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Transnational law and state transformation. The case of extractive development in Mongolia

Jennifer Lander, *Transnational law and state transformation. The case of extractive development in Mongolia*. Abingdon, Oxon: Routledge, 2021, ISBN 9781032086064, £120 (hbk), £36.99 (pbk).

Oh, the Devil in hell, they say he was chained
(...)

So he asked the Lord if he had any sand
Left over from making this great land.

“Hell in Texas”, Frontier traditional folk song (arr. Steven Mark Kohn, 2006)

Over the past couple of decades, the case of Mongolia has loomed large as the “final frontier” of the late phase of capitalism thanks to a still largely untapped immense mineral wealth. A poster child of structural adjustment programs, Mongolia navigated the 1990 collapse of its overbearing neighbour, the Soviet Union, so smoothly that its political landscape has been dominated ever since by its communist-era party, the Mongolian People’s Revolutionary Party (MPRP - which in 2010 restored its pre-1925 name, MPP). This transition was ushered in by the party’s 1994 Gold Programme, which promised to transform this immense “land of the eternal blue sky”, sparsely populated by nomadic herders, not only into one of the world’s biggest mineral reserves but a country where the boon of mining would be harnessed towards the country’s development and the welfare of its present and future generations. Mongolia’s case is not unique in falling short of this promise. Just like other “frontier economies” in the Global South, the country is sorely vulnerable to the periodic shocks induced by the volatility of commodity prices on global markets. The authoritarian slide taken by the country since the 2021 Presidential elections also echoes the common script of the “resource curse” (Collier, 2008). A third of the population remains entrapped in poverty while the prominence taken by the MPP - backed by patronage and business elites - is paving the way for a single-party regime (see Bayarlkhagva, 2021).

Against the backdrop of this narrative - which echoes the equation drawn by the post-Washington consensus between poor governance and underdevelopment - Lander’s *Transnational law and state transformation. The case of extractive development in Mongolia* unpacks the *transnational* background of this story. What if, she asks, “there had been no decline in foreign direct investment and a ‘crisis’ of investor confidence with it in 2012 and 2013, would the post-2014 configuration be present?” (p. 219). Rather than a “test-case” for a “hollowing out’ of the state or even an overall weakening” (p. 220) induced by dependence on mining rents and vulnerability to Beijing as main client and creditor - Lander’s study highlights what is overlooked by not tracking the implications of the current “global capitalism” phase on the state’s transformations: “the evident expansion of pro-market legality, bureaucracy and the increase of executive authority in relation to the minerals sector, alongside efforts to re-engage foreign investment interest” (p. 220).

Lander’s narrative is encapsulated in the caption of the daunting photograph, reproduced on the series title page, of a fragile fence signalling the enclosure of the steppe: “The Art of Building Fences”. “In the process of negotiating its relationship with the owners and enablers of foreign capital investment, the state has internalised market-enabling regulatory preferences” (p. 245). Lander’s study documents a process that is not simply that of the state becoming less and less of a counterweight to markets – but a state whose regulatory task has itself been reorganized to respond to “(t)ransnational legal norms related to political risk mitigation (which) have effectively

penetrated Mongolian law, policy-making and state-society relations” (p. 209). What she calls the “stabilisation” reforms (Chapter 5) following the country’s debt crisis in 2016 and engineered under the aegis of the World Bank and other international donors have embedded corporate interests within local and central decision-making processes and tamed civil society resistance to the social and environmental damages of mining extraction by enclosing claims for sustainability and justice within “business friendly” parameters and corporate-defined due processes.

This demonstration promises to bring the book out of the area-studies shelf into the emerging story of the implications of the rise of neoliberalism around the world for the state - and democracy. First, because it brings empirical flesh to the Comaroffs’ dubbing of “(o)ld margins (...) becoming new frontiers” – but not as a place “where mobile, globally competitive capital (...) finds minimally regulated zones in which to vest its operations” (2012: 13). On the contrary: the mining boom in Mongolia came at the tail-end of the regulatory “catch-up game” that followed the societal and environmental damages of the previous mining booms in Latin American and Sub-Saharan contexts, “where the damage of the initial gaps ha(d) never fully been assessed” (Dezalay S, 2019: 1306). Lander tracks a constitutional-like process whereby the “negotiation of the state with capital” (p. 207) has led to the reordering of the state’s position as enabler of market expectations, and with it, to the conflation of politics with market branding, under the influence of “a distinctively global rule of law discourse, promoted by both internal policy elites and external actors” (p. 227). Second, because the result is eerily akin to the process described by Vauchez and France (2020) in the unlikely setting of France as an epitome of the “strong state” and a global power: a privatization of the state regulatory function that is constitutive of a democratic “black hole”. Lander’s warning that “the cost of insulating the mining sector from political and legal risk is also borne by certain components of the state, in this case democratic institutions and norms” (p. 220) thereby takes on acute relevance in a global context where alternative economic and socio-political paths are relentlessly suppressed in favour of authoritarian globalisation (Streeck 2013).

