International Journal of Law in Context (2021), **17**, 114–121
doi:10.1017/S1744552321000057

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REVIEWS SYMPOSIUM

Private actors in development projects: reflections on human rights between power and resistance

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1 Introduction

The theme of the book symposium 'The Rule of Law in Transnational Development Projects' is, as Bhatt's *Concessionaires, Financiers and Communities* (2020) and Lander's *Transnational Law and State Transformation* (2020) highlight, ripe for critical reflection. The two books reveal the power wielded by private for-profit actors in the co-constitution of legal norms, often at the expense of local communities in development-investment settings. The co-constitution of legal norms by private actors via 'contracts', 'policies' and 'intermediaries' (Bhatt, Lander and Taekema, Book Symposium Introduction in this issue) development permeates rule of law in the public sphere, including in ways that affect the application of domestic and international legal norms relating to human rights. Of course, rule of law may be defined by 'thick' conceptions … as a just system of laws 'consistent with international human rights norms and standards' (UN Secretary General, 2004, para. 6) or 'thin' conceptions with more formalistic requirements that do not prescribe political or social values. Deontological questions aside, even in its 'thinnest' conception, rule of law means that legal norms 'should be publicly promulgated; be predictable in their application; apply to all citizens, including government officials; and be subject to some form of neutral adjudication in the event of disputes as to their interpretation or application' (Trebilcock, 2011, p. 209). Yet, rule of law has often been applied 'to favour entrenched elites over resistance groups, vested interests … over civil disobedience, official actors over unofficial actors and property owners over protestors' (Simpson, 2012, p. 9).

The question that this symposium asks is whether rule of law can also be invoked to delimit the exercise of compulsory private power as well as structural power of global markets and market fundamentalist leanings that allow the too often arbitrary exercise of compulsory private power. In what follows, I will argue that it can by first analysing the dynamics that underlie how structural and compulsory expressions of power co-exist and co-reproduce. This part zooms in on financiers as brokers of the public–private relationship in the context of development projects and highlights trends in outsourcing project appraisal that result in a complex architecture that includes multiple layers of private actors. Following this, the paper analyses the selective recognition of human rights-holders and human rights within this complex power architecture and consequences for these rights-holders. Finally, I propose that structural power that gives way to the arbitrary exercise of compulsory power by private corporate actors should be met with transformative resistance in the form of institutional and productive power that can act as a corrective.

2 Rule of law and development projects: between power and rights

The links between rule of law and human rights tend to be multi-faceted and often defy unidirectional interactions (Peerenboom, 2005). Nonetheless, rule of law is inextricably linked to accountability, including to rights-holders, achieved through the accountable exercise of power. Defining rule of

law from a teleological perspective as 'the progressive reduction of arbitrariness' in how law is formulated and applied (Selznick, 1969, p. 12) or of 'tempering' the exercise of power to avert arbitrariness (Krygier, 2017) is in essence an expression of its accountability function and should equally apply to private forms of power.

Barnett and Duvall define power as 'the production, in and through social relations, of effects that shape the capacities of actors to determine their own circumstances and fate' (Barnett and Duvall, 2005a, p. 3), reformulating Scott's general definition of power as 'the production of causal effects' and of social power as one that 'involves the socially significant affecting of one agent by another' (Scott, 2001, pp. 1–2). Interactions among actors and constitutive relationships lead to four expressions of power: compulsory power, institutional power, structural power and productive power (Barnett and Duvall, 2005a; 2005b). I argue here that, in the international legal arena, these expressions of power may co-exist, interact, reinforce or oppose each other.

Rule of law in its formalistic strands has so far corresponded most directly to establishing limits on compulsory public power, denoting the 'direct control of' public actors 'over the actions' of others (Barnett and Duvall, 2005b, p. 48). I contend that compulsory power is often a function or outcome of structural-power relations that define the political economy of development and permeate its legal structures. For instance, the transnational legal structures around global political economy that Lander analyses (2020) constitute the structural-power background of the private actors' shaping of domestic legal framings through some of the contractual relationships exposed by Bhatt, to produce a significant exercise of compulsory power.

