
COMMENTARIES

From Metaphors to Legal Solutions

Anne Meuwese* and Armando Menéndez Viso†

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1 Introduction

In the 2019 Montesquieu Lecture at Tilburg University, Saskia Sassen revisited the theme of 'predatory formations', which was the subject of a 2017 article¹ she wrote and had already featured in her 2014 book *Expulsions: Brutality and Complexity in the Global Economy*.² Formations—assemblages of knowledge, interests, and outcomes—are predatory when they result in large scale exploitation, although no 'self-evident brutality' is involved.³ They are combinations of legal arrangements, strategy, wealth, high-level technical expertise, and information systems that come together and become a machine that runs by itself, thus enabling individuals to avoid having to take responsibility for any ensued damage. The main example Sassen presents is the effect that the practices of high finance have had on housing costs and/or homeownership for ordinary people. Her argument raises the question: Are these formations inherent to the current economic system, somewhat necessary or at least inevitable, or are they rather free-riders—parasites that infect economic structures and live off of them?

We start our commentary by investigating two metaphors at the heart of Sassen's argument: predation (as in 'predatory powers') and extraction (as in 'extractive logic'). We argue that predatory formations do not need to be employing an extractive logic. Clarifying whether a certain practice has crossed the line and engages in extraction is essential to proposing effective legal solutions. We subsequently assess the rather stark distinction that Sassen draws between traditional banking and (high) finance, using our own proposal for metaphorical clarification in order to illustrate our point. In the final part of this commentary, mainly as a thought exercise, we briefly address a few avenues for possible legal solutions: regulatory policy, criminal law, constitutional law, and private regulation. We do not claim to be exhaustive or conclusive. If the problem is highly complex and sophisticated legal arrangements are in fact part of it, we should not expect any easy fixes. Nevertheless, thinking about the array of directions for available legal solutions and exploring them tentatively can help get the problem into sharper focus and can produce a foundation for the undoubtedly complex and nuanced answer the law may have to the occurrence of predatory formations.

2 Predatory vs Extractive

In Sassen's literature, she appears to use 'predatory' as equivalent to 'extractive,' but there are nuances that make each metaphor substantially different. In nature, predators need to kill other animals to survive and, in that sense, they could not exist without them. It is the very existence of a sufficient number of edible creatures that opens the possibility for other animals to live on them. Predators are the evolutionary result of an adaptation process that allows them to extract their energy from other living species by hunting them. Like any other kind of living being, predators subsist because there is a niche for them to play an ecological role—mainly regulating the population of prey. Prey, in turn, predate on other species (e.g. smaller animals, grass), thus forming a trophic pyramid with plants—which are extractive devices—at the base. The different species of an ecosystem are at an equilibrium in which they make the most of the energy available in it, feeding and thus preventing each other from unrestricted—and potentially self-destructive—growth.

* Professor of European and Comparative Public Law at Tilburg Law School, Tilburg University, The Netherlands. Anne.Meuwese@tilburguniversity.edu.

† Associate professor of Philosophy at the University of Oviedo, Spain.

¹ Saskia Sassen, 'Predatory Formations Dressed in Wall Street Suits and Algorithmic Math' (2017) 22 *Science, Technology and Society* 6.

² Saskia Sassen, *Expulsions: Brutality and Complexity in the Global Economy* (Harvard University Press 2014).

³ Sassen (n 1) 6.

Predators do not aim at the destruction of the preyed species. Translating this to the economy, predatory formations would be just an evolutionary possibility opened by distributed income or labor force: they have a place because they use available resources of the economic system to make it more diverse and fruitful, and probably more stable. Successful economic predators make the economic system more diverse not only because they constitute a new economic species themselves, but also because they concentrate existing wealth to produce new kinds of activities—such as banking, high finance, and world trade—that are good for the economy at large and would not exist otherwise. When the predatory formation is no longer useful to the economic system, it has to change or the latter will make it disappear—just as changes in ecosystems push species towards adaptation or extinction. Thus, for instance, feudal structures are predatory because they take their income from peasants' labor, without 'producing' anything themselves, but allegedly generating a certain diversity with their own existence and providing services that need some accumulation of wealth. When the feudal system ceased to make sense, it disappeared, albeit not without considerable suffering.

Unlike proper predators, economic predatory formations do not live directly off of individuals, but off of their money or labor—it can be argued that it is virtually the same, but still they do not kill the way a lion kills a zebra. Like proper predators, economic predatory formations defend a territory, try to expel competitors, and get energy—money, in this case—from their 'prey'. But they do not aim for their prey's destruction: doing so would be suicidal. Even the biggest financial corporations have an interest in retaining their customers, although they probably do not care much about them except as customers. Predators are still optimizers—they assess, perhaps cruelly, how much their hunting is going to cost them. The problem with predatory formations is at first instance a moral, not an economic one—it is an economic one in a second and later instances, inasmuch as moral perceptions can change the behavior of consumers and producers: predation makes economic sense, just as it makes biological sense.

