

A just rule of law?

Holston, J. 2008. *Insurgent citizenship: disjunctions of democracy and modernity in Brazil*. Princeton, NJ: Princeton University Press. 416 pp. Pb.: \$27.95/£19.95. ISBN-13: 978-0-691-14290-6.

Mattei, U. and L. Nader. 2008. *Plunder: when the rule of law is illegal*. Oxford: Blackwell Publishing. 296 pp. Pb.: £19.99/€23.00. ISBN-13: 978-1-405-17894-5. Hb.: £55.00/€63.30. ISBN-13: 978-1-405-17892-5.

During fieldwork in Mexico in 2007, I suggested to a leader of a movement called Citizen Power, which promoted participation in municipal politics, that they might pay more attention to law. I had in mind that they could take municipal governments to court and also work to improve the administration of justice. Holding power to law while reforming it would help to push citizenship beyond participating in politics, freeing citizens from the arbitrary rule of power. He replied that they regarded the law as a tool of political and economic elites.

Was the Citizen Power leader right to query the rule of law as a road to justice? I will review the two books by considering how they help to answer that question and, more broadly, what prospects their authors hold out for a just rule of law.

Imperial rule of law

There are many critiques of the idea of the rule of law. Marx insisted that the rule of law was an ideology that served as a mask for the defence of property, while Schmitt argued from the right that it masked the interests of the liberal politicking that he profoundly despised, hiding the state of exception through which even liberal constitutions come into being. In a similar vein, Asad has recently argued that law in its abstraction presupposes the state power that makes it concrete – it is states that rule rather than law (Asad 2004). Agamben has claimed that the rule of law has increasingly entailed its exception – key to the contemporary rule of law is the ability to strip people of their legal status, reducing them to bare life (Agamben 2005).

The legal theorist Ugo Mattei and anthropologist Laura Nader add to those critiques the argument that the rule of law is imperial. It is an ideology that serves to justify plunder, understood as the ‘often violent extraction by stronger international political actors victimizing weaker ones’ (p. 2). Their examples fall into three groups. First, particular laws have facilitated plunder: the colonial appropriation of North American lands was justified by the *terra nullius* legal doctrine (pp. 104–5); Nader cites her recent return to the Oaxacan site of her fieldwork to argue that NAFTA has enabled the plunder of Mexican agriculture (p. 136); one of the later chapters writes, in a rather different vein, of the ‘plunder of liberty’ in the attack on civil liberties in the USA since 2001 (pp. 171–91). Second, Mattei and Nader argue that whole systems of law have been imposed through imperialism, from the British law codes in India to the

legal reforms pushed by institutions such as the IMF and World Bank, linked to the Americanisation of international law (pp. 20–2, 158–67). Third, they show how empire and its accompanying plunder has been justified by claiming that certain peoples ‘lack’ the rule of law (pp. 67–76).

The book’s subtitle – *When the rule of law is illegal* – is provocative. There seem to be three senses in which the rule of law is, for them, ‘illegal’. First, it is often rhetorical and masks the fact that policies supposed to further the rule of law, such as unilateral war, are themselves illegal (p. 121). It is also immoral or unjust by any reasonable standards in that it justifies plunder, which is ‘contrary . . . to social justice, to the basic needs of the people, and for the planet’ (p. 202). In the final chapter, they concede that ‘[t]o judge aspects of the rule of law to be illegal in a fundamental sense requires indigenous legal standards separate from nation state and modern globalized legal structures’ (p. 199). They maintain that the imperial rule of law offends what they variously call local law, popular law, social justice, the counter-hegemonic use of law, and indigenous law or custom (pp. 202–11).

