty, which committed

states to recognize their rights to exercise their own forms of law. Ratified by a majority of Latin American states throughout the 1990s, ILO C.169 had a major influence on the region's constitutional reform processes during the subsequent decade (Van Cott 2000; Yrigoyen 2011). In 2007, the approval of the United Nations (UN) Declaration on the Rights of Indigenous Peoples by the UN General Assembly set out a stronger formulation for recognition of indigenous self-governance, establishing rights to self-determination within the sovereignty of existing nation-states – something the first UN Special Rapporteur on Indigenous Peoples, Mexican sociologist Rodolfo Stavenhagen, had referred to many years previously as "internal self-determination" (Stavenhagen 2002). The emergent jurisprudence of the Inter-American Court of Human Rights since the mid-2000s also reaffirmed the centrality of indigenous peoples' specific forms of law and governance in safeguarding rights to territory and consultation to ensure free, prior and informed consent (FPIC) about development projects or other government initiatives that stood to affect their ways of life (CEJIL 2014).

Legal recognition of semiautonomous spheres for indigenous justice was a marked feature of constitutional reforms in the Andean region. Colombia was the first country to approve a new constitution recognizing legal pluralism in 1991, followed by Peru (1993), Bolivia (1994), Ecuador (1998), and Venezuela (1999). The most recent constitutions of Ecuador (2008) and Bolivia (2009) went further than previous formulations, declaring that henceforth these states would be based on principles of ethnic pluralism and "plurinationalism." In the Andes these new constitutional regimes specified indigenous jurisdictions and mechanisms or general principles for coordination between ordinary and indigenous law; in Colombia – and to a much lesser extent in Ecuador – special regimes were extended to some Afrodescendant populations. Even in countries where constitutional recognition of legal pluralism was much weaker, such as Mexico or Guatemala, indigenous movements revitalized their own forms of law as part of broader processes of ethnogenesis and judicialized demands that their goverments uphold the commitments set out in ILO C.169 and the UN Declaration to recognize their jurisdictional autonomy. Yet by the 2000s, the onslaught of extractivist forms of economic activity focused on indigenous territories and the multiple and renewed forms of violence this entailed led many analysts to ask whether the formal recognition of legal pluralism in late twentieth century Latin America was not in fact a facet of contemporary forms of capitalist accumulation premised on continuities of racialized colonial frames.



## *Studies of Legal Pluralism and Indigenous Law*

In 1990, Rodolfo Stavenhagen and Diego Iturralde published *Entre la Ley y la Costumbre*, an influential collection of essays underlining the continuing existence of indigenous peoples' legal systems and emerging international legal principles demanding their recognition. Earlier accounts of the forms of governance and dispute resolution in indigenous communities had long been a mainstay of anthropological studies in the region (research often supported by official indigenist institutes). To the extent that these studies theorized legal pluralism, they tended to follow mid-twentieth century anthropological conceptions emphasizing the existence of multiple legal orders within the boundaries of the nation-state.[1] Interdisciplinary studies of legal pluralism multiplied from the 1990s onwards as activist scholars – primarily lawyers and anthropologists – engaged with the challenges of coordinating state law and indigenous legal orders under the aegis of the new constitutional orders. A significant hub for this research was the activist-scholar network, the *Red Latinoamericana de Antropología Jurídica* (RELAJU), which since 2000 held biannual conferences throughout the region. Ethnographic studies continued to focus on documenting justice practices within indigenous communities (see for example, García 2002;

Orellana 2004) and also provided accounts of the legal hybrids generated by justice sector reforms, which recognized a greater role for indigenous laypeople and "culturally specific" forms of mediation, for example, Adriana Terven's work on the juzgado indígena in Cuetzalán in the Mexican state of Puebla (Terven 2009) or Orlando Aragón's research on the officialization of indigenous justice in Michoacán (Aragón 2016). Research published by legal scholars tended to compare constitutional provisions and emerging jurisprudence on issues of coordination across different countries (Yrigoyen 2010, 2011; Condor 2009, 2010; Sousa and Grijalva 2012; Sousa and Exeni 2012). Some studies explicitly combined applied anthropological and legal analysis, such as that by Colombian anthropologist Esther Sánchez Botero (2010), which considered test cases before that country's constitutional court where the author herself had provided special anthropological testimony.

