*International Journal of Law in Context* (2021), **17**, 128–135
doi:10.1017/S1744552321000070

REVIEWS SYMPOSIUM

# A counter-hegemonic rule of law?

Johanna del Pilar Cortés-Nieto[1]* and Giedre Jokubauskaite[2]

[1]Faculty of Law, Universidad del Rosario, Bogotá, Colombia and [2]School of Law, University of Glasgow, UK
*Corresponding author. E-mail: johanna.cortes@urosario.edu.co

## 1 Introduction

We are sympathetic to the research aims of the two books examined by this symposium and their desire to understand law's role in generating and contesting social injustice. We are also intrigued by the proposal in the Introduction to this symposium, notably to expand the normative reach of the rule-of-law ideal to private actors, in order to transform it into an ally of counter-hegemonic action. In our research, we share a similar research focus (development projects), methodology (case-studies) and concerns (harmful effects of development interventions) with the authors of the two books. Accordingly, in this contribution, we want to think together with the editors of the symposium – by examining the case-study of the Hidroituango project in Colombia (hereinafter, 'Hidroituango') – whether the rule of law can indeed be reimagined to limit the arbitrary exercise of power by private actors, and what benefits this might create for dealing with social injustice. However, since neither Bhatt nor Lander advances an explicit account of rule of law in their books, our critique in this piece is addressed not at them, but rather at the theorists and advocates of rule of law as a political ideal.

Based on our research on Hidroituango and beyond, we agree with the authors of the symposium that the rule of law in its 'narrow' and simplistic form has been closely aligned with neoliberal rationality. This is because the rule of law is often invoked to protect property rights of transnational funders and investors, to create stable and predictable legal environments for their investments and to ensure that their contractual claims are immunised from domestic political contestation. As Lander puts it, the rule of law has become 'a code for certainty and stability' that protects investors from state interventions and communities' contestation (Lander, 2020, p. 228). Both Lander and Bhatt show that the rule of law has been instrumental in 'locking' investors' interests and thus making them safe from disputes under national legal systems. In a similar vein, Cutler and Gill claim that this 'narrow' investor-friendly version of the rule of law underpins a new global (and national) constitutional order in which investors have rights but not duties, while states and local communities have duties towards investors but not rights (Gill, 2008; Cutler, 2018).

Hence, the problem is not just that the rule of law has not been implemented appropriately, but rather that some of its constitutive elements, such as an individualistic conception of property rights or its focus on predictable outcomes for private actors, has facilitated the expansion of private power at the expense of local communities. From this point of view, the rule of law represents what Lorde (1984) calls 'master's tools', namely the means that are used to institutionalise injustice and oppression in the first place. In this contribution, we accept the provocation of this symposium and wish to consider whether this particular 'master's tool' can indeed be reimagined, revamped and used in the context of transnational development projects in a way that is helpful to social movements and thinkers contesting economic globalisation and neoliberal models of development.

Krygier (2009; 2016), whose account is central to the proposal of this symposium, views the rule of law as an analytical framework that should be geared towards advancing a value of non-arbitrariness in political systems. His teleological approach emphasises the *function* of the rule of law to curb arbitrary exercises of power. This suggests that, despite his commitment to Selznick's 'law-in-context' approach (Taekema, 2019), Krygier believes in a possibility of separating the universal/normative rule-of-law

*ideal* from the hegemonic and context-specific *institutions*, and thus from bad practices and discourses. Drawing on this separation, Krygier is optimistic about the possibility of advancing the rule of law's core value through institutional arrangements that are amenable to the cultural, economic and political traditions of each society. We, however, remain sceptical of this possibility. Looking at rights and property as core legal conditions that have shaped the encounter between the Hidroituango project and affected communities, we argue that the rule-of-law ideal is inevitably derived from concrete practices, beliefs and historical pedigrees (Cheesman, 2018) that, in the case of development projects, follow the mainstream blueprint of economic development. Therefore, we are doubtful of the possibility of 'rebooting' institutions such as private-property or procedural rights through a functional definition of the rule of law, given that a pedigree of (neo)liberal economic development remains a powerful and dominant element in rule of law's social and political DNA.