Despite their sympathy for ‘local legal traditions’, Mattei and Nader are also critical of legal anthropology. Simon Roberts complained in 1978 that the field was bogged down in the question of whether other societies did or did not have law (Roberts 1978; Fuller 1994). Mattei and Nader note that there was nothing dull about the question – it was key to imperial plunder. On the one hand, many anthropologists found themselves testifying that other societies lacked a sense of legal property, for example, so legitimating the theft of their lands. On the other hand, Gluckman’s argument that the Barotse did have something comparable to Western law, while seeming generous, simply helped to assimilate them into the colonial order (pp. 100–10). Cohn was one of the first anthropologists to pay attention to colonial officers using ideas of ‘native law’ to construct and justify colonial law (Cohn 1987).

Mattei and Nader’s argument is forceful to the point of polemic. For example, they extend ‘plunder’ to include the US electoral ‘plunder’ of 2000 as well as the ‘plunder of liberty’ after 9/11, which is provocative but risks inflating the term (pp. 176–91). Perhaps that is justified by the times – politicians all over the world have found in the ‘rule of law’ that panacea that ‘democracy’ was in the 1980s and ‘civil society’ in the 1990s. Thomas Carothers, in a 1998 essay entitled ‘The rule of law revival’, noted that the ‘rule of law’ was already being invoked as a condition of foreign aid (Carothers 1998). The Mexican President elected in 2006 has rarely missed a chance to insist on the rule of law, however little that impressed the Citizen Power leader.

Law ruling citizens unequal

In his study of the settlers of São Paulo’s urban peripheries, the anthropologist James Holston finds that the rule of law has worked historically to ensure the inequality of citizens. Holston insists, like Mattei and Nader, that law has done so not just in its breach but precisely in its rule. Impunity has certainly been an issue and Holston cites the adage, familiar throughout Latin America: ‘for friends, everything; for enemies, the law’ (p. 5). That does not just apply to personal friends and enemies, he notes, but to elites and non-elites: the law is used as a weapon by the former against the latter. In a similar vein, the political scientist Guillermo O’Donnell wrote in an essay on ‘the (un)rule of law in Latin America’ that:

Latin America has a long tradition of ignoring the law or, when acknowledging it, of twisting it in favor of the powerful and for the repression or containment of the vulnerable. When a shady businessman recently said in Argentina, ‘To be powerful is to have [legal] impunity,’ he expressed a presumably widespread feeling that, first, to voluntarily follow the law is something that only idiots do and, second, that to be subject to the law is not to be the carrier of enforceable rights but rather a sure signal of social weakness. (O’Donnell 1999: 312)

Holston counters that Brazilian elites do not just ‘twist’ law to their own ends – law is already skewed towards them. Indeed, a common way of escaping law was not simply by ignoring it but by using law to draw things out – one land dispute had lasted 420 years, for example (pp. 220–32). Justice takes time, but how much time is critical. Holston’s main example of the rule of law creating inequality is ‘residential illegality’. The properties acquired by many of his informants in São Paulo’s peripheries since the 1950s were not properly titled and settlers have since then been classified as illegal residents and marginalised as such (pp. 206–13).

Indeed, Holston finds that ‘treating unequal people unequally’ has been a principle and not just the practice of Brazilian law (pp. 25–33). He notes that Brazilian citizenship has been more inclusive than US citizenship, which has consistently excluded groups from citizenship by law (pp. 52–62). But although Brazil has been more inclusive, Holston argues, it has been less egalitarian. No citizenship has ever been wholly egalitarian, he admits. The French constitution pronounced formal equality before immediately qualifying it: people must be treated equally *except as regards merit* (p. 26). The Brazilian constitution, though, limited itself to equality before the law and even that did not stretch far. All were entitled to a fair hearing but, for example, only graduates were entitled to an individual jail cell (pp. 27–9).

Plunder is not the focus of Holston’s book, but it is easy to see how inequality as citizens makes for economic plunder. First, it allows people to profit from illegality: the fraudsters who sold the lands of São Paulo’s peripheries obviously made a handsome profit, while a generation of politicians and lawyers have had settlers at their mercy (pp. 227–32). Second, inequality helps to justify exploitation that is perfectly legal, such as the paying of low salaries.