While most publications had a strong normative bent in favor of greater autonomy for indigenous law they also drew on a range of theories of legal pluralism in order to analyze how different legal orders interact. Rather than engaging theoretical debates on legal pluralism per se, the primary concern of these studies was to document and legitimate indigenous justice practices.[2] Multicultural reforms – formulated in a strictly legal register – invariably presented state law and indigenous law as separate, bounded entities, posing the central policy challenge as one of coordination between systems. Yet anthropological and sociological analysis of legal pluralism had long adopted constructivist perspectives and pointed to the porous boundaries between different forms of law as social practice and their mutually constitutive natures. Sally Falk Moore's classic formula of the "semiautonomous sphere" (1973) was often cited as a point of departure.[3] Other analysts explicitly deployed Bourdieu's concept of the legal field to analyze power relations in the constitution of subaltern justice practices, for example, Juan Carlos' Martínez's research on justice practices in the Mixe region of Oaxaca, Mexico (Martínez 2004). Boaventura de Sousa Santos's formulation of *interlegality*, which explicitly aimed to move beyond the traditional legal anthropological conceptualization of different legal orders as separate entities, proved highly influential among Latin American analysts of legal pluralism, pointing as it does to the counter-hegemonic potentials of subaltern forms of law, and the imbrication of the "local" and the transnational.[4] The emphasis Santos' concept of interlegality placed on the dynamism of relations between different legal orders and norms and their heterogenous nature lent itself to empirical studies, which were concerned with the ways in which regimes of multicultural recognition and international human rights were affecting systems of indigenous or community justice. For example, the volume edited by María Teresa Sierra in 2004 explicitly used Santos's analytical framing to explore the uses of law and dynamics between hybrid justice practices and gender relations in different indigenous regions of Mexico, emphasizing the cultural logics and strategies deployed by litigants in context (Sierra 2004). Indeed studies of gender and law concerned with changes in indigenous community law have been a significant area of empirical and interpretative contribution from Latin America. While documenting the exclusion of women from community governance systems and their lack of access to justice, research in Mesoamerican and the Andean regions has also explored how elements such as multicultural justice reforms, legal innovations to address gender discrimination, the influence of human rights nongovernmental organizations (NGOs), and the organization of indigenous women themselves is contributing to transformations of gender ideologies and justice practices within indigenous communities (Barrera 2016; Calla and Paulson 2008; Chenaut 2014; Franco and González 2009; Hernández 2016; Lang and Kucia 2009; Nostas and Sanabría 2009; Sieder and Sierra 2010; Sieder 2017; Sieder and Barrera 2017). These studies emphasize the inherently dynamic nature of subaltern forms of law; by documenting how different actors understand justice and the measures they take to try and secure it, they reveal

how indigenous women and their allies are challenging and reframing custom in order to favor women's participation and more appropriate forms of remedy for the specific problems they face. Deploying intersectional perspectives, which explicitly reject separation of the axes of race, class, gender, and other forms of discrimination, such research suggests that group autonomy rights for indigenous peoples can be combined with greater gender justice for indigenous women. In this way it counters more abstract philosophical debates – and empirical findings from other regions of the world – which maintain that autonomy for indigenous legal systems invariably deepens and entrenches discrimination against women. These grounded analyzes of different Latin American realities have contributed more broadly to "de-essentializing" the study of indigenous law.

