On the Systematic and Historical Analysis of Concessionary Zones

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Against James Scott's (1999) pivotal account of homogenized and standardized state territory, interest has grown in the fragmentation of political space under contemporary capitalism. James Ferguson (2005) memorably characterized the ways resource enclaves across neoliberal Africa distinguish between "usable" and "unusable" landscapes as "seeing like an oil company." Subsequent studies have shown similar practices at work in the creation of oil, gas, and mining enclaves (Côte and Korf 2018; Appel 2019); special economic zones (Levien 2018; Nyíri 2012); and large-scale land deals (White et al. 2012). Taken as a whole, the use of these spatial demarcations across key economic sectors and the reiteration of the form across so many distinct parts of the world suggest that these zones, enclaves, and exceptional spaces are a spatial signature of global capitalism today.

To understand the creation and operation of these zones, theorists have returned to a suite of concepts, including primitive accumulation, accumulation by dispossession, expulsions, expropriations, enclosures, grabbing, and theft.[1] Constituting a robust line of inquiry, these concepts supplement classic Marxist accounts of exploitation in the labor process by drawing attention to the variety of "extra-economic" and, at times, "extralegal" processes (Ulas Ince 2014) by which land is converted into property and people are made into proletarianized workers. Used to describe global capitalism today, these terms also emphasize the ongoing role of violence and plunder in conjunction with noneconomic processes of expropriation as central to contemporary political economic orders. Nancy Fraser, for instance, argues that exploitation via capitalist commodity production constitutes the foreground of the economy, but it rests on background conditions of expropriation

1. See David Harvey (2005) on accumulation by dispossession. Saskia Sassen (2014) presents land-grabbing as a form of expulsion. Nancy Fraser and Rahel Jaeggi (2018) discuss the relation between expropriation and exploitation. Robert Nichols (2020) addresses the specific relations between dispossession, property, and theft. For synthetic accounts of these discussions across disciplines of political theory, agrarian studies, law, geography, and anthropology, see De Angelis 2001; Glassman 2006; Hall 2013; Ulas Ince 2014, 2018; and Özsu 2019 among others.

within the domains of politics, social reproduction, and human-environmental relations (Fraser and Jaeggi 2018).

Such concepts are useful in grasping the underlying logics by which capital secures spaces for accumulation. Constituting what Robert Nichols (2020: 86) calls a "synoptic evaluation" or what Fraser (2018: 163) terms a "stylized history," these frameworks explain "the overall effect of a set of historical processes, which are not reducible to any one particular instance." In these accounts, emphasis falls on the continuity of dispossession, racial capitalism, enclosure, and violence, as the seventeenth-century colony, the eighteenth-century plantation, the nineteenth-century mine, and the contemporary special economic zone are linked by a common extractive structure. Questions remain concerning variation within and across social formations and historical epochs. If the fragmentation of political space is a spatial signature of contemporary global capitalism, how is this phenomenon linked to but also different from the longer history of expropriations? And how can we grasp the various historical trajectories by which those spaces of accumulation are secured?

In what follows, I make a brief contribution to these discussions by arguing that concession agreements provide a useful object to analyze these structures and histories. *Concessions* refer to a whole class of agreements between states and companies. Not only do they create and govern the legal form for many extractive zones and resource economies today, but they have done so in a wide variety of places across centuries and under very different geopolitical conditions. As such, the concession provides a lens on the changing forms of authority undergirding these spaces. Read genealogically, the concession explains how a medieval European legal device developed within the frameworks of secularized political theology became a tool for extraction under the hegemony of capitalism. So conceived, a genealogical approach to concessions can help explain the shifting positions of sovereignty, law, property, and government across social formations, highlighting the development of a unique legal form—neither simply public law nor private right—central to the creation and transformation of capitalist societies today.

Why Concessions?