Many of Holston’s observations hold true for Mexico. Mexico has like Brazil been fairly inclusive, although the Mexican Revolution introduced a principle of equality absent in Brazil and enshrined it in the progressive 1917 constitution.¹ But a constitutional right needs law in order to make it an effective legal right: only in 1971, for example, was the constitutional right to housing met with legislation designed to provide some social housing. Mexicans have been entitled to little *as citizens* and the corporatist state rewarded groups (and especially their leaders) for loyalty (Lomnitz 2001; Gordon and Stack 2007). I found, meanwhile, that plunder was rife in Mexico and some of that plunder was illegal by any reckoning. One leader, for example, was charging indigenous peasants an exorbitant fee for being allowed to set up street stalls on festival days. The county mayor was, allegedly, authorising land use changes to allow his cronies to build housing developments. But other plunder appeared to be legal. Maquila companies were allowed to set up sweatshops in the region, while, as is

1 During the 20th century, for example, the Mexican government promoted the idea of cultural *mestizaje* (mixing, normally racial), although that has led to Indians being considered marginals by definition.

well known, the legal owner of the formerly public company Telmex recently became the richest man in the world.

My research also looked at a kind of plunder, linked to citizenship, on which Mattei and Nader as well as Holston are strangely silent. Holston notes that the United States has been 'exclusively egalitarian' without pointing to the contemporary exclusion of millions of undocumented workers and their families. Mattei and Nader do not point, either, to the economic plunder enabled by that legal exclusion. De Genova has argued for a study of the history of immigration policy in the United States, suggesting that US law has effectively maintained a pool of cheap labour by keeping tens of millions of labourers in a state of illegality (De Genova 2002). I conducted recent fieldwork in the East Bay Area, near the Berkeley that is home to Nader and Holston, and found that people were happy to live off the proceeds of illegal labour, while employers were effectively immune from criminal prosecution. Many liked to complain but there was little political will to push for comprehensive reform, beyond some measures designed to place pressure on immigrant labourers and others designed to take the heat off the situation.²

Toward a just rule of law?

Reading Mattei and Nader as well as Holston, I came to feel that I was wrong to advise the Citizen Power leader to take law more seriously. In showing how unjust the rule of law can be, however, the authors give all the more reason to take it seriously rather than simply ignoring it. Their books also hint at the following paths towards a just rule of law.

Championing local or indigenous or popular law

Mattei and Nader do not quite give up on the rule of law. Their subtitle hints that the rule of law is not always illegal and may even be just. First, although they spend much of the book accusing the United States of using the rule of law as a means to an end for plunder, both in colonial and post-colonial times and in recent years, they note that during the Cold War the United States did stand for the rule of law and democracy, as a counter to Soviet totalitarianism and imperialism. In other words, the Cold War was a kind of 'special period' during which the United States showed the political will required to hold itself and others to law (pp. 200–1).

Second, Mattei and Nader contemplate the *counter-hegemonic* rule of law. Their final chapter takes up the cause of the various non-imperial uses of law that I have already mentioned:

2 Exclusion in the contemporary USA takes several forms. The refusal to legalise the long-term residence of tens of millions of immigrants is perhaps the most obvious. But the imprisonment of astonishing numbers of African Americans (and other minorities) is arguably another kind of exclusion. Meanwhile, the imprisonment of 'enemy combatants' at Guantánamo, which I mention below, might also be considered a kind of exclusion and one with historical antecedents. The Declaration of Independence already excluded Native Americans as a kind of 'enemy combatants', judging the illegality of British rule by the Crown's signing of treaties with them.

it lies outside the purview of state law or cosmopolitan law. It might involve alliances or exploit counter-hegemony, but it remains a different force not grounded, as is the imperial rule of law, in the needs of corporate capitalist development masked as efficiency... Their efforts are legitimized by social necessity. Innovative legal restructuring may be what will allow us to pass this planet on to our grandchildren. (p. 211)

In other words, salvation may come from sources of law other than those of the imperial state and its allies. For example, Mattei and Nader observe of the wave of protests in the Mexican state of Oaxaca in August 2006 by a coalition of teachers, peasants, workers, directed at removing the state governor from office, that: 'People [in those protests] began to contemplate their relations with the state based on indigenous Oaxacan understandings of collective responsibility and customary law' (p. 205).