Whereas a previous generation of studies of indigenous law and legal pluralism in Latin America focused on the relations between state law and subaltern legal orders, contemporary studies mirrored concerns in the global field of legal pluralism studies with transnational forms of legal ordering. Sally Merry's concept of "vernacularization" (2006), with its focus on the ways in which transnational discourses and frameworks of human rights are taken up, understood, contested, and reframed in specific local contexts, thereby reshaping legal consciousness and identities, was deployed in different studies (Hernández 2016; Arteaga 2017). Emerging work on gender and indigenous law points to the vernacularization of human rights – such as the right to a life free of violence and discrimination on the basis of gender – but also the deployment of alternative epistemologies and ontologies. Actors make recourse to such framings in order to critique existing power imbalances and seek decolonized forms and languages for reimagining local law in context. Examples include the use of Andean concepts of male/female balance *chacha-warmi* (Arteaga 2017; Burman 2011) or Mayan concepts of complementarity (Macleod 2011). A concern with the possibilities offered by the judicialization and juridification of indigenous peoples' claims in national and international spheres has also led some scholars to draw on Boaventura de Sousa Santos and César Rodríguez-Garavito's concept of "subaltern cosmopolitan legalities" (2005).[5] As well as signaling the importance of non-recognized or "illegal" forms of law in counter-hegemonic struggles, Sousa and Rodríguez-Garavito emphasize the connections between law and political struggle and the importance of "bottom-up" reimaginings of the law by subaltern groups, which are played out at a range of different scales. Aragón (2015), for example, has deployed the concept in his analysis of the strategic litigation he accompanied in Cherán, Michoacán, and Sieder (2013, 2017) uses it to discuss the collaborative research that she and her colleagues have carried out on organized indigenous women's uses of law in Latin America.



## Legality, Illegality, and Plural Constellations of Governance

Recent contributions to the field of legal pluralism studies have been concerned with the transnational and international dimensions of legal ordering, and with the declining sovereign authority of states in processes of legal norm-setting. As Franz and Keebet von Benda-Beckmann and Anne Griffiths have observed: "The idea of legal pluralism draws attention to the possibility that there may be sources of law other than the nation-state and has become far more widely accepted than it was only a few decades ago" (2009a, 1). Various tenets of legal pluralism have now become common sense in the study of law, including the existence of a plurality of legal orders, the decentralization of the state, and the strengthening of non-state norms (Michaels 2009, 255). The existence of global legal pluralism is now widely accepted and its study has extended far beyond legal anthropology, with legal sociologists and social theorists analyzing the nature and relevance of a wide range of non-state forms of law (Michaels 2009; Schiff 2009).[6]

However, these more sociological appreciations of global legal pluralism still tend to approach the law in normative or institutional terms. By contrast, anthropological approaches to law and legal pluralism emphasize process and law's social constitution. They point to multiple competing and overlapping normative orders coexisting in the same social field, each encompassing distinct discourses, practices, routines, symbols, and identities. Such constructivist perspectives raise the central question of foundational debates in the anthropology of law: what is and what is not law? More importantly perhaps, they also invite us to consider more centrally the relationship between the law and that which is deemed illegal in any specific time and space. In order to have any purchase for Latin America (and for postcolonies more generally: see Comaroff and Comaroff 2006), a theory of legal pluralism needs to take into account not just the subnational, national, and international, or transnational spheres in which law operates, but also the shifting dynamics between the legal and the illegal, and between law – or the order that law purports to guarantee – and violence (see Lemaitre in this volume).[7] While the existence of multiple sources and types of law is now generally accepted, the processes underpinning changing dynamics between the "legal" and the "illegal" within these legally plural landscapes have generally been less considered. Mark Goodale has argued for a dialectical approach to legality/illegality, stating:

> the spaces of the legal are in constant motion with the spaces of the nonlegal or illegal … because legality and illegality are never finally settled discursively, but remain two necessary parts of the same conceptual framework within which 'law' itself can serve its purposes. *(2008, 216)*