The Austrian legal scholar Peter Fischer (1974: 549) defined concessions as "synallagmatic acts by which a State transfers the exercise of rights or functions proper to itself to a foreign private person which, in turn, participates in the performance of public functions and thus gains a privileged position vis-à-vis other private law subjects within the jurisdiction of the state concerned." Put in everyday language, conces-

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sions are special types of agreements in which states grant privileges to private juridical entities (either corporations or individuals) to carry out some public function. The logic of the concession is that the private entity receives a favorable position in the market—often with access to coveted lands or resources secured by the state—in return for undertaking enterprises that the state deems profitable. States enter into these agreements in hopes of receiving direct payments without bearing the full costs of production, but also to develop technical capacities and foster industries. Agreements are a major channel for foreign direct investment, which policymakers often consider a public good in its own right. But concessions are also a basic tool by which states privatize public functions, which makes them controversial.

Analytically, concessions provide a lens on extraction across varied political geographies and economic sectors. In oil fields, plantations, mines, and special economic zones, it is concessions, rather than simply companies, that legally define the boundaries and relations between "downsized, postdevelopmental states and increasingly powerful and unconstrained global corporations" (Ferguson 2005: 378). Although concessions are most infamously associated with petroleum production (see Cattan 1967a, 1967b), they have also played a key role in establishing the legal frameworks for the post-2008 land rush (Cotula 2011; Alden Wily 2012). Scholars have documented their extensive use in forestry management in the Central African Republic (Hardin 2011), oil palm plantations in Indonesia (Li and Semedi 2021), rubber production in Laos (Kenney-Lazar 2012, 2018), and gold mining in Burkina-Faso (Côte and Korf 2018). Pál Nyíri (2012) charts a "renaissance of concessions" in his work on tourism contracts given to Chinese firms to operate casinos in Laotian special economic zones.

Renaissance implies a revival or return. One reason that concessions are fascinating is that they are so old. Prior to their use in contemporary resource enclaves, concessions were a basic framework for structuring nineteenth-century imperial relations between European companies, investors, and colonies across the Global South. Concessions established the legal frameworks for the treaty ports in China, the brutal rubber plantations of King Leopold's Congo Free State, the Suez Canal, British Petroleum's control of Iranian oil fields, the extension of US copper companies in Chile and oil producers in Mexico, and the Firestone rubber plantation in Liberia, among many other colonial projects. We need to go back even further, however: concessions were central to the monopolies granted by charter to the British and Dutch regulated companies during the first wave of European colonization in the sixteenth and seventeenth centuries (Stern 2023). As Peter Fischer (1976–78) has documented, copper and silver mining concessions given by Charles V to the Fuggers in the 1520s and 1530s helped establish that family as one of the richest

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in Europe. The Spanish and Portuguese empires also used concessions in the form of *asientos* and *capitulaciones* to colonize the lands subsequently referred to as "the Americas" as well as to govern the transatlantic slave trade (before transferring that right to the British in 1713). In the twelfth and thirteenth centuries it was the papacy that offered concessions to corporate institutions like the crusading papal orders as part of the Church's effort to conquer Jerusalem.

Surprisingly, given the ubiquity of the form, systematic analysis of the structure of concessions is limited.[2] The historian Cyrus Veeser (2013: 1139), writing on late nineteenth- and early twentieth-century concessions, termed them "a forgotten instrument of global capitalism" and argued that "uncollected, unquantifiable, and underanalysed, concessions were an institutional foundation of modern capitalism about which we have virtually no systematic, comparative knowledge." This is something of a refrain, as one of the few things connecting the far-flung scholarship on concessions is the claim that it does not exist and cannot be produced. The legal scholar Lorenzo Cotula (2011: 1), writing about contemporary land contracts in Africa, has noted, "Little is known about the exact terms of the land deals. Negotiations usually happen behind closed doors. Only rarely do local landholders have a say in those negotiations. Few contracts are publicly available." Writing almost forty years earlier, David Smith and Louis Wells (1975: 560–61), of Harvard's Law School and Business School respectively, echoed the sentiment: "Analyses of the forms and substance of concession agreements, particularly outside the oil industry, have been rare. This fact is, no doubt, largely a result of the difficulty that any potential analyst has faced in gaining access to contracts." And thirty years before that, the international legal scholar Tatiana Guldberg (1944: 50) argued much the same, albeit with more literary license:

> There does not exist any bibliography on that particular subject: concessions. Most of the libraries do not include the word in their catalogues, nor do textbook writers use it in their index. It will be noticed that most of the concession agreements which are reproduced here are of older concessions. This is due to the fact that concessions agreements are nearly never published. They are jealously hidden in the archives of state departments, company lawyers, international experts or arbitrators and who else who meet with asperity, disfavour and undisguided suspicion the inquisitive student.

