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## The Extralegal Forum and Legal Power: The Dynamics of the Relationship — Other Pipelines

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### **Summary**

Diverse groups — e.g., Brazilian squatters, Navajos, village Eskimos and Indians — look to special forums to resolve disputes outside the formal legal system. These forums are employed because they accept disputes as defined by their clients and offer remedies based upon these conceptualizations. Formal agents of the law in their environments cannot do this. When these forums are extralegal (without formal legal authority to act) and are located in an environment where the formal legal process has the theoretical capacity to intervene in the disputes, they must tap into authentic lines of power to maintain their credibility with their constituents. Legal power is not usually formally delegated without defined limits upon its use. Because extralegal forums often must be free from the constraints of particular norms and processes, in order to correctly define and remedy disputes, extralegal forums seek borrowed power through special relationships with formal agents of legal power. Then they reapply it to meet the needs of their constituents. This paper describes the ways to study these relationships and their likely impact upon an informal forum. The author suggests a way of viewing extralegal dispute resolution in a given community against the larger matrix of relationships between the formal and informal legal process. He draws upon his field work in Brazilian squatter colonies, Navajo Indian communities, and rural Athabascan and Eskimo villages in Alaska.

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The Extralegal Forum and Legal Power:  
The Dynamics of the Relationship -- Other Pipelines

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## Abstract

Diverse groups, Brazilian squatters, Navajc , Eskimos, and others look to special forums to resolve disputes outside of the formal legal system. These forums are employed because they accept disputes as their clients define them and offer remedies based upon these conceptualizations. Formal agents of the law in their environments cannot do this. When these forums are extralegal (without formal legal authority to act) and are located in an environment where the formal legal process has the theoretical capacity to intervene in the disputes, they must tap into authentic lines of power to maintain their credibility with their constituents.

Legal power is not usually formally delegated without defined limits upon its use. Because extralegal forums often must be free from the constraints of particular norms and processes, in order to correctly define and remedy disputes, extralegal forums seek borrowed power through special relationships with formal agents of legal power. Then they reapply it to meet the needs of their constituents.

This paper describes the ways to study these relationships and their likely impact upon an informal forum. The author suggests a way of viewing extralegal dispute resolution in a given community against the larger matrix of relationships between the formal and informal legal process. He draws upon his field work in Brazilian squatter colonies, Navajo Indian communities, and rural Athabascan and Eskimo villages in Alaska.

When urban squatters or Native-Americans with special kinds of disputes or with special kinds of remedial needs seek the intervention of third parties in their disputes, they will often seek a forum which can understand their problem and remedy it authoritatively. In this round of pragmatic forum shopping they are not unlike any potential client of any legal system.

The crux of the client's problem is his selection of the correct forum. While he may have physical access to the attorney, policeman, or judge who usually provides services in the justice system, his access also contemplates a forum that he can manipulate to achieve the particular remedies that he desires. Engagement of a powerful third party in any dispute raises the threat that the client will lose control of the capacity to define the problem and its remedy. In the case of courts and police, it also subjects the client and his problem to the unquestioned legal power of the state.

No forum offers considered remedies for specially conceived problems unless it can accept without much effort the problem as defined by the disputants and apply its authoritative weight to those issues. Native-Americans, among them Navajos, and village Eskimos and Indians in Alaska, and urban squatters in Brazil share a special talent in this regard because each has created and used forums which are outside the law but that also apply correctly power of the legal systems to local disputes. These forums deal with problems and remedies in a manner which is qualitatively superior to formally established forums and agents of the state or tribal legal system. However, each third party who operates in such a forum still needs a pipeline to authentic legal power to reinforce his capacity to arbitrate or to conciliate disputes.

Each group which I have studied has been denied effective relief by the formal legal process for some of their disputes because the formal legal process would not accept either the problems as they were cast by the disputants or offer the remedial process that the disputants desired.

Urban squatters in Brazil have disputes which touch upon ownership, possession, or use of their homes. These disputes between squatters are theoretically adjudicable within city or state courts. Yet the courts are often driven to reject or ignore law suits which consider the property rights of these litigants because the object of the dispute is a house built upon land illegally possessed in a favela where "as everyone knows" the law of the jungle prevails. Those who know this are people who reside outside of favelas.

The result of this denial of access to the formal legal process because the agents of law deny the authenticity of urban squatter colonies is that allocation of rights to property in favelas where half of the urban population often resides must take place in forums which are not formally courts at all.