In addition to our scepticism about the possibility of a more contextual and open understanding of the rule of law, we also see a fundamental tension at the heart of the rule-of-law idea, which is a promise of *predictability* and *certainty*, while also claiming to have the capacity to resolve political conflicts and address injustice[1] – in short, a tension between stability and change. Through our case-study, we observe that the potential of an *un*predictable outcome, in which new meanings and ways of moving forward are created and put into action, is central to realising the ideal of inclusive development and, ultimately, justice. Political creativity gives social movements, through resistance and contestation, a chance of creating alternatives to extant orders and practices of exploitation and domination. We argue that this political space for the creation of alternatives – rather than further institutionalisation and enhanced legality – is crucial for breaking through the logic of development machinery and its oppressive effects on local communities. However, this openness is in tension with the aims of predictability and certainty. In this respect, the emphasis of this symposium on rethinking the rule of law seems helpful to an extent, but also misplaced; and including private actors into its ambit risks further legitimising hegemonic agendas.

## 2 Arbitrariness in Hidroituango

In order to substantiate our theoretical claims, we now turn attention to the construction of a regional mega dam, Hidroituango, which is located at the heart of the Colombian mountains on the Cauca River's basin. Hidroituango's construction not only involved damming thirty-eight square kilometres of land previously devoted to agricultural, artisanal mining, fishing and other economies of subsistence, but also led to displacements, dispossessions, death threats and physical violence. Peasants, artisanal miners, fishermen and other groups directly affected by the dam have gathered in *Rios Vivos* – a social movement that engaged in a rich repertoire of resistance against the project, including strategic litigation before national courts and international bodies.[2] Hidroituango's radical effects on the natural and social environments of the Cauca River basin are representative of the impacts of large-scale infrastructure projects more generally. However, due to its position in a region that is already affected by armed conflict, Hidroituango is marked by higher levels of violence and security concerns than many development projects. Because of this, Hidroituango shows the powerful legitimising role that law can play, even in difficult social contexts in which legal justifications operate simultaneously with military coercion and non-state violence.

EPM (Empresas Publicas de Medellin), a state-owned enterprise of one of Colombia's richest regions, Antioquia, is the company implementing the project. Although not a private entity in a formal sense, EPM is a parent company of over fifty companies operating in Chile, El Salvador,

[1]Krygier sees justice and rule of law as separate ideals; however, we think that, even in this 'separationist' view, there exists a link between the two because non-arbitrariness is still not an intrinsic value, but rather is defined in functional terms (Taekema, 2019; Krygier, 2018).

[2]While not everyone living in the Hidroituango area opposes the project, our analytical emphasis is on those people who resist the project due to its far-reaching negative impacts on their ways of living.

https://doi.org/10.1017/S1744552321000070 Published online by Cambridge University Press

Guatemala, Mexico and Panama.[3] EPM is also driven by a commercial rationale and associated objectives, with aspirations of exporting electricity to neighbouring countries, attracting capital from global financial markets and ensuring market dominance in the region.[4] In this sense, it is a 'transnational private actor' that falls under the conceptual framework of this symposium. Similarly to other development projects discussed by Bhatt and Lander, Hidroituango was also funded by a wide range of international institutions and investors, some of which played an important role in determining the course of this project, but which will not be the focus of the present analysis.

In 2018, a part of the operational structure of Hidroituango's dam collapsed due to flooding caused by heavy rains, coupled with design failures. This exposed an already contested project to further controversy and calls for accountability concerning faulty project design and decisions that continue to harm the local population. *Rios Vivos* had spent over a decade contesting the rationale of the project at first, and then demanding for adequate treatment after the harm had been caused. They have highlighted not only problems related to land loss and unfair compensation, but also connections between Hidroituango and the use of violence by both state and non-state actors (MICI, 2018). From the perspective of this social movement, the exercise of power in Hidroituango has been indeed arbitrary, and this arbitrariness arguably becomes more obvious if we extend the rule-of-law analysis to EPM, as discussed in the following paragraphs.

Krygier (2009, pp. 11–12) explains that arbitrariness is *not* desirable, for two reasons: because the arbitrary exercise of power is 'frightening' and because it is 'confusing'. Building on his conceptualisation, it can be said that the arbitrary exercise of power is one that is (1) unchecked and (2) unpredictable. Krygier (2016, pp. 203–205) later added another element to his account of arbitrariness: (3) non-participation by those affected by the exercise of power. Arguments in Lander's and Bhatt's books help us to explain why and through what mechanisms, despite an elaborate governance framework being in place, the authority of EPM over members of *Rios Vivos* evaded all scrutiny based on fundamental rights' protection or democratic participation.