One limit of Lander’s demonstration is due to its format. As the result of her doctoral research, it follows the traditional structure of theoretical positioning/methodology (Part I); case study (Part II); synthesis and conclusion (Part III), which somewhat dilutes the strength of her demonstration as her case-study remains too loosely connected with her theoretical ambition of – to put it simply – reconciling transnational and global legal scholarship which marginalises the national scale, with a political economy approach attentive to the state as a “site of strategic action” where the mutually constitutive relationship between state formation, legal change and market expansion is negotiated over time. This theoretical positioning espouses the research agenda promoted, notably, by Cutler et al. (2017) on the role played by law in capitalist expansion so as to track the relations of power it enables by codifying the redefinition of borders between the political, the economic and common goods at the global and domestic levels. But it also reflects some of its limitations: that of falling short of empirically cracking down the close association of law with the conversion of economic surpluses and power into enduring social relationships, in the *longue durée*. While highlighting the *transnational* characteristics of the mutually constitutive relationship between state power, legal change and market forces is welcome, Lander’s study illustrates a still common trap: that of invoking implicitly an ideal-typical form of the state - reflected in the preface’s title “the state has forgotten its reason for being” – as if the nexus between the international and the national, the public good and private interests retained an objective reality despite their wavering heuristic capacity. In other words: as if alternative socio-political paths could still be redeemed through institutional reforms. Yet, as argued by Bebbington et al.’s: “one cannot build a framework to analyze the relationships between politics, extractive industry and development, and then introduce ‘institutions’ as an independent mediating variable. Such institutions are themselves a product of the same relationships that they mediate and have to be accounted for historically” (2018: 6).

This historical account *is* present in Lander’s study – but as a chronologically-built analysis (Chapter 3) designed to provide a background to the mining boom and the post-2014 market-

oriented restructuring of the state apparatus and state-society relations. This tends to isolate the present phase of mining extraction from the role played by law as an institution of extraction in the *longue durée* of Mongolia's trajectory. Lander aptly demonstrates that the "crisis" fostered by the decline in foreign direct investment in 2014 - fueled by the downturn in global commodity prices and "resource nationalism"-dubbed legislative reforms aimed at countering China's commandeering of Mongolia's minerals export market – is not a sufficient variable to explain subsequent transformations. Rather than solely focusing on state institutions "adaptive" responses (p. 251), however, this crisis like others in the country's trajectory could have been a powerful entry-point to trace "initial conflicts and contradictions that existed at the outset" (Dezalay Y and Garth, 2011: 40). What is striking indeed, as reflected in Lander's historical overview – is the formidable continuity of repertoires and institutions of power in Mongolia's trajectory – from empire to nation-state, from feudal-like structures to socialism. To boot, the reliance on "feudal legislation" justified by "socialist scholars": "the utilization of old legal norms meant putting new meanings into old forms of law, and...destroying these laws from within" (p. 82). While Lander underscores that following the economic crisis of the post-socialist transition, "for the first time (...) herding operated outside of an intricate system of administration, either under customary law (...) or state law" (p. 92), her analysis of Mongolia's mining regime lacks historical density – to the point of creating the impression of a *tabula rasa* with the past.

Yet, espousing a deeper historical approach to historical change – as urged by the global turn in history (see Burbank and Cooper 2010) could help further explain Mongolia's post-2014 transformation, by repositioning the mining boom in Mongolia within the *imperial* story of this state - from Qing influence, its uncomfortable position as a buffer between the USSR and China to its prominence in the global race for critical minerals in the competition between the US and China. Certainly this might not contradict Lander's claim of a market "meta-regulation" facilitated by transnational legal norms related to political risk mitigation in the current phase of global capitalism. But it would help uncover dynamics of push-back and cooptation - at the level of the field of state power in Mongolia, as much as among "external" actors, which in Lander's study remain a nebulous - that may provide more flesh to the constitutional claim made by the author. Lander's study is backed up by a relatively solid fieldwork – about forty interviews conducted with the claim that "the significance of the interviews is not so much who said what, but rather what was said where" (p. 58). While this contention reflects the paths now well-trodden by the sociology of globalization – namely, to put it bluntly, that ideas have legs – the "where" in Lander's study is not unpacked. Yet – understanding who the "importers" and "exporters" of what Lander describes as a new process of constitutionalism – through the expansion of a transnational legality – matters, if only to situate Mongolia within what the author describes as the global economy's "patchwork" (p. 105).

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