Barnett and Duvall define structural power as 'the structures – or, more precisely, the co-constitutive, internal relations of structural positions – that define what kinds of social beings actors are' (2005b, pp. 52–53). It is structural power that conditions social, political, economic and legal relations among the different actors by 'produc[ing] and reproduc[ing] … internally related positions of super- and subordination, or domination' (Barnett and Duvall, 2005b, p. 55). Lipschutz argues that the attempts fuelled by globalisation and the 'expansive tendencies of private actors' to create distinct global public and private spheres, including through international law, is one such purposive exercise of unchecked and arbitrary structural power (Lipschutz, 2005, p. 235). The domestic arena and the legal relationships that characterise it are no less exempt from such tendencies. As Bhatt's and Lander's work in their respective books meticulously uncovers, domestic legal frameworks that should exercise institutional power and regulate private actors are often themselves shaped by the logic of the markets and the interventions of private market actors. The 'increasingly consolidated body of norms [designed to facilitate and secure global markets] becomes authoritative *within* states seeking global economic integration' (Lander, 2020, p. 55). At the same time, the 'legal, policy and regulatory financial instruments' that development projects are premised on 'can, without corrective actions, … create benefits for their holders (as they are designed to do) but … 'trickle out' issues of rights implementation, at the expense of communities' (Bhatt, 2020, pp. xv–xvi).

3 Financiers in perpetuating global structures of market dominance

There is a fundamental structural-power imbalance between private commercial actors privileged by the logic of integrated transnational markets on the one hand and individual or community rights-holders on the other (Bhatt, 2020, p. 53). The power imbalance is further exacerbated by the involvement of 'financiers' that act as brokers.

3.1 Financiers as brokers of the public–private relationship in development projects

The public–private relationship in development projects is often brokered by financiers, often including one or more multilateral development banks (MDBs), national development finance institutions (DFIs), commercial banks or a combination thereof (Erdem Türkelli, 2020a, pp. 212–213). That relationship is brokered between the corporations undertaking development projects and the host state as

https://doi.org/10.1017/S1744552321000057 Published online by Cambridge University Press

well as between these corporations and affected communities. The multi-tiered and complex financial architecture often results in a harmonisation of 'the financing terms that are common to the lenders, many of which will relate to environmental and social issues' (Bhatt, 2020, p. 95). The brokerage already shapes the compulsory expressions of power that are articulated within contracts, policies or in the practice of intermediaries as Bhatt, Lander and Taekema sketch out in the Introduction to this symposium.

The public actor (host state) may be left between a rock and a hard place with the contractual obligations to the project sponsors on the one side and its sustainable development objectives and human rights obligations on the other (Cotula, 2008). Bhatt illustrates the tension within the host-state context by referencing a clause from a Democratic Republic of the Congo mining concession with wide-ranging stabilisation requirements, resulting in 'a state that is demotivated from taking action to protect human rights or apply new laws that might affect profits' (Bhatt, 2020, p. 96). Consequently, powerful financiers' environmental- and social-policy frameworks and safeguards tend to take centre stage, often displacing domestic legislation and international human rights obligations. When these frameworks are implemented, they have been defined as exercises in box-ticking as opposed to a true and comprehensive assessment of potential impacts (Larsen and Ballesteros, 2013; Richard, 2017).

The positionality of the World Bank (WB) Group as 'a global standard-setting institution', in particular, has been important in the emergence and elaboration of safeguards and performance standards in development-project financing by other MDBs as well as private banks (Lander, 2020, p. 182). WB's long-standing practice of avoiding direct and explicit engagement with human rights legal obligations for itself and its borrowers is often replicated by other MDBs (Erdem Türkelli, 2020b), expanding 'human rights-free zone[s]' (UNGA, 2015, para. 68) across the spectrum. Even when a human rights agenda is explicitly espoused, it emerges from a market-based discourse around strategic risk calculations of potential profit losses or litigation (Sarfaty, 2012, p. 24) and strongly echoes the global audit culture (Lander, 2020, p. 36) that is more performative than substantive. Thus, the 'business case' for human rights as opposed to a moral, ethical or legal imperative is normalised in ways that do not challenge the dominant structural-power relations.