In their introduction to a special issue of *PoLAR: Political and Legal Anthropology Review* on anthropology in contexts of supposed "illegality," Kedron Thomas and Rebecca Galenda remind us "how dominant legal discourse [be it national or international] … 'illegalizes' particular people and practices, excluding them from the moral–legal community and rendering them available for criminalization, marginalization, exploitation, and even dehumanization" (2013, 211). By focusing on the socio-political processes and power dynamics that underpin what they call "illegalization" (2013, 211), Thomas and Galenda underline the importance of analyzing the relationship between the constitution of law and the exclusion and criminalization of different subjects. In other words, they insist on one of the central concerns of critical legal studies: the analysis of how power operates through law. However, the category of illegality covers an enormous range of phenomena that merit disaggregation if we are to distinguish – and theorize – their changing roles in plural constellations of governance. While in practice the boundaries between different phenomena or social practices deemed illegal by states are often blurred, I suggest here four heuristic categories of illegality emerging from although by no means exclusive to Latin America that may contribute to such an undertaking: *informality*; *transnational criminal economies*; *corruption*; and the *criminalization of social protest*.

1 *Informality:* this category, the subject of decades of sociological debate, refers principally to non-state ordering of spheres such as commerce, employment, or the provision of social goods such as housing, justice, or security. The preponderance of informality is a long-standing feature of Latin American societies and underlines the structural exclusion of the majority of the region's population from the formal protections of the law and the ways in which existing forms of social regulation are simultaneously tolerated by the state and criminalized in practice. (See for example, Boaventura de Sousa Santos' landmark study of

alternative regulation of informal housing in a Rio de Janeiro favela [1977], or the work of Goldstein 2004, 2012; Risør 2010; and Snodgrass 2006 on the role of vigilantism and lynchings in the alternative provision of security)

2 *Transnational criminal economies:* such as the trafficking of narcotics or people are part of transnational regimes of profit, prohibition, and persecution, which invariably involve highly violent and coercive social orders. In Latin America analyzes of *la ley del narco* is a growing area of research, albeit one fraught with ethical and methodological challenges (Arias 2006; Maldonado 2010). Similarly, the normative dimensions of paramilitarism and the "guerrilla justice" of the FARC (Revolutionary Armed Forces of Colombia) in Colombia, both paralegal formations intimately related to the transnational drugs economy, have been analyzed respectively by Aldo Civico (2016) and Alfredo Molano (2001).These violent orders have increasingly assumed explicitly para-statal forms, in effect constituting predatory, and lethal constellations of governance across many parts of the continent

3 *Corruption:* governments across Latin America are increasingly legislating against corrupt practices by state officials in response both to pressure from their own citizens and from international institutions and other governments. Yet at the same time, massive corruption and bribery scandals, such as the *Lava Jato* or "carwash" scandal in Brazil, or the case of *La Línea* in Guatemala (both of which led to the removal of sitting presidents) highlight the ways in which transnational criminal economies are increasingly intertwined with formal politics and business in Latin America and across the globe.[8] (Comaroff and Comaroff 2006, 2016; see chapter by Linn Hammergren in this volume)

4 *Criminalization of social protest:* this fourth category of illegality refers to the increasing criminalization of processes of resistance to neoliberal forms of political economy, which in effect signals a form of politics by other means or what the Comaroffs have termed "lawfare" (2006). This has been particularly evident in the repression of indigenous peoples' and environmental movements across the region, repression which involves both the use of criminal law and direct state violence in attempts to quash dissent and defend the interests of transnational capital (Composto and Navarro 2012; Bastos and León de 2014).



Thinking across these categories of illegality can put the extant law and society literature on "lawlessness" in Latin America in dialog with contemporary debates on legal pluralism in the region.[9] In more functionalist or state-building framings, Latin America has often been characterized as having weak rule of law – for example, Guillermo O'Donnell's (1993) celebrated conceptualization of the rule of law and citizenship as a kind of social and territorial heat-map, with blue zones signifying functioning law and bureaucracy and brown zones disorder and lawlessness. Yet while state institutionality and "law on the books" may apparently be absent for many geographical regions and populations, these places and people are ruled in practice by highly effective, and sometimes extremely violent, coercive, gendered, and racialized normative orders. For example, drug cartels in Mexico regularly publish their "norms" through *narcomantas* or in the most gruesome manifestations inscribe them directly onto the bodies of their victims. Understanding these norms means the difference between life and death for subject populations and facilitates control over specific geographical areas, economic activities, and subject populations. As Boaventura de Sousa Santos reminded us, "there is nothing inherently good, progressive or emancipatory about legal pluralism" (Sousa 1995, 114–15). Yet in the main scholars have shied away from using theories of legal pluralism to frame more systemic analysis of these phenomena. Aside from the ethical and political risks involved, many would argue that extending the notion of "law" to all forms of social regulation means that law as a concept loses all analytical purchase. Yet understanding the nature of law and its effects requires attention to