As in the cases that Bhatt analyses, EPM was not only able to exercise power without scrutiny, but also delegated authority to other private actors. For instance, private contractors hired by EPM conducted social and environmental assessments, and designed resettlement and compensation plans without independent oversight. In this process, artisanal miners who have a partially nomadic lifestyle were excluded from the original impact assessment (similar issues identified in Mongolia by Lander, 2020, p. 113). The lack of transparency has made it difficult for *Rios Vivos* to contest the assessments that defined their rights to land and compensation, among others.[5] Furthermore, since affected communities were not recognised as indigenous groups, they have been denied free, prior and informed-consent-like mechanisms (issues with non-recognition explained by Bhatt, 2020, pp. 23–24). For people exposed to such an 'unchecked' authority, the actions of EPM – that is working closely with military forces and has alleged links with non-state armed groups (Afanador, 2018) – were, and indeed remain, frightening.

Generally, national legislation has also been ineffective in protecting the right of *Rios Vivos* members to participate in decisions that directly affect them. As in Mongolia (Lander, 2020, pp. 197–198), legal rules have been interpreted in ways that prevent effective participation from affected communities. For instance, Colombian national legislation allows communities to call for a hearing in the context of environmental licencing procedures. However, in Hidroituango's case, only regional governmental authorities were invited, while the participation of grass-roots movements and local communities was restricted.[6] Hearings were also called in towns, but farmers who live in remote

[3]Information based on EPM's official website; see https://www.epm.com.co/site/investors/general-information/investor-faq (accessed 6 November 2020).

[4]Although formally owned by the Municipality of Medellin, EPM regularly issues bonds in Colombian and international capital markets (*ibid.*).

[5]*Rios Vivos* is currently demanding a new social assessment based on a comprehensive appraisal of affected people (https://riosvivoscolombia.org/en/who-we-are/brief-history-of-our-resistance-against-hidroituango/ (accessed 29 January 2021)).

[6]Information in this section is based on interviews with *Rios Vivos* members (on file with the authors).

https://doi.org/10.1017/S1744552321000070 Published online by Cambridge University Press

areas could not attend or simply were not informed about them. Moreover, compensation plans were grounded on an individualistic and profit-seeking conception of property, which, as in the case of pastoralists in Mongolia (Bhatt, 2020, pp. 125–136), could not capture cultural and spiritual relationships that local communities have developed with their territory – an issue discussed later in this paper.

All in all, once we adjust the lens of the rule-of-law analysis to cover profit-seeking decision-makers such as EPM, the omnipotent nature of their decisions vis-à-vis the local population becomes apparent. It therefore becomes difficult to claim that their actions were legitimate, although many of their decisions are undertaken under the umbrella of the rule of law. Furthermore, although the rule-of-law analysis could indeed expose the lack of checks and balances in exercising authority, the process and the outcome of decision-making in Hidroituango were both arguably highly *predictable* – that is, fully in line with the second criterion of non-arbitrariness identified above. Plans announcing the intention to construct Hidroituango were made public as early as 1997 (Consorcio Integral, 2007), threatening to displace local groups from their land and take away their livelihoods. While many members of *Rios Vivos* were not aware of the project or its impacts until late in the planning process, this does not mean that knowing about the project earlier would have changed its outcome.

From this experience of local groups encountering development planning as a *fait accompli*, it seems to us that the rule of law in the context of economic development cannot escape the risk of being conflated with the notion of *efficiency*. Predictability is often equated with reducing transaction costs as a sign of efficiency. Therefore, there is a high risk that efficiency in achieving developmental aims is read as calling for reducing dialogue and opportunities for contestation. This intimate link between efficiency, predictability and the rule of law constitutes a conceptual limit of the rule of law's normative potential for counter-hegemonic action. In the next sections, we explain why that is the case, even if a promise of predictable development outcomes is extended beyond private actors to those who are subjected to their operations.