Being local and/or collective is of course no guarantee of being just.³ There are local hegemonies and states have sometimes undone them, while local collectives often turn out to be complicit in state hegemony. Mexico's agrarian reform is an example. On the one hand, the federal government undid the local hegemonies of *hacienda*-owners. On the other hand, it replaced those local hegemonies with corporatism: peasant collectives were bound into the 'peasant sector' of the ruling party, not least because they had only use rights to the lands, which remained state property. More broadly, the political scientist José Antonio Aguilar has complained that the Mexican state left power in the hands of all kinds of collectives, many of them local: it did so both by sins of commission, preferring to work through often unscrupulous leaders, and of omission, by failing to provide public services as well as security and justice. In this context, community autonomy has been used to justify a variety of nefarious practices: imprisoning Protestant converts for not contributing to Catholic town festivals, for example (Aguilar Rivera 2004).

Seeking post hoc legalisation

Holston observes that the illegal settling of São Paulo's peripheries helped to *unsettle* the hierarchy of Brazilian society. Citizens went beyond the law in order to build (literally) a measure of autonomy or indeed to survive: '[t]he very illegality of house lots in peripheries makes land accessible to those who cannot afford the higher sale or rental prices of legal residence' (p. 207). Moreover, the never-ending work of building their homes, known as *autoconstrução*, gave settlers a sense of entitlement – they had played their part in building the city. That sense of entitlement made for a kind of 'insurgent citizenship', one that challenged the inequality of 'historical citizenship' and fuelled, for example, the election of Lula, who was from the urban peripheries (pp. 5–6).

3 In the quote above, Mattei and Nader actually suggest several different grounds for a just rule of law, which share little more than not being imperial. Together with the local and indigenous, they ground law in 'social necessity' as well as 'the people' (p. 211). In the case of the latter, Holston cites disapprovingly Lula's response to accusations of corruption in his government: 'the ballot box will absolve the PTistas accused of corruption' (pp. 272–3).

If illegal residence is a road to justice, it is not the rule of law's road to justice. Arguably peripheral settlers were themselves profiting from illegality. But Holston notes that the urban poor had not yet given up on law:

residential illegality eventually prompts a confrontation with legal authorities in which residents generally succeed, after long and arduous struggle, in legalizing their precarious land claims. Illegal residence is, therefore, a common and ultimately reliable way for the urban working classes to gain access to land and housing and to turn their possession into property. (p. 207)

The experience of 'illegality' pushed them back to national law, to 'make law an asset', even if simply to keep that law at bay (p. 207). That is classic counter-hegemony. However, Holston is ambivalent about post hoc legalisation. Legal limbo had historically kept people unequal and, even when used by subalterns, could still mean violence and impunity (pp. 271–5).

My fieldwork in Mexico suggests likewise the need to distinguish between legalisation as a move toward a just rule of law and legalisation that simply creates opportunities to profit from illegality. Elites were fully complicit in the 'informality' about which they liked to complain: they themselves hired workers without giving them legal benefits; politicians and leaders lived off the protection they afforded to informal businesses; lawyers, of course, had a field day. Organised crime has been parasitic on the informality of so many people's livelihoods – the first to be charged protection by the formidable mafias were street sellers of pirate music and imitation clothing. Recent attempts at a government crackdown on organised crime, itself bypassing law, has unleashed an extraordinary wave of violence. In turn, lynch mobs in lower-class and rural areas as well as armed self-defence groups in wealthy suburbs claim to dispense the justice that the government has failed to provide.