relations between the legal and the illegal. This can reveal changing dynamics within normative and institutional fields (local, national, and transnational), and also changing legal imaginations, consciousness, and identities. How do perceptions about what is legal or illegal change across time and space? How do people negotiate the often indeterminate frontiers between them and with what effects on their legal subjectivities?[10] And how do such shifts within plural constellations of governance relate to broader patterns of political economy and global legal pluralism?

In their call to put political science and anthropological perspectives on democracy into dialog, Desmond Arias and Daniel Goldstein advance the idea of "violent pluralism" as a characteristic feature of Latin America, which they define as "states, social elites, and subalterns employing violence in the quest to establish or contest regimes of citizenship, justice, rights, and a democratic social order" (2010, 4). Rather than taking debates on law or legal pluralism as their point of departure, Arias and Goldstein focus on the pervasiveness of violence in Latin America and consider what that implies for understandings of democracy. Nonetheless, by emphasizing the centrality of violence to the functioning of the region's political systems and challenging more normative understandings of politics, they invite further reflection on the relationship between law, legal pluralism, and violence. As they observe, "violence is implicated both in the institutional structure of the regimes and the ways these regimes are inserted into the international system" (2010, 13). They also point to the ways in which state institutions function more or less optimally in different contexts – echoing O'Donnell's formulation – but insist that these are intrinsically connected with each other. In other words, the securing of political order without violence in some contexts always depends on the securing of order through the direct use of violence in others, as postcolonial studies have emphasized (Mbembe 2017). These propositions lead us to ask what role different modalities of illegality and violence play in contemporary constellations of governance in Latin America, and what law and society scholarship from Latin America can contribute to their understanding. In recent years, legal orders across the region have become more formally plural, recognizing indigenous and Afrodescendant jurisdictions but also incorporating international human rights and commercial law into domestic law. International standards are increasingly important and their guarantee is demanded by citizens and social movements through different kinds of political and legal mobilization. Yet at the same time violence and illegality characterize most people's everyday experiences of the state. Can a regional theory of legal pluralism informed by more anthropological sensibilities toward law account for the shifting interplay between legality and illegality?



César Rodríguez-Garavito makes an important theoretical intervention, which potentially bridges the division in the literature between a focus on legal pluralism and indigenous peoples, on the one hand, and on the relationship between contemporary forms of governance, law, illegality, and violence on the other. Rodríguez-Garavito used the term "social minefields" to conceptualize the dynamics at play between law, extractive economies, and violence in Afrodescendant and indigenous territories in Colombia:

> I use the term "minefields" to refer to these territories and the dynamics of social interaction produced within them, including FPIC processes. They are minefields in both the sociological and the economic sense. In sociological terms, they are true social *fields*, [emphasis in original] characterized by the features of enclave, extractive economies, which include grossly unequal power relations between companies and communities, and limited state presence. They are *mine*fields [emphasis in original] because they are highly risky; within this terrain, social relations are fraught with violence, suspicion dominates, and any false step can bring lethal consequences. In this regard, they

> are an indication of the volatile social relations that are associated with hybrid economies – situated at the crossroads of legality, illegality, and informality – which abound in nations of the Global South (and increasingly Global North) in times of globalization.
>
> *(2011, 5)*