## 3 The indeterminacy of rights

Rights are the hallmark of substantive or 'thick' conceptions of the rule of law. They are mainly conceived of as protective shields that define claims and liberties on the one hand and duties and liabilities on the other (Quong, 2013). They protect the interests and freedoms of rights-holders by imposing restrictions on the duty-bearers' behaviour. In this traditional sense, rights provide predictability and certainty to people's interactions while protecting rights-holders from arbitrary exercises of power. When rights as protective shields are taken to the contexts of developmental interventions, they are usually portrayed as allies of affected communities. For instance, Bhatt advocates the recognition and proper implementation of land rights and the right to free, prior and informed consent for indigenous peoples as a remedy that could lead to clearer and fairer outcomes for affected communities (Bhatt, 2020, p. 195). On the contrary, when rights are narrowly interpreted and fail to protect local communities, this is regarded as a violation of the rule of law and a failure of political and judicial systems.

As the Hidroituango case illustrates, this view of rights as protective shields often loses sight of other functions that rights have and that emanate from their intrinsically indeterminate nature. Besides functioning as protective shields, rights are governing techniques. As some critical readings suggest, rights can be deployed to govern rights-holders' behaviours, to neutralise and discipline opposition to governmental interventions or to produce subjectivities that render people into 'governable subjects' (Sokhi-Bulley, 2016). Narrow constructions of rights that impose restrictions on the ways in which they can be exercised or that limit rights-holders' remedial and political aspirations are examples of how rights are deployed to govern dissenting populations. By the same token, rights are often deployed by social movements and social groups to shape the behaviour of powerful actors. In this sense, rights provide hope and hold emancipatory potential.

To sum up, when rights are understood as governing techniques, besides their protective function, two additional functions emerge: on the one hand, they can be deployed as regulatory and disciplining

https://doi.org/10.1017/S1744552321000070 Published online by Cambridge University Press

techniques aligned with exercises of power akin to domination; on the other, rights can be a means of resistance and contestation (Wall, 2012). The emancipatory potential of rights (Wall, 2012) rests precisely on their indeterminacy and renders them in a way unpredictable. This reveals a tension between definition and openness that is at the heart of rights. Definition might be helpful for protection purposes but, at the same time, the processes of rights determination (of turning rights into positive law) open up spaces for control and domination. Indeterminacy, on the other hand, may impair rights' protective power (particularly before courts) but, at the same time, holds the promise of more radical changes while allowing social movements to articulate novel demands before the political system.

The Colombian Constitution contains a long list of rights that includes social, economic, cultural and environmental rights. In 1991, when the current Colombian Constitution was drafted, rights were thought to be good means to address the causes and consequences of the ongoing internal civil conflict, including poverty and inequality. The Constitutional Court of Colombia (CCC) and other national tribunals have keenly protected the rights recognised in the Constitution. Myriads of judicial decisions have granted protection to indigenous communities, peasants and vulnerable populations affected by development projects. This court has not only recognised the right of indigenous peoples and other ethnic minorities to free, prior and informed consent; it has also protected the right to health, food, decent housing, work and participation of communities affected by development projects (Rodríguez, 2014).

Despite the above, after more than a decade of legal contestation, *Rios Vivos* have succeeded in very few legal battles over their rights. Most judicial decisions have tilted the balance in favour of the project, all anchored in thin conceptions of participation, property rights and access to justice. An example of this is how both the environmental authorities and courts approached the rights of Hidroituango's affected communities. For ANLA (National Authority of Environmental Licenses),[7] participatory requirements were fulfilled by inviting local authorities and members of the community to hearings aimed at spreading information about the project and collecting data for managing environmental impacts. Based on this assumption, ANLA approved the environmental-impact assessment conducted by Hidroituango (Consorcio Integral, 2007) – a decision upheld by national courts.[8] According to these authorities, local communities do not have a legitimate claim to further participation and, in particular, they do not have veto power. Furthermore, for courts, access to compensation depends on clearly defined property rights, namely rights to carry out mining activities in areas affected by the project, which many local communities lack.[9]

We see a sort of paradox here. In legal arenas, rights have not extended their protective shield to the communities affected by Hidroituango. Narrow constructions of rights have been advanced in the name of the rule of law. Courts' emphasis on bureaucratic and procedural requirements, coupled with demands of clearly defined property rights,[10] have left affected communities unprotected. In the long run, this is arguably meant to create more predictable development outcomes for the businesses and oppositional movements alike, by asserting that rights-based challenges to economic objectives would *not* succeed, notwithstanding harms caused. In this way, rights have been instrumental in neutralising opposition to the dam. Nevertheless, the idea of rights continues to have a central role in *Rios Vivos*' contestation strategies.