3.2 Outsourcing and diffused responsibilities for project appraisal

Financiers' frameworks also mandate the outsourcing of development-project preparation and implementation tasks to other private actors such as consultancies, in further distancing the actors planning and undertaking development projects from the individuals and communities that are affected by these projects. As Bhatt (2020, p. 33) and Lander (2020, p. 154) expose, the consultations with potential affected communities, particularly when a project involves involuntary resettlement, are routinely conducted by external private consultants or law firms hired by project sponsors. The benchmarks used by these advisers or consultants are often based on the requirements of the financiers' safeguard policies but tend to disregard applicable obligations, including human rights obligations, under domestic legislation and international law. Reportedly, 'consultants are willing to bend to their principals' wishes and to alter reports on demand' and disinclined to author conclusions unfavourable to the financiers or the sponsors because they want to be considered for upcoming projects (Kornfeld, 2020, p. 96, footnotes omitted). Private companies consulting on or supervising development projects may also become 'ineffective' when their recommendations are continuously ignored by project sponsors or borrower agencies (Erdem Türkelli, 2020a).

Additionally, the first stage of project appraisals by MDBs may rely on information gathered not by their own personnel or by host-government agencies, but by third parties to cut down on transaction costs. For instance, the WB decided to rely on information collected and provided by a third party (the GET Fit Program) 'for the appraisal of all future projects [in renewable energy in Uganda], to be supplemented or verified as the Bank considers necessary for the completion of its due diligence' to decrease transaction costs (WBG, 2014, p. 7, para. 22). The Secretariat of the GET Fit Program had been outsourced to a consulting firm as its Project Implementation Unit (PIU) (WBG, 2014, p. 7,

https://doi.org/10.1017/S1744552321000057 Published online by Cambridge University Press

paras 18–19), which amounted to an outsourcing of WB's primary information-gathering duty in a process requiring inclusiveness, complete transparency and accuracy. Rights-holders affected by projects thus find themselves in the midst of a constellation of private actors that individually or collectively broker, devise, interpret and reinterpret legal norms, including those that are meant to protect their rights.

4 Selective recognition of rights-holders and rights considerations

4.1 Circumscribed voice and agency

The social and environmental safeguards drawn by MDBs or DFIs circumscribe the perimeters of who among the population is accorded a voice and a measure of agency, contrary to rights and entitlements that may be nominally available to everyone under domestic law in the host country. The category of 'affectedness' often ascribed arbitrarily (Jokubauskaite, 2020, pp. 9–10) is thus open to the discretionary interpretation of powerful financial actors such as MDBs that ultimately decide on 'the entitlements [for affected persons or communities] (such as participation in decision-making process or access to project-related information)' (Jokubauskaite, 2018, pp. 711, 709). The clear losers in this exercise of compulsory power are those individuals or communities who already experience difficulties in political and legal access. Bhatt and Lander highlight the various ways in which MDBs, intermediaries and borrowers demarcate who is considered 'affected' by a project – who benefits from 'indigenous' status or considerations of 'vulnerability' and is thus entitled to legitimate claims (Lander, 2020, p. 192; Bhatt, 2020, p. 19).

My own research has focused on children – an often unseen and unheard but disproportionately affected group in development projects. Beyond prohibitions relating to harmful and hazardous child labour, particularly in its worst forms, MDBs' safeguarding policies provide neither child-specific protections nor child-friendly mechanisms of information, consultation and remedy beyond considering children a 'vulnerable group' (Erdem Türkelli, 2021). Coupled with the non-recognition of children's formal legal agency under domestic systems, their invisibility within safeguard policies has meant that children are further disenfranchised as objects in development projects as opposed to active subjects. Consequently, the need for specific safeguards for children including consultation and consent requirements, specific protection and more expeditious remedies, as children may be disproportionately affected, are entirely disregarded (Erdem Türkelli, 2020a).