By pointing to what he calls "hybrid economies," Rodríguez-Garavito raises the central question of what kind of il/legal orders of governance underpin contemporary forms of accumulation in neoliberal Latin America. The social minefields he refers to in Colombia are characterized by one of the most advanced legal formulations for the recognition of cultural difference existing in the region, and the institutionalization of international legal standards for indigenous and Afrodescendant peoples, most notably processes of prior consultation to secure free and informed consent (FPIC). The fragmentation and instability of multiple forms of order, many highly violent and coercive,[11] seem to coexist with a hyperlegalization of the political, or what some have referred to as the fetishization of the law.[12] Viviane Weitzner, also working with indigenous and Afrodescendant peoples in Colombia, has proposed the concept of "raw law" to refer to the often lethal rules and regulations deployed by armed actors, an interpretation of the interplay between state regulation and violence inspired by Achile Mbembe's work on "raw economy" – the illegal shadow or "dark" economy that structures contemporary global capitalism (Weitzner 2017, 2018).



## Plural Forms of Governance: Fragmented and Overlapping Sovereignties



Outside Latin America, recent contributions to the field of legal pluralism studies have also turned to the ambiguous divisions and continuities between the legal and the illegal, and on the role these dynamic and diverse il/legal configurations play in securing neoliberal forms of governance (Benda-Beckmann, Benda-Beckmann, and Ekert 2009b). Jean Comaroff and John Comaroff (2006) have rightly emphasized the need for an analytical shift within legal anthropology from concern with legal pluralism per se, to a consideration of the combined problematic of law and governance in the contemporary world, and specifically relationships between law and governance in the age of neoliberalism. The securitization of development is particularly important in this respect, with securitization paradigms increasingly favoring the partial suspension of constitutional guarantees for specific regions or populations,[13] blurring the line between the legal and the illegal and creating "gray zones" of intensified legal ambiguity. Across Latin America indigenous peoples' movements for self-determination, autonomy, and territorial defense are caught in comparable gray zones: formally recognized by national and international legal instruments and provisions yet subjected to violence and increasingly to criminalization, they inhabit a liminal space that Deborah Poole incisively described as a place "between threat and guarantee" (Poole 2004).

I want to suggest that anthropological theories of sovereignty can contribute to a regionally informed theory of legal pluralism that engages debates on illegality. Anthropologists have distinguished between legal and de facto sovereignty; for example, Thomas Blom Hansen and Finn Stepputat define legal sovereignty as "the legitimate right to govern" and de facto sovereignty as the "right over life" and "the ability to kill, discipline and punish with impunity" (2006, 296). Yet while many theorists have taken their cue from the work of Giorgio Agamben and Carl Schmitt, emphasizing the violence of both *de jure* and de facto forms of sovereignty, others have suggested an analytical focus on the situated ways of life that constitute and sustain sovereignty, rather than just conceiving it as the power of exclusion and violence (Humphrey 2007). Caroline

Humphreys's appeal speaks to the concept of indigenous sovereignties, which can be understood as claims for alternative ontologies or ways of being in the world, moral orders and constructions of law and justice "from below," subaltern forms of "legal consciousness" and identity, and forms of defense against the racialized violences visited on specific populations and territories. Indigenous sovereignties are constituted through everyday practices and projected through a range of transnationalized legal imaginations claiming autonomy as a right, yet in practice they continue to exist in a liminal space between the *de jure* and the de facto. In this way, they signal the porous and indeterminate boundaries of the legal and the illegal in Latin America; the fact that the law is inherently unstable, dynamic, and constantly contested. The mobilization of "languages of stateness" (Blom Hansen and Stepputat 2001) by indigenous movements and communities in order to stake their claims and defend their territories, natural resources, and political autonomy reflects the current global purchase of the law as a language of politics, but also its historic importance as an idiom of both elite and subaltern politics in Latin America.