An explanation for this paradox might be that rights enable communities affected by injustices and arbitrariness to articulate claims that are often invisible to the legal system. They allow rendering visible before the law other ways of being and living together, marginalised by the modern and Western underpinnings of liberal law. Against this backdrop, it is possible to understand *Rios Vivos*' claim to a right to territory. Reference to 'territory' (rather than property) highlights the relationship between

[7]Abbreviation in Spanish.

[8]Sección Primera de la Sala de lo Contencioso Administrativo del Consejo de Estado (2018), 'Auto del 30 de mayo de 2018 Radicación 11001032400020170013000', Bogota.

[9]Corte Constitucional de Colombia (2012), 'Sentencia T-447'.

[10]Corte Constitucional de Colombia (2012), 'Sentencia T-447'; Sala Segunda de Oralidad del Tribunal Administrativo de Antioquia (2013), 'Sentencia del 8 de abril de 2013 Radicado 05001–33–33–009–2012–00488–01', Medellin.

https://doi.org/10.1017/S1744552321000070 Published online by Cambridge University Press

human and non-human agents – including rivers, mountains and animals – which are not coded into the anthropocentric and utilitarian analysis of ANLA, EPM or domestic courts. These spiritual bonds of communities with animals, mountains and the river cannot be understood through the lenses of property rights and pecuniary damages. For *Rios Vivos*, the indeterminacy of rights works as a sort of 'crack' in the legal system, which, by opening spaces for change, enables resistance and contestation. In this sense, rights provide hope to oppositional movements and hold emancipatory potential. On the whole, this feature of indeterminacy of rights calls into question assumptions of the rule-of-law theory about predictability and certainty as key conditions to curb arbitrariness.

## 4 Property

With the acquiescence of governmental authorities, Hidroituango placed property rights at the centre of its compensation scheme (Consorcio Integral, 2007). Compensation was allocated according to the quality of property rights that people were able to prove, with artisanal gold miners receiving nearly nothing, as they usually lack mining licences and undertake their activities on public land. For the project promoters, property rights are the best distributive criteria for compensation purposes: they are a legally justified criterion that provides certainty and predictability about who ought to be compensated while contributing to 'distributive fairness' (the more precarious the rights, the lower the compensation).

The problem with structuring compensation schemes according to the quality of property rights is that they do not account for all the types of relationships that communities such as those affected by Hidroituango have with their territory. Property rights under Colombian law, following the liberal legal tradition, are grounded in an individualistic conception of a juridical subject (Gill, 2008, p. 164). The property owner is conceived of as a sort of possessive sovereign whose rationality is expressed in terms of profit-seeking and accumulation (Cotula, 2017). Property's main purpose is to grant owners control over flows of income derived from the thing owned, while at the same time preventing others from using or extracting value from it (Gill, 2008, p. 166). This model involves a particular spatiality: the land is parcelled out into plots setting apart neighbours (Blomley, 2020). By excluding others, fences and borders prevent quarrels and secure owners' private uses. Therefore, property protects the owner's interests from external interventions, while also preventing conflicts over land.

This understanding of property rights as relational yet exclusionary spaces under the Western legal tradition tends to distribute power in a way that renders communities such as those in the Hidroituango area vulnerable to the arbitrary exercise of power. That is because this focus on the property owner leads to a hierarchy of rights that structures the use, occupation and possession of land, and that also distributes power among people with interests and activities in a given territory. Within this hierarchy, most power is allocated to the individual owner, based on the assumption that the legally recognised right to property is the most important relation that a person can have with a thing. People who develop other types of territorial relationships become subjected to the owner's power and excluded from the property. In this way, 'property law also structures interlocking relations of vulnerability and privilege' (Blomley, 2020 p. 41). Not only does this model not protect territorial relationships that are different from ownership, but it also provides grounds for arbitrariness, as it privileges owners over everyone else.