Examples of invisibility abound. For instance, during the appraisal process, the Bujagali project identified a number of child-headed households and child landowners prior to the resettlement of affected communities in 2001. Yet, children – even those heading households – were not consulted. '[B]ecause WB safeguards and standards did not require the WB staff to evaluate the project with respect to Uganda's international human rights and labor law commitments … the substantive rights of the project-affected individuals, including children, were easily sidestepped' (Erdem Türkelli, 2020a, p. 238). Though the environmental and social safeguards may formally accord 'procedural rights for people to participate and be heard in the development of a project and its implementation' (Dann and Riegner, 2019, p. 543), whether such procedural rights are available in practice to rights-holders such as children who are already disenfranchised is unclear. The consequences of invisibility are often dire for children affected by development projects and may range from adverse impacts on educational and health outcomes to susceptibility to sexual exploitation (Wachenfeld, 2012).

4.2 Rights selectivity

There is also an element of rights selectivity in how safeguards are valued and implemented in addition to the selectivity of the definition of 'affectedness' in a project, 'the boundaries [of which] are drawn by a straightforward, top-down exercise of authority' deciding who is included and who is excluded from entitlements extended to rights-holders (Jokubauskaite, 2018, p. 714). For instance,

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'institutional responses to different children's rights issues' in development projects financed by MDBs diverge (Erdem Türkelli, 2020a, p. 239). Only 'the most serious violations of human and children's rights, amounting to criminal behavior such as sexual abuse and exploitation' receive immediate responses, while violations of economic and social rights such as the right to education or health, 'attract … less scrutiny', even if they are longer-lasting (Erdem Türkelli, 2020a, p. 240).

An adequate response by financiers to violations of human rights standards or lack thereof in turn conditions how other private actors such as corporate project sponsors will engage with these standards. For instance, the WB's review of its involvement of the Uganda Transport Sector Project that was cancelled after allegations of sexual abuse and exploitation of female children were substantiated revealed 'a tension between the contractor's view of its business performance as measured by the output of delivered services/goods compared to a more holistic view of good performance that would require avoiding or mitigating social externalities' (Erdem Türkelli, 2020a, p. 235).

Despite the global discourse around the indivisibility and mutually reinforcing nature of human rights within a global rule-of-law framework, there is clear rights selectivity in terms of what types of rights are privileged as well as the (extremely high) threshold of rights violations that are deemed important to address in a timely manner. This is of course also because standards around financier and sponsor behaviour are fragmented and piecemeal when it comes to human rights issues, only providing procedural guarantees for some selected rights in specific issue areas such as labour or resettlement or to specific groups such as indigenous communities (Jokubauskaite, 2020) and doing so through contracting and bargaining (Bhatt, 2020; Lander, 2020).

The fragmentation is at no point more visible than when rights-holders seek remedies for rights violations. Although internal complaints mechanisms at the financier level 'push … forward an element of an international rule of law' (Dann, 2017, p. 432), there is no guarantee of effective accountability to rights-holders given the ability of financiers to 'single out which rights-holders [and which rights] are entitled to a transparent review of policies, decisions and operations affecting them without reference to international standards and without external oversight' (Erdem Türkelli, 2020b, p. 261).

5 Counterbalancing the structural power of market dominance and the compulsory power of private actors with transformative resistance

Financier policies and safeguard frameworks that broker public–private relationships in favour of corporate actors delimit voice and agency, pick and choose among rights-holders, introduce rights selectivity into development projects and work to uphold existing power structures. Echoing Krygier, the counterbalancing exercise against structural and compulsory types of power that private actors possess centres on halting its arbitrary exercise by empowering individuals and communities with institutional power and by employing the productive and discursive power of transformative resistance.

The empowerment of rights-holders with institutional power starts with recognising the centrality of rights-holders to the development process and a 'people-first' (Bhatt, 2020) approach to development projects. Institutional responses to arbitrary exercises of compulsory and structural power fit well within rule of law's teleological interpretations. Relying on the range of already-existing obligations under domestic and international law towards rights-holders would overcome issues linked to rights and rights-holder selectivity. Opening up the structural power of financiers to external review, including judicial review, would also be another step forward for rule of law through an exercise of corrective institutional power (Erdem Türkelli, 2020b). For groups such as children, institutional empowerment may include requirements to pay attention to specific impacts on them, the formal recognition of their rights to be consulted in development projects and formal requirements to make appropriate remedies available (Erdem Türkelli, 2021). Of course, for disenfranchised groups, being able to garner institutional recognition of their rights requires a process of bargaining and brokerage often not 'by' them, but 'on their behalf', within the existing structural-power architecture. Hence, institutional empowerment is but a first step.