2. But see also Matthew Craven (2019) and Andrea Leiter (2022), who both analyze concessions in relation to decolonization. Hannah Appel's (2019) brilliant account of the Production Sharing Agreements (PSAs) governing oil production in Equatorial Guinea should also be considered a notable exception. Although Appel distinguishes PSAs from concessions based on their more "contractual" dimensions and the greater control host states exercise in PSAs, PSAs developed out of concessionary relations in the context of the changing ensemble of power relations between states and companies in the 1970s (Fales et al. 1973; Smith 1992; Ohler 2015).

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Although there are certainly problems accessing specific agreements or gaining a comprehensive account of their use across time and space, the lack of systematic analysis is not solely based on the paucity of information or evidence. Along with the ethnographic literature examining concessions today, we have detailed studies of the use of these legal devices in specific times and places, running from Georges Scelle's (1906) early twentieth-century analysis of the *asientos* in structuring the slave trade to Catherine Coquéry-Vidrovitch's (1972) comprehensive study of the concessionary regime in the Congo. Recent scholarship has also looked at the legal questions raised by concessions during the process of decolonization (Craven 2019; Leiter 2022). Moreover, numerous NGOs, research centers, and governmental institutions seek to empirically document the scope of contemporary deals, the nature of the contracts, and the range of disputes and arbitrations they engender.

Rather, the lack of analysis addressing the concession is conceptual and symptomatic, telling us something about the juridical form of concessions in at least two senses. First, concessions are by definition nonsystematic. Although agreements contain standardized clauses establishing the scope of the privileges, the nature of the compensation, and the processes for renegotiation and conflict resolution, concessions are frameworks designed to be specific and occasional, establishing exceptional rather than generalized rules and procedures. They are a legal placeholder for nonstandardized or one-off legal relations. This makes comparative analysis of concessionary regimes difficult, as they do not refer to generalizable categories as much as specific contexts. For lawyers, it also makes them attractive. Read as flexible and as an impetus for direct negotiations between companies and states, the singular dimensions of these devices are why some scholars view them as a favorable model for host states to attract investment, relative to the more standardized requirements of bilateral investment treatises (Vagts et al. 2019: 458–59; Yackee 2008).

Second, this also helps us understand the structural functions served by the problems of accessibility, secrecy, and lack of transparency. If, as Hannah Appel (2019: 138) has demonstrated, contracts emerge in response to incessant invocations of the "rule of law," concessions do so by joining public and private power to legally designated spaces for suspending rule-of-law commitments to transparency, generality, stability, and publicness. Often shaped by broad geopolitical strategies and concerns and, periodically, bound up in charges of corruption and bribery,[3] concessions are not simply "extralegal" (or "extra-economic") forms of expropriation. Rather they are legally designated modes for relations between states and companies that do

3. See for instance Laleh Khalili's (2020) discussion of the geopolitics and corruption scandals associated with the history of oil concessions in the Persian Gulf.

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not conform to broader principles of law, in which the former concede exceptional rights to the latter.