As a social relationship, property is contingent. What Blomley names 'the Lockean property model' or the 'ownership model' is not a universal arrangement (Blomley, 2020, p. 49). It is a product of social struggle (Blomley, 2020, p. 49). Therefore, other forms of territorial arrangements are possible. This is precisely what eco-territorial movements like *Rios Vivos* are looking for: to make visible other types of territorial relationships that are not protected and are threatened by the ownership model (Escobar, 2015; Svampa, 2019). Therefore, even if communities like those affected by Hidroituango were granted exclusionary property rights, it would arguably not be enough to protect the cultural and ancestral relationships that they have with their territories.

https://doi.org/10.1017/S1744552321000070 Published online by Cambridge University Press

Lander generally appears to be critical of the protective function of land rights. She draws attention to Mongolia's post-communist Constitution in which the customary land-use rights of pastoralist communities appear to be protected by the state's commitment to developing the economy 'based on all forms of property' (both public and private) as a means of preventing communal-land privatisation and maintaining the pastoral economy (Lander, 2020, p. 95). However, constitutional protections have not delivered. Pastoralists have been deprived not only of property, but also of use rights in the context of a state highly dependent on extractive businesses, in which investors have been given greater powers at the expense of local communities. Admittedly, it can be argued that Mongolia's example is context-specific and that, in any case, herders were not granted exclusionary rights, as, according to the Mongolian Constitution, the state kept ownership over pastureland and subsoil. Nonetheless, the question of whether property rights assigned to communities always fail to protect them or only in some instances is beside the point for our analysis. That is because our claim is that, even under a situation of strong protection of land through property rights, the Western conception of property is likely to be at odds with alternative visions of development that indigenous and local traditional communities tend to advance and support. The liberal ownership model of property rights not only renders invisible before the law territorial relationships that are central to these visions alternative to development, but also imposes a particular grammar with which to talk about land, which risks undermining the very practices at the heart of those alternatives.

While this 'Western model of property rights' is not, by default, included in the concept of rule of law and therefore might appear of no relevance to the focus of this symposium, in practice, in the Hidroituango case, private property has been central to the quest for predictability and non-arbitrariness. This goes hand in hand with traditional approaches to development economics according to which, without such protection of identifiable property rights, there can be no economic development that generates profit and subsequent wealth for individuals and states (Krever, 2018). The premise here is that property rights afford certainty to economic transactions, facilitate trade and promote efficient outcomes. For that reason, property rights, economic development and the quest for non-arbitrariness in pursuit of the rule of law appear to us as intrinsically connected ideals that are extremely difficult, if not impossible, to separate in practice. Accordingly, rule of law and the exclusionary notion of property explained in this section cannot be either analytically or ideologically separated in a meaningful way.

As in the case of rights, we take issue with property because, although it might signal predictability and certainty, from the point of view of social movements such as *Rios Vivos*, property might frustrate change in terms of legal protections for other types of territorial relationships and, more broadly, alternatives to development. Accordingly, local communities like *Rios Vivos* can only benefit from the rule of law as an ideal if they are willing to surrender their non-exclusionary and relational understanding of territory in their pursuit of better legal entitlements or compensation. This might indeed lead to more predictable outcomes (although Lander's analysis suggests that this would not always be the case), but any discussion following such renunciation would take place in predominantly Western economic, political and legal terms.

## 5 Conclusion

The question that guided our analysis in this paper was whether or not there is a possibility of reimagining the rule-of-law ideal in a way what advances the causes of social movements that contest development projects. Our answer to this question is a qualified 'no'. Given how intimately the rule of law is connected with the modern liberal worldview and functioning of capitalist economic systems, including the notions of efficiency, predictability and exclusionary property rights, we do not see how it can create spaces for open dialogue between different worldviews and ways of being that are so often at stake in development projects. In this sense, the 'usefulness' of rule of law to social movements would depend on the willingness of the local groups to embrace the path of mainstream economic development. We do, however, accept that the rule of law has some critical purchase in highlighting

https://doi.org/10.1017/S1744552321000070 Published online by Cambridge University Press

the extent to which private power operates unchecked and without sufficient participation, although, arguably, the argument about arbitrariness, non-participation or rampant dominance of commercial interests can be made without reference to the rule of law.