These forms of claim-making occur within a broader context of fragmented or overlapping sovereignties (Randeria 2007; Sieder 2011) characterized by competition and conflict between different transnationalized actors pursuing territorial control, new forms of governance and political economy. The fragmentation of the Weberian paradigm of state legality is intimately related to the privatization and deregulation that are the hallmarks of contemporary capitalism and governance, leading to a "dispersal" or "fracturing" of state sovereignty into the plural, partial, and lateral sovereignties, which characterize twenty-first century forms of private indirect governance and produce the paradoxical "present-absence of state enforcement" (Comaroff and Comaroff 2016, 28, 39). Joshua Barker refers to "informal sovereignties," observing that "[they] are most evident at the margins of modern state power: in remote areas, squatter settlements, zones of illegality, conflict zones, domains of 'traditional' authority, privatized concessions, free trade zones." (2013, 260). Veena and Poole (2004) suggested that such margins of state power, where the hold of state power is tenuous and the state as a project is always incomplete and contested, are in fact central to processes of state formation. As Daniel Goldstein has argued, "understanding the relationship between the state and its margins, particularly in terms of justice and security making, requires us to move beyond a limited vision of the law's spatial distribution and connection with nonstate forms of ordering" (2012, 29). In other words, the constitution of the contemporary state in Latin America is characterized by rule through fragmented and overlapping sovereignties, which are both *de jure* and de facto, legal and "illegal." These multiple sovereignties are generated in part through law and particularly through legal pluralism at the global scale where human rights, commercial law, soft law mechanisms, and other globalized forms of ordering are superimposed. At the same time they are also configured through highly violent, coercive, and illegal means. As Rodríguez-Garavito (2011), Weitzner (2017, 2018) and others have signaled, this is particularly evident in disputes surrounding extractive industry projects in territories claimed by indigenous people. The actors in such disputes or "social minefields" may include transnational companies and their local allies, state institutions (national or federal and municipal authorities, the military, different police corps, etc.,), private security firms hired by the companies to police the sites of extractive developments, and illegal armed groups, or paramilitaries linked to drug cartels, generically referred to as "organized crime." Within such contexts indigenous peoples' forms of law and governance, or *derecho propio*, are increasingly "illegalized" in practice; for example, the authorities of the policía comunitaria in Guerrero, Mexico, who in recent years have been charged with kidnapping when they detain suspected miscreants (Sierra 2016), or community leaders in Guatemala who face criminal charges when they try to assert their rights over communal land in conflicts with mining companies (Mazariegos 2014). The boundaries between what is "the state" and what is not, and

what is legal and what is illegal, are increasingly difficult to decipher. More broadly, analysis of indigenous peoples' experience with the law in Latin America indicates that what is considered illegal at one moment can become part of the formal law the next, and then again be illegalized in practice. This is clearly the case for *derecho propio*, which was marginal or outlawed, then became part of state legality through late twentieth century multicultural constitutional reforms, but has been illegalized in practice – as evidenced by indigenous authorities being subjected to criminal prosecutions for exercising their own forms of law.[14] This heightened ambiguity surrounding the legal appears to be a central factor in facilitating the processes of accumulation and dispossession that threaten the very existence of indigenous peoples across the continent.