Extractive logic, on the other hand, does not come from the natural world, but from mining. Mining does have an ecological impact, but the extractive activity per se is not an ecological one. From the widest point of view, mining is also integrated into a large-scale ecosystem, but a particular mine does not follow ecological (biological) patterns. Extractive enterprises aim at taking all the relevant minerals and do not follow any ecological logic. Their only limit is the availability of the material they are interested in. Of course, extraction cannot continue beyond the exhaustion of the mine but if the threat of exhaustion is the only regulatory force, this can hardly be prevented—except by the mechanism of diminishing returns. Extraction takes place on non-living matter, like money. Therefore, the problem with extractive logic is immediately economical, if not physical, and moral in the second instance: exhaustion does not make economic sense.

Apart from organizations that are criminal in nature, only social structures able to leave the depleted area and move to a different one are in a position to apply extractive logic. To do so, size and economic power matter: only a big and powerful organization can move across the planet in search of more places to exploit without suffering excessive economic trouble. Predatory formations can be particularly good at accumulating size and power—in this way, the practices denoted by the metaphors are evidently connected. A predatory formation, as opposed to 'normal' companies or organizations, brings together different structures in a communion of interest, and does so in such a complex and anonymous way that is difficult to identify. This complexity can in itself be just an adaptation to the distributed wealth it means to extract.

According to this distinction, the truly problematic structures that Sassen is pointing out would be predatory formations applying an extractive logic; but there can be tolerable predatory formations (like traditional banking) and small-scale extractive enterprises.

3 Traditional Banking vs High Finance?

Building on this clarification of Sassen's central metaphors, the distinction between traditional banking and finance may not be as sharp as she depicts it. Sassen argues that '[t]raditional banking sells something it has (money) for a price (interest),' whereas '[f]inance sells something it does not have.'⁴ Phrased in terms of her own metaphors, as Sassen sees it, traditional banking could be called merely predatory, whereas high finance can afford to resort to extraction.⁵ The latter is the case, she argues, because contemporary finance has moved on from the purpose of the first residential mortgage-backed securities of the 1970s, which

⁴ *ibid* 9.

⁵ 'At its most brutal and innovative, I argue that finance is an extractive sector: once it has extracted what there is to extract, it moves on, leaving behind destruction. Yes, in this it is similar to mining, albeit dressed in much finer clothes. In contrast to finance, traditional banking gains when its borrowers grow, do well and keep borrowing. At its best, traditional banking enables others, while finance, at its best, destroys others to enable itself.' Sassen (n 1) 9.

was to generate an additional source for funding the mortgages of modest-income households. Today's high finance, Sassen contends, aims to 'use the actual physical good (the house) to develop an asset-backed security.'⁶ Consequently, she paints the situation of large scale loss of homes in the sub-prime mortgage crisis as part of the design of the formation rather than a side-effect.

However, traditional banking also sells something that it does not possess (money deposits amount only to a small percentage of any bank balance), and modern financial complexes do have something to sell. Even if the direct purpose that high finance formations have in mind for the real estate they acquire has 'nothing to do with the provision of housing,'⁷ the fact that someone down the line will want to use the houses and buildings involved still matters in many transactions. Put differently, some sophisticated financing constructions will have features of a pyramid scheme and thus be extractive, but others will not. How to tell the difference is crucial for effective policy responses, as we will argue below. A similar nuance may need to be applied to the 'dark pools' Sassen already mentions in her article and elaborates upon in her lecture. These alternative, non-transparent trading forums are potentially problematic—certainly in terms of fair-trading practices—but there is no evidence that they make the effects that high finance operations have in the real world *necessarily* worse.

4 A Glance at Legal Solutions

Sassen claims that '[p]redatory formations are often beyond the reach of ordinary policy responses, in good part because they tend to assemble elements of separate domains into novel configurations.'⁸ Indeed, policy-making has a bad track record when it comes to preempting situations that are the result of entrepreneurship at the forefront of technological developments. Without denying the difficulties, which will be elaborated below, we propose that the conceptual distinction between predatory formations and extractive practices introduced above is the 'way in' when it comes to keeping predation within acceptable limits and freeing the world of extraction as much as possible.