**Conflicts of Interest.** None

**Acknowledgements.** We would like to thank Kinnari Bhatt, Lenny Lander and Sanne Taekema for inviting us to this project and for their comments on the earlier draft of this paper. We are also grateful to the members of *Rios Vivos* for their willingness to take part in this research.

## References

**Afanador J** (2018) Poderes fácticos y megaobras de infraestructura. El caso de Hidroituango. Ideas verdes No. 13, Heinrich Böll Stiftung Colombia.

**Bhatt K** (2020) *Concessionaires, Financiers and Communities: Implementing Indigenous Peoples' Rights to Land in Transnational Development Projects*. Cambridge: Cambridge University Press.

**Blomley N** (2020) Precarious territory: property law, housing, and the socio-spatial order. *Antipode* **52**, 36–57.

**Cheesman N** (2018) Rule-of-law ethnography. *Annual Review of Law and Social Science* **14**, 167–184.

**Consorcio Integral** (2007) Estudio de impacto ambiental. Hidroeléctrica Pescadero Ituango, Medellín. Available at https://www.epm.com.co/site/Portals/0/documentos/ituango/estudio-de-impacto-ambiental.pdf (accessed 15 August 2020).

**Cotula L** (2017) Land, property and sovereignty in international law. *Cardozo Journal of International and Comparative Law* **25**, 219–286.

**Cutler AC** (2018) The rule of law, new constitutionalism, and transnational legality. In May C and Winchester W (eds), *Handbook on the Rule of Law*. Cheltenham: Edward Elgar, pp. 307–320.

**Escobar A** (2015) Territorios de diferencia: la ontología política de los 'derechos al territorio'. *Cuadernos de Antropología Social* **41**, 25–38.

**Gill S** (2008) *Power and Resistance in New World Order*, 2nd edn. Basingstoke: Palgrave Macmillan.

**Independent Consultation and Investigation Mechanism (MICI)** (2018) MICI-CII-CO-2018–0133. Recommendations for a compliance review and terms of reference, revised version. Ituango hydropower plant. Interamerican Development Bank.

**Krever T** (2018) The rule of law and the rise of capitalism. In May C and Winchester W (eds), *Handbook on the Rule of Law*. Cheltenham: Edward Elgar, pp. 184–200.

**Krygier M** (2009) The rule of law: legality, teleology, sociology. In Palombella G and Walker N (eds), *Re-locating the Rule of Law*. Oxford: Hart, pp. 45–70.

**Krygier M** (2016) The rule of law: pasts, presents and two possible futures. *Annual Review of Law and the Social Sciences* **12**, 199–229.

**Krygier M** (2018) Why the rule of law matters. *Jurisprudence* **9**, 146–158.

**Lander J** (2020) *Transnational Law and State Transformation: The Case of Extractive Development in Mongolia*. Abingdon: Routledge.

**Lorde A** (1984) The master's tools will never dismantle the master's house. In Lorde A (ed.), *Sister Outsider: Essays and Speeches*. Berkeley, CA: Crossing Press, pp. 110–114.

**Quong J** (2013) Rights. In Gaus G and D'Agostino F (eds), *The Routledge Companion to Social and Political Philosophy*. Abingdon: Routledge, pp. 618–628.

**Rodríguez GA** (2014) *De la consulta previa al consentimiento libre, previo e informado a pueblos indígenas en Colombia*. Bogota: Universidad del Rosario, Agencia de Cooperación Alemana y GIZ.

**Sokhi-Bulley B** (2016) *Governing (through) Rights*. Oxford: Hart.

**Svampa M** (2019) *Neo-extractivism in Latin America: Socio-environmental Conflicts, the Territorial Turn, and New Political Narratives*. Cambridge: Cambridge University Press.

**Taekema S** (2019) Two realist idealists theorizing the rule of law. *Hague Journal on the Rule of Law* **11**, 301–306.

**Wall IR** (2012) *Human Rights and Constituent Power: Without Model or Warranty*. Abingdon: Routledge.

**Cite this article:** del Pilar Cortés-Nieto J, Jokubauskaite G (2021). A counter-hegemonic rule of law? *International Journal of Law in Context* **17**, 128–135. https://doi.org/10.1017/S1744552321000070