Confronted with this threat to their property rights in homes which are regularly bought, sold, and rented, squatter communities establish their own forums to deal with real property disputes as they surface in neighborhood disputes or as secondary considerations in family squabbles. These forums both understand and reiterate accepted definitions of property in the favela. They also have access to external legal power to make decisions stick. Their "judges" are used by the police to ferret out criminal law violators in neighborhoods where police usually fear to tread.

As dispute resolvers these forums attempt to conciliate disputes. However, where consensual agreements cannot stick they employ the threat of police power which they can bring to bear upon a recalcitrant disputant by recasting the problem as a matter for the police and reporting it under one of the catch-all definitions of antisocial misdemeanors which are present in every criminal code.

This extension of power out of the criminal justice system and reapplication to civil disputes is a technique employed by Athabascan village chiefs, Eskimo village councils, and Navajo judges and chapter house officers (Conn, 1971; Vicenti, 1972; Conn and Hippler, 1972, 1973).

To define the formula for successful resolution of disputes in an extralegal forum in its entirety, local forums for dispute resolution, in my experience, succeed when:

1. They have access to or can direct real power. The local resolver of disputes can reinforce his position by employing as leverage other, more powerful authorities who do not unilaterally intervene on a regular basis.
2. They define problems and remedies in ways that are acceptable to participants and to potential participants. They address mutual interests with some insight into the basis for definition of these respective interests. The third party who resolves disputes knows the limits of his authority where adjudication ends and a process of conciliation begins.

That is, the dispute resolver makes appropriate use of law and nonlaw (e.g., commercial understandings and custom) and can relate his actions, judgments, or persuasive endeavors to the particular outlook of the people with a dispute.

Immediate access and employment of legal power is also limited to Navajos who seek relief in tribal or state courts or to Eskimo people who seek help from state magistrates, the lay judges who function now in their villages. One reason for this is that the sets of rights and duties which flow from their living arrangements are not satisfactorily reaffirmed in court hearings unless the lay judge, who is usually himself a Native-American, is sufficiently comfortable with the rigidities of his role to move from them and proceed imaginatively.

For example, for Navajos, rights to use and enjoyment of land held by grazing permits and the personal property of deceased persons are best sorted out prior to any court hearing in Navajo tribal court. Although the Navajo code stipulates that custom is to be deemed superior to state common law and statute in this and other matters, training sessions prior to 1968 that many older judges attended included warnings that unless criminal and civil process and decisions therefrom emulated state law, the states might take over the Navajo legal system. While this threat was removed in Congress by the Indian Civil Rights Act which made tribal consent a prerequisite for such a takeover, this diminution of custom to an evidentiary matter left to be proved affirmatively by the litigant effectively limited an opportunity to develop a common law of custom for even this rather large and contiguous group.

It is no surprise that within the vacuum so created, local community leaders, chapter house officers whose political authority is real enough, as well as officers of the court, Navajo lay advocates, were lead to conciliate disputes which could not proceed to court unless the rights and duties of parties were substantially redefined in the process.

Each had the advantage of not being the judge and yet possessing a role which allowed them to summon up legal power if their role as extralegal dispute resolver was challenged. They also were capable of recharacterizing the dispute and bringing judicial and police power down upon the challenger.

For the Eskimos as well as the Navajo, a concept of comparative negligence prevailed in disputes which result in their physical and property damage. No distinction existed between criminal or civil disputes. Remedies awarded extrajudicially in village councils were thus victim-oriented and usually involved acts which ranged from an apology to restitution. (It should be noted that a process which looks at relative fault in the context of the dispute is also more likely to succeed in conciliation of disputes.)

Civil legal process which seeks liability on one side only and the guilt seeking of criminal process which awards the governmental entity with a fine and not the victim are potentially amenable to change. However, the problem is that the courts afforded Native-Americans in these two cases, the magistrate court and the tribal court, are deficient in flexibility even when formal power is delegated to Native-Americans to judge their own. The thrust for modernization and uniformity in judicial training sessions and in supervision by consulting attorneys or judicial advisors colors the process with undue rigidity. The handhold on power -- if translated into the handhold on the job, as it often is -- places undue pressure upon judges to give fellow Native-Americans hyperlegal and hypertechanical examples of the working legal process. If someone is to adapt, it is assumed that it will be the consumer of justice and not the supplier.