The role of regulation cannot be to prevent predatory formations as such from appearing or to forbid them; its role can, however, be to tackle properly extractive practices and to reduce the ensuing societal harm. As demonstrated above, the formations themselves can to some extent be useful: if you suppress predatory formations, the economic system will suffer.⁹ Moreover, 'forbidding structures' is problematic in law, especially when they are as intangible as the predatory formations in high finance that Sassen describes. If the analogy with organized crime is pursued for a moment, one of the instruments used to fight it is the prohibition of criminal organizations. However, if proving that the 'organizational element' is already problematic there, pinning down 'formations' spanning multiple jurisdictions and various professional fields would appear impossible. This is not to say that the analogy with organized crime is not useful in a different way; perhaps some of the behavior Sassen describes could and should be criminalized, as a way of allowing the law to act retroactively to remedy or punish predatory or extractive behavior. In the example of the sub-prime mortgage crisis, though, the real problem was the scale and the carelessness (the extractive logic) of the sale of a merely 'predatory' financial product. This indicates that it is the behavior that needs to be regulated, not the structure as such. The existence of anonymous, cross-border, interdisciplinary predatory formations in finance may have been a factor in producing this crisis, but it may well be the case that the crisis has roots in individual behavior as well.

Thus, criminal law is not the reason there is hope for getting a regulatory grip on financial practices based on an extractive logic resulting in large scale damage to society. After all, resorting to criminal law would be an *ultimum remedium* and would mean working with strict definitions, which would not be able to capture instances of predatory formations. The reason there is hope for regulating these formations is the fact that extractive logic, in the end, is susceptible to economic conditions. Therefore, the most obvious legal technique would be to take regulation of financial markets one step further by adjusting prudential regulation, consumer regulation, and competition rules so as to be more responsive to the risks of large-scale extraction.

We are aware that the 'past performance' of financial regulation certainly presents no reason for optimism. Financial regulation did not anticipate the 'innovations' in finance that appeared in the late 20th century, such as credit default swaps and regulatory evasion on the part of financial institutions.¹⁰ Having to decide

⁶ *ibid* 11.

⁷ *ibid*.

⁸ *ibid* 6.

⁹ Of course, radical systemic change is an avenue, but it is not one we take into account in this commentary.

¹⁰ Jonathan McMillan, *The End of Banking: Money, Credit, and the Digital Revolution* (Zero/One Economics 2014).

which predatory formations are acceptable is difficult enough, but assessing upfront which formations will remain predatory in a manner that capitalist societies deem to be acceptable and which will slide into extractive practices—the effects of which often will only become visible years after the fact—appears to be the real obstacle to effective regulation. This obstacle is exacerbated by the sheer size and global character of these formations. Their opaqueness stems from these characteristics, rather than from their activities and intentions per se.

However, as we contend above, it appears possible to define ‘extractive practices’ in economic terms. The specific set of market and regulatory failures, in any case containing information asymmetries (on a large scale) and free riding, would need to be entangled to start designing regulatory responses. One route is through enabling consumers by using ‘traceability’ as a central building block of the regulatory infrastructure, the same way this is done with food and, to some extent, already with financial products as well. Recent research on financial regulation, specifically on regulatory failures regarding shadow banking, suggests forging new ties between regulators and the industry in order to overcome information asymmetries.¹¹ Furthermore, perhaps competition law could start to incorporate extractive logic as one of the economic evils it exists to fight. As for private regulation, credit rating agencies could take greater responsibility by incorporating socially responsible behavior more explicitly into their methodologies.

A final, very different avenue for thinking about legal responses to predatory formations that apply extractive logic is constitutional law. Of course, employing constitutions to prevent predatory formations from emerging and/or using extraction presupposes more of a hold on these formations on the part of the state than is probably realistic. However, we should not underestimate the symbolic value of constitutional provisions, or the legal momentum they could help create if and when a legislator wanted to take action. Any such provision speaking out against certain forms of predation and large-scale extraction would need to be carefully drafted to avoid clashing with economic rights. The provision could be drafted as a legislative competence to limit certain economic rights where extraction is in play. Inspiration could be drawn from the 2011 Draft Constitution of Iceland, which attempted to protect the country from ‘predatory’ buyers of extremely large pieces of land. This is not to say that the text of the provision itself could be used—the issue of controlling a country’s natural resources is in many respects very different or even opposite from the issue of predatory formations—but the fact of attempting to use a constitution for a bold statement on a society’s red lines can be regarded as inspirational. Exploring the constitutional avenue would furthermore be in line with the idea that citizens need constitutional protection not only against the state but also against private entities that pose a threat to human rights.

5 Conclusion

In this commentary, we have tried to get a firmer grip on the phenomenon of ‘predatory formations’ by unpacking two metaphors from Sassen’s work on this theme: ‘predation’ and ‘extraction’. We have suggested that, paradoxically, predatory formations that employ extractive logic should be easier to address through legal means than the emergence of predatory formations as such. Regulating behavior based on extractive logic, ideally backed up by new-style constitutional provisions, is still the best chance we have to get a grip on these practices, as this behavior can be defined in economic terms and can be disciplined by market conditions.

Competing Interests

The authors have no competing interests to declare.

¹¹ Matthias Thiemann, *The Growth of Shadow Banking: A Comparative Institutional Analysis* (Cambridge University Press 2018).

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