Political Theology and the Hegemony of Capital

Although these brief comments barely scratch the surface of the concession's juridical form and contemporary functions, they do index some of its defining features. More specifically, they highlight the liminal dimensions of the concession, existing at, combining, and transgressing the boundary between public power and private right. That these features echo modes of sovereignty that Michel Foucault (1990: 136) characterized as "deductive power" in his genealogy of political reason should not surprise us. Long before concessions were used for technology transfers or infrastructure development, they were associated with "the concept of *iura regalia*, or rights enjoyed by a sovereign in virtue of his prerogative" (Fischer 1972: 226). Within the complex of medieval sovereignty, Fischer notes two classes of regalian rights: major rights "touching the royal dignity" and minor rights addressing fiscal matters. Concessions emerged out of these minor rights, as a class of alienable privileges that sovereigns could grant to individuals or collectivities and that "could be translated into terms of money" (227). Fischer documents rights such as the protection of merchant orders, rights to mint coins, and rights to mineral extraction as some of the earliest concessionary relations. He also demonstrates the use of these grants in conjunction with feudal rights associated with ecclesiastical fiefs. As he documents, "In return for the grant of wide public powers, corresponding to what nowadays would be termed sovereignty," the feoffee would be required to make payments to the Church. Although mediated by monetary payments, the spatial extension of these delegated forms of sovereignty (whose texts use the term *concessio*) depended on theological arguments concerning "universal Christianization" (232).

Seen in this manner, the concession was a specific mode of dispersed or delegated sovereignty within the political theological order of Christian universalism. Its later use for imperial projects, for national modernization plans, or even under the contemporary hegemony of neoliberalism did not linearly evolve from medieval legal concepts. Today's rubber or palm oil concessions are not identical to their political-theological precursors. Rather the concession, as it developed within a Christian and feudal order, defined a set of practices and a space for their application that were subsequently rearticulated within new social formations. Stuart Hall (2003: 134) provides us a methodological gloss for analyzing the changing position of relations—like concessions—within social formations across historical epochs: "What matters is not the mere appearance of the relation sequentially through

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time, but its position within the configuration of productive relations which make each mode an ensemble. Modes of production form the discontinuous structural sets through which history articulates itself."

Processes of articulation in discontinuous structural sets are readily visible in subsequent debates over concession agreements. Take, for instance, the 1958 *Saudi Arabia v. Aramco* arbitration, which attempted to establish a legal definition for concessions. The case concerned the status of a concession, granted by the Kingdom of Saudi Arabia in 1933 to the Standard Oil Company of California (Socal) for "the *exclusive right*, for a period of sixty years . . . to explore, prospect, drill for, extract, treat, manufacture, transport, deal with, carry away and export petroleum, asphalt, naphtha, natural greases, ozokerite and other hydrocarbons, and the derivatives of all such products" (Saudi Arabia v. Aramco 1963: 175). The concession established an "exclusive zone" for the company's operations, which would eventually expand to over 440,000 square miles (Yergin 1991: 300), and financial commitments between Saudi Arabia and the company, reincorporated in 1944 as the Arabian American Oil Company (Aramco) under Delaware law. These commitments included annual payments and royalties to the government, as well as a series of loans, granted by the company, that the kingdom would pay off via the proceeds if oil was successfully produced. The concession also set specific time frames for discovery and production, established accounting practices and oversight mechanisms, granted the company exemptions from taxes and duties, and empowered the company to survey and map the landscape. The controls over land, territory, and resources in the agreement were expansive, including the right to build and construct infrastructure for housing, water, and transportation (except for aviation projects, which were prohibited) as well as the right of the company to employ, at its own expense, "guards and guides to protect its representatives, its camps and installations." The concession also established mechanisms for resolving disputes and terminating the agreement. As is well known, the concession was wildly profitable for the company. It was also lucrative for Saudi Arabia, especially after the parties renegotiated a fifty-fifty profit-sharing plan in 1950 under the threat of nationalization (see Schwebel 2010; Martin 2020).

The question of the legal status of concessions arose after Saudi Arabia entered into a subsequent agreement with shipping magnate Aristotle Onassis to transport Saudi Arabian oil. Aramco challenged the Onassis concession as a violation of its exclusive rights. Before the tribunal could rule substantively on the conflict, however, they had to address a prior issue concerning the system of law governing the relationship between Saudi Arabia and Aramco. This was a problem endemic in international concessions. To treat concessions as treaties would be to raise the

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company to a subject of international law on par with states. To treat concessions as simply private contracts, however, belies the state's role as a participant and the public nature of the undertaking—in this case involving much of the territory of Saudi Arabia and its (and the world's) most valuable natural resource (see Craven 2019: 105–6).