From the inception of white contact Eskimo communities were afforded an opportunity to deal effectively with internal disputes without tying them to the rigidities of Anglo-American legal process. This circumstance was created first because even those military and governmental agencies who enforced law did so themselves extralegally. A jurisdictional base for law enforcement over the civilian population was not afforded to these authorities for the first twenty years of territorial status. The second reason was logistical. The lay judge, the white commissioner, had no marshall. The marshall had no commissioner. Neither had funds to transport offenders or witnesses in any but the more serious cases. Many of the logistical constraints upon what purports to be a unified justice system in Alaska continue to the present day.

Left with this situation, agents of American and state power, territorial and later state police and prosecutors reinforced the power of villages to make and enforce law extralegally. The Alaska Native Service aided many villages in organization under the Indian Reorganization Act under the theory that members of these corporations could make and enforce rules upon themselves. A territorial village incorporation act which later became state law allowed village councils who had no judges to make misdemeanors and enforce them in proceedings "substantially similar" to those of the magistrate. This narrow legal base, supplemented by calls to police, allowed Eskimos and some Athabascan councils to deal authoritatively with a range of disputes. Troopers were given phenomenally large areas to enforce the law. The single trooper in Bethel, for example, dealt with a region of tundra, rivers, and seacoast that included 57 Eskimo villages in over 90,000 square miles of territory. When he received complaints from the councils, he encouraged, by written replies and by

visits, disposition by the council in lieu of arrests. In 1963 the district attorney from Fairbanks helped these same villages draw up a set of village rules to enforce. If problems arose, each rule was capable of reinforcement by filing a general complaint with the state court system.

This collaboration by village councils with agents of the military and later civil law enforcement might have lead them to be no more than mandarin agents of the police. In fact, a review of council records indicates a different direction for legal process when it was placed into council hands. Many village councils manipulated their role as agents of the police by conciliating disputes and sending only the recidivist, the person who was wanted out of the village, away for certain conviction in the real system.

Of course the capacity of councils to act as full-blown forums was subject to several external concerns. If the police were capable of getting into the village too often, the council's role diminished and became more policelike. Fines or short jail sentences then became the rule and not the exception. The capacity of police to reinforce councils diminished as police became more accountable to district attorneys and more rigidly the investigators and not decision-makers in the prosecution of crimes. Some observers may conclude that the increase in alcoholic traffic to villages by carriers who were indifferent to the pleas of councils to limit this traffic also gave rise to more violent crimes which councils were less capable of controlling through calm deliberation. Yet I would interpret the emergence of violent crimes in part as a consequence of councils' loss of capacity to intervene in disputes at an earlier time on a lower level, as they did during most of the twentieth century.

No single act destroyed the council's capacity to divert and reapply legal power in its proceedings than the introduction of a lay magistrate in their village theoretically to take up the process of justice. The magistrates were less capable of offering private results to disputes filed as criminal complaints. The adversary system which is the mainstay of the judicial process in combination with plea bargaining between disputants' attorneys has never worked because there are no advocates in the village to make it work. Although the magistrate system did not take up the gamut of complaints heard in the council, it supplanted the council as a rubberstamp for law enforcement.

One can argue that the diminution of the council as a forum for dispute resolution was inevitable. Each council now is innundated with governmental considerations and reorganization efforts in order for it to take control over the surface rights to ten townships around the village under the Alaska Native Land Claims legislation. Perhaps, one should wait to see what extrajudicial figure might bleed off sufficient legal power to resolve disputes informally. There is some sign that village constables, much as their brothers in smaller cities and towns, employ the threat of arrest (and invariable conviction) as an inducement to resolve disputes.

#### Extralegal Forums -- Their Future

While it appears that particular extralegal forums will rise and fall according to their capacity to tap into authentic power and meet the other requisites of a forum outside but adjacent to formal legal process, it also appears that unless the formal legal process adapts itself to special problems, new forums will emerge.

In squatter colonies in five Brazilian cities and in squatter colonies in a single city, one can discover entirely different extralegal forums each which resolve property disputes and each with its own considered ties to police power, local courts, or the state. In Pirambu in Fortaleza, Brazil, the forum is known as the "little court" and functions with explicit recognition by municipal land offices, the church, and the courts. In Dende, in Rio de Janeiro, the residents' association, under fire in civil litigation which threatens the favela's control of land itself, retains crucial ties with the local police precinct.

In transitional Native-American communities where the relationship between active agents of outside power and traditional power continues to change, one can perceive two developments. First, traditional dispute resolvers (such as the Athabascan chief) tap into the legal process by acting as the village's agent for communication with the police or they are replaced by other modern entities such as the council or roles such as the village constable. On the Navajo reservation the traditional headman has been similarly replaced by the chapter officer, the lay advocate, or the grazing committee member. However, while power relationships tend to determine who or what may resolve a dispute, the fundamental ways in which disputes are resolved -- their definition, the process, the remedies afforded -- differ very little as dispute resolvers change.