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Transformative resistance can act against the constraining effects of deeply unequal and inequitable structural-power relationships within the globalised economy. Following Foucault (1976), Barnett and Duvall conclude that any form of power generates resistance in the ordinary meaning of the term (Barnett and Duvall, 2005a). What I mean by transformative resistance, however, is resistance expressed in terms of collective action by those experiencing injustice. Brighenti argues that resistance 'shows the otherwise of [structural] power, that is, a way of composing human relations that is external to the logic and the action of power and is capable of leading towards a common world' (Brighenti, 2011, p. 65) and is therefore transformative. Transformative resistance may include the use of institutional and discursive power by '[t]hose seeking to put restraints on capital' (Lipschutz, 2005, p. 243) domestically and internationally. The alternatives that transformative resistance produces depend on those who resist and the matrix of structural, compulsory, institutional and productive power dynamics underlying the particular development context. Of course, those alternatives may or may not be conceptualised in a rule-of-law framework.

Feminist theory has contributed much to the understanding of productive power as transformative resistance to relationships of domination created by those exercising structural power. To dismantle domination relationships,

> 'Those of us who are not part of the ruling race, class, or gender, not a part of the minority which controls our world, need to know how it works. Why are we – in all our variousness – systematically excluded and marginalized? What systematic changes would be required to create a more just society?' (Hartsock, 1990, p. 159)

'[R]eject[ing] the powerful's definition of [one's] reality' can in itself be 'an act of resistance and strength' (hooks, 2000, p. 92). Structural power is thus counterbalanced by discursive power to instigate social and legal change. Of course, we should not have the illusion that legal challenges to the arbitrary structural and compulsory power of private actors will readily translate into fundamental transformations. Transformation is less likely to be a function of rule of law and more likely an outcome of sustained resistance by societal actors experiencing disenfranchisement and injustice.

In the legal realm, one area in which the productive power of resistance links with transformation is the idea that people are the original authors of their own (human) rights (Baxi, 2007). Certainly, 'the "rule of law" and "human rights" in the development context' can be and are often co-opted into 'the liberal, market-oriented versions of those concepts' (Pahuja, 2011, p. 245). Yet, legalised human rights are also often invoked as correctives to the abuses of compulsory power, albeit with the caveat of incrementality that does not fundamentally challenge existing structural-power relations. When children, notably indigenous children experiencing intersectional disenfranchisement, act as plaintiffs in climate-change litigation, for instance, they are seeking to use their legalised rights claims for transformative purposes. Because of their emancipatory potential, the idea and discourse of human rights can also challenge structural-power imbalances when rights demanded at the grassroots level are not (yet) legalised.

Productive power of discourse may equally rely on global justice. Sornarajah notes that '[t]he employment of [global] justice as an argument against the rule of [structural] power lends great force to … resistance', which comes not only from less powerful states, but also from

> 'the lower levels, protests by tribal people affected by mining, protests against land grabs to erect new manufacturing plants for multinational corporations, prevention of sweated labour at multinational factories, and farmers' protests at lowering tariff barriers that affect prices of their produce.' (Sornarajah, 2016, p. 1985)

Regardless of whether transformative resistance adopts a rights language, a global justice language, both or something else entirely, it has the potential to unseat structures of market dominance through

https://doi.org/10.1017/S1744552321000057 Published online by Cambridge University Press

the productive power of discourse, to put in place alterative structures of just, non-extractive and inclusive development.

Conflicts of Interest. None

Acknowledgements. I would like to thank the conveners of this review symposium Dr Kinnari Bhatt, Dr Jennifer Lander and Prof. Dr Sanne Taekema for this opportunity to engage with these two important contributions to the field. This contribution was written as a part of my Postdoctoral Fellowship with the Research Foundation Flanders (FWO) No: 12Q1719N. The themes explored in this contribution also relate to the New Frontiers in International Development Finance (NeFDeF) project in which I also participate.

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Cite this article: Erdem Türkelli G (2021). Private actors in development projects: reflections on human rights between power and resistance. *International Journal of Law in Context* **17**, 114–121. https://doi.org/10.1017/S1744552321000057