## Conclusions

In a key intervention in debates on law and legal pluralism, anthropologists Jean Comaroff and John Comaroff called for analysis of "the ways in which legally plural configurations secure different forms of governance in the age of neoliberalism" (Comaroff and Comaroff 2009, 32, 39). I have suggested here that the concept of fragmented and overlapping sovereignties may help us understand new modalities of governance and power in Latin America, allowing as it does for analysis of the dialectical relationship between plural forms of legality and illegality, between structural and other forms of violence, and between hegemonic and counter-hegemonic constructions of law. Anthropological perspectives on law have underlined the importance of exploring ethnographically how people in different contexts and historical moments conceive of law, justice, and security, and their actions to try and achieve them. Such research perspectives help us continue to evaluate the legacies of nearly three decades of multicultural legal reform in Latin America,[15] as well as the transformative potentials of different constellations of legal pluralism. As Mark Goodale has observed, a reconceptualized legal pluralism in Latin America "is both permanently shifting, and potentially subversive" (2008, 220). He argues that the fragmentary nature of law in the region – and thus the inevitable incompleteness of hegemonic, state law – opens the possibilities for non-elite sectors to experiment with a plurality of legal strategies. In line with other Latin American scholars, I emphasize the counter-hegemonic elements present in the fragmented sovereign landscape of contemporary legal pluralism, and the importance of careful ethnographic research into these configurations. Numerous examples show how neoliberal multiculturalism's limited endorsement of indigenous autonomies has opened the way for new demands and forms of self-determination, which question dominant logics of extractivism and commodification. Within plural fields of often highly violent regulatory orders, communities and social movements continue to invoke international law alongside their own ethical and moral constructions, insisting on the legality – but more importantly, the legitimacy – of their alternative practices and ontologies. In the process they generate new understandings and subjectivities, which ultimately go far beyond the languages of the law. Ethnic identity is but one dimension of these subaltern sovereignties; these fragile and contested sites of autonomy in fact constitute claims to forms of sociality, which contrast with the dominant tropes of individual advancement and ever more militarized forms of development and security promoted by national and transnational elites. In sum, in this chapter I have argued that more anthropologically informed research on fragmented sovereignties and the interplay between the legal and the illegal from Latin America makes important contributions to the broader theorization of legal pluralities and contemporary constellations of governance, and thus to law and society scholarship as a whole. Debate between empirical, positioned ethnographic research, and efforts to develop more regionally grounded theories of (i) legal pluralism continue to constitute the heart of this endeavor.

## Notes

1 See for example, Chanock 1985; Griffiths 1986; Merry 1988; Moore 1996, 2005.
2 One exception is the work of Antonio Wolkmer (2015), who proposes a theory of legal pluralism to counter prevailing traditions of legal monism in the region.
3 Moore proposed that a small field, such as that observable by an anthropologist, could generate its own rules, customs, and symbols internally, but that it was "vulnerable to the rules and decisions and other forces emanating from the larger world by which it is surrounded" (1973, 720).
4 Sousa defined interlegality as:

> the conception of different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions, either on occasions of qualitative leaps or sweeping crises in our life trajectories, or in the dull routine of eventless everyday life. [He stated that] We live in a time of porous legality or of legal porosity, multiple networks of legal orders forcing us to constant transitions and trespassings. Our legal life is constituted by an intersection of different legal orders, that is, by interlegality.
>
> *(Sousa 1995, 473)*

5 Sousa and Rodríguez-Garavito (2005) deploy "subaltern cosmopolitan legalities" to refer to locally grounded forms of resistance and legal innovation by those most marginalized within the current global order. They also emphasize the need to give due weight to non-hegemonic or non-Western elaborations of rights and human dignity in subaltern formulations of law.
6 See for example, Cotterrell on legal transnationalism and the challenges this poses for legal sociology (Cotterrell 2009), or César Rodríguez-Garavito's call for a "post-Westphalian conception of law" (Rodríguez-Garavito 2011).
7 One important contribution, which did consider these questions for the case of Colombia, and explicitly discusses legal pluralism, is the two volumes *Caleidoscopio de las Justicias en Colombia*, edited by Mauricio García-Villegas and Boaventura de Sousa Santos (2001).
8 They also point to the ways in which accusations of corruption have become part of the idiom of political competition, as they have elsewhere in the world.
9 Goldstein's proposal of "outlawing" (2012) is a signal contribution in this respect.
10 On the relationship between perceptions of justice and legal subjectivities see the essays in the collection edited by Sandra Brunnegger and Karen Ann Faulk (2016).
11 Daniel Goldstein emphasizes the ways in which "marginal spaces are characterized not by stable forms of social ordering and by plural systems of law and legality, but by fractured, ever-shifting planes of law and lawlessness, order and chaos" (2012, 30).
12 See Lemaitre 2009.
13 See chapter by Madrazo and Pérez Correa in this volume.
14 See for example, Marc Simon Thomas's analysis of intercultural justice coordination in Ecuador (2016).
15 For an important contribution on Colombia see Chaves 2011; on Mexico see Hernández, Sierra, and Sieder 2013.

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