For a student of dispute resolution to discover the crucial dynamics of the extralegal forum which operates in an environment where formal legal process and its agents also hold sway, I suggest study of the process on three levels.

First, the student must know the formal legal structure and process which operates beyond the community and which purports to affect legal relationships inside the community. Second, the student must understand the actual dynamics of the process -- what Brazilians might term the *jeito* of the legal process, the *way it is*. The influence of plea bargaining and the actual availability of attorneys or paralegals to persons inside or outside of the community are examples of this. Third, the student must know the particular adaptations of legal process for the community studied and consequent responses by and compensations for resultant deficiencies in the process by the community in its own complementary law ways. Here for example, patterns of nonenforcement of fish and game laws by state troopers upon Natives or their reinforcement of village councils as local courts and the operation of local councils fall into place.

Thus, when one studies cases which appear before the council, one is aware of the particular and changing influence or lack of influence of formal legal process as theory and as reality and particularly, the councils' responses to shifts in the employment of power by outside police, attorneys and judges. Some of these changes in the employment of power as they affect village Alaska have been described above. Internal law of a village is in a crucial sense not internal at all since it looks outward to those who can wield real legal power and attempt to do so within the group studied.

If one employs this three-tiered picture of the world, for studying law and nonlaw as dynamics of society, one discovers certain things. First, one recognizes the role of legal fiction or legal ideology even when that role is not intrinsically important to each case that one observes. The cloak of authenticity, even if it is no more than the black robe handed to a single member of the village who without much training is denominated and

paid as judge, reverberates through the village legal system and challenges the authenticity of the council as forum for dispute resolution, even when the council is more successful at dispute resolution. The dynamics of the legal process are also important. The troopers get an airplane and must justify their regular flights into the village with arrests instead of lectures before the council. A prosecutor is delegated to a large Eskimo town such as Bethel, and removes from the troopers the decision of whether or not to prosecute, asking them to bring back the offender so that he, and not they, make this decision. The tribal judge returns from a training session where he has been warned not to shake hands with litigants he knows despite the fact that he is a member of their clan. He has been taught judicial independence. This also reverberates through his clients' community as a legal environment.

What one observes from many of these examples is this: that power derived from the formal legal system is more flexible than power delegated along with the substance of law. The latter delegation of power comes with particular strings attached. Those strings more often than not reflect just the ideology and not the reality of legal process. The formal agent of law in the village is often urged to unlearn his sense of a complete system of dispute resolution as a range of formal and informal remedies. And when he does this, he becomes little more than a pale reflection of some other court or some other formal agent foreign to the local community. He loses his constituency because his constituency depended upon him to "make a balance" not only between litigants but between the power of law and the sense of local norms as they defined appropriate ways to solve conflict in his village. When this careful balancing act is not accomplished, a forum is dead for the effective resolution of important local disputes however much power is delegated to it.

Of course what I am explaining is no more or less than the reason why the legal system has lost its vitality in this country. Too ingrown, too self-centered and concerned with the formation of guild-like traps, and smothered by its own mystique, it has lost potential clients. The earliest clients to go were big businesses who have made arbitration a second system of justice. Unfortunately, untold number of consumers of justice, both middleclass and poor, have been less capable of pulling out of the legal process and recreating forums which are more socially conscionable. Rabbinical courts are built on shared law and shared identity. Vigilante activists were organized if we are to credit near-recent interpretations as the forerunners or heralds of a legal system which had not reached its frontier.

The examples of extralegality that I have studied are somewhat different. The Eskimo council and the favela forum are at once employed as courts by those who aspire to a system of law which they expect will offer some regularity to their problems and be employed as a buffer to the aspects of law which are less welcome because they represent other outside interests.

In terms of the allocation of power there is the seed of Aristotelian tragedy in every forum such as this. Their linkage to real power is tenuous and fragile. Forces at work on their society are changing it constantly. The legal ideology of the larger society is a participant in this change. However, I suggest that an exploration of these relationships and more importantly the changes effected in the legal process by such disparate groups as urban squatters or Eskimos can tell us more than any essay on the consumer's perspective, what the reality of a consumer perspective might mean if alternative but

authenticated processes were available for people in a legal system that was not self-defined but defined by consumers and by those persons who actually want to solve the disputes.

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