The tribunal, comprised of preeminent legal scholars, struggled to find a coherent legal account of concessions. As they noted, "The Tribunal must first ascertain what is, in municipal law, the legal nature of a concession, as the Laws of Nations does not contain any principle regarding the characterization of this legal institution" (Saudi Arabia v. Aramco 1963: 157). They went on to describe the legal concept of concessions as "very wide and varied." Whereas Switzerland and Germany treated concessions as a "unilateral act of the conceding State" (159), in France, concessions could be considered either a unilateral act of state or a private law contract depending on the undertaking. As the case concerned the status of property rights to subsoil resources in Saudi Arabia, the tribunal also considered the status of concessions under Islamic law, arguing that "the régime of mining concessions, and, consequently, also of oil concessions, has remained embryonic in Moslem law" (163). Considering this diversity, and "inasmuch as the law in force in Saudi Arabia did not contain any definite rule relating to the exploitation of oil deposits . . . this lacuna was filled by the 1933 Concession Agreement." Thus, the tribunal resolved the primary question of the law to be applied by turning to the agreement itself, deeming it "the fundamental law of the Parties" and, more bracingly, holding "that the Concession has the nature of a constitution which has the effect of conferring acquired rights on the contracting Parties." Where the tribunal encountered "gaps in the law of Saudi Arabia, of which the Concession Agreement is a part" the tribunal would turn to "world-wide custom and practice in the oil business and industry" and, failing that, to "world case-law and doctrine and by pure jurisprudence" (171).

Saudi Arabia v. Aramco is read by legal scholars as evidence of the lack of a clear definition of the concession in international law (Ohler 2015). Yet, as more politically attuned analysts have argued (Mitchell 2011; Khalili 2020), the arbitration took place within a geopolitical context shaped by the competing imperial desires of the US and British governments to control the flow of oil, as well as the powerful business interests of oil firms and shipping magnates. As was apparent in the ruling, which held in favor of Aramco's original concession and invalidated Saudi Arabia's shipping concession to Onassis, those desires and interests came to define the future trajectory of the agreement.

Saudi Arabia emerged with a limitation on its sovereignty imposed by arbitration, but nonetheless maintained a pivotal role in oil production, including the

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ability to renegotiate the concession with Aramco under threats of nationalization. But the company also carved out a space of extensive territorial control, including the ability to enforce the acquired rights generated by the concession in its newly discovered constitutional capacity. Most notable, however, is the way the arbitral award gave the "world-wide customs and practices" of the oil industry legal status as a foundation for international agreements. As such, the arbitration not only enabled the industry to exercise control over concessions in this instance. It also created the conditions in which capital itself—its logics, requirements, and demands for ceaseless accumulation—emerges in the structural position of the *Grundnorm* governing the entire legal relationship.

The Aramco arbitration, of course, represents only one moment in the history of these devices. As with other concessions, its formulation and development were deeply shaped by competing forces and interests in a specific place and time. Likewise, subsequent conflicts over the concession were raised, negotiated, and resolved in ways that reflected existing configurations of power. And decisions in arbitration cases like *Saudi Arabia v. Aramco* would shape the trajectories of those power relations into the future. However, to only consider the proximate historical and geographic context of this concession obscures the power of the legal device itself. In contrast, a genealogy of the concession can help us understand and critique the juridical form as it emerged from disparate contexts and persists in the present. Doing so does not demonstrate a linear development or the simple refining of a legal device. Rather it shows the ways today's extractive capitalism draws on and repositions older forms of sovereignty and law in new ensembles (see Hall 2003: 136). Moreover, because of its diverse historical iterations, the concession clarifies and specifies how past epochs inhabit or establish the conditions of possibility for today's numerous resource enclaves. Neither the sole vision of the state nor of the oil company, the concession is a self-generating legal device that draws on both of those sources to create its own space of application. Although concessions are almost always extractive and often depend on relations of appropriation and dispossession, the logics, rationales, and conceptions of the world governing those appropriations and their relation to capitalist production are dynamic and variable. By taking the concession as an object of knowledge, my hope is to regain a sense of the ways that variability inhabits a spatial signature of the present to understand its contradictions and limits.

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