Holding power to (state) law

Three other possible roads to a just rule of law are less explicit in the books under review. Mattei and Nader largely dismiss the traditional idea of the rule of law: to hold sovereigns – and by extension all power – to law. Holston seems ambivalent: the law was not just to begin with. The legal anthropologist Julia Eckert, though, is more optimistic. She notes, on the one hand, that legal anthropologists have focused on the multiple sources of law: not just the local legal traditions celebrated by Mattei and Nader but also globalised traditions such as human rights. On the other hand, Eckert's informants among the urban poor of Delhi had turned increasingly to *state* law and with some success. 'Legalism from below', as she terms it, includes seeking post hoc legalisation, but it also includes holding government and other kinds of power – such as business – to law. She quotes one of her informants: 'Law makes us illegal, but the business others make from us being illegal is even more illegal. We want to use the law against them' (Eckert 2006: 54).

That was part of my idea in suggesting that Citizen Power take law seriously. Mexicans have long tried to hold power to law but have only succeeded on occasion. In fact, the movement that gave birth to Citizen Power, Civic Alliance, tried during the 1990s to protest the lack of transparency in government by applying for injunctions

called *amparos* (literally, protections) on the grounds of their constitutional rights to petition and information. The attempt failed and it is worth noting that the same legal procedure, often celebrated as the ultimate defence from arbitrary government, is used much more often to drag out proceedings to the detriment of the poor. It also serves to keep the rich out of prison: a good (and usually expensive) lawyer can get an *amparo* against an arrest warrant on the constitutional grounds of *habeas corpus* rights.

Making formal equalities significant

I have mentioned Aguilar's complaint that the Mexican state has sacrificed individual rights to loyal collectives and their leaders: not just to local communities but also to trade unions and social movements, often linked to political parties. O'Donnell insists, in a similar vein, that the rule of law rests ultimately in 'the formal *but not insignificant* equality of legal persons that are attributed autonomous and responsible agency (and . . . the basic dignity and obligation of human respect that derive from this attribution . . .)' (1999: 310; emphasis added). O'Donnell notes that political rights in Latin America have in recent years, through electoral competition, been grounded increasingly in the formal equality of 'one person, one vote'. But he laments that civil rights such as access to justice have not followed suit – equality before the law is undermined by the appalling state of the justice system in many Latin American countries (O'Donnell 1999).

Mattei and Nader are sceptical of formal equalities, arguing that US champions of individual rights such as Chief Justice Warren were simply furthering the imperial rule of law, by opposing affirmative action for example (p. 138).⁴ Holston has been ambivalent. Holston and Caldeira agreed with O'Donnell in an earlier essay that civil rights in Brazil had lagged behind political rights, but had difficulty accepting O'Donnell's distinction between those formal equalities and the broader social justice of wealth redistribution (Caldeira and Holston 1999). In the book under review, Holston argues that formal equalities (whether before the law or as Brazilian citizens) co-existed with a grossly unequal substantive distribution of rights as well as broader social inequality (p. 7).⁵

4 A similar argument could be made about the rule of international law. The political scientist Herfried Münkler distinguishes hegemony from empire in the following terms:

Hegemony is supremacy within a group of formally equal political players; imperality, by contrast, dissolves this – at least formal – equality and reduces subordinates to the status of client states or satellites. (2007: 6)

Law is not in the index of Münkler's book, but it would seem important to his distinction between hegemony and imperality, since the 'formal equality' to which he refers is presumably a figure of international law. For Münkler, the rule of international law limits hegemony, keeps it from spilling into empire. By contrast, Mattei and Nader argue that the 'rule of law' has functioned (largely) as an imperial construction – the rule of law tends to legitimate empire, not to limit it.

5 Some confusion surrounds the terms 'formal' and 'substantive'. Social scientists sometimes use the distinction in the sense of theory and practice: what the law says as opposed to what is done in practice. O'Donnell defines 'formal' instead in terms of procedure – presumably as in legal formalism – but also in terms of universality: formal equalities are independent of particular distinctions, such as ethnicity or gender (O'Donnell 1999). Formal equality is, in other words, *equality by abstraction*. Holston follows that latter meaning: he notes that the substantive distribution of rights in Brazil is not based in the formal equality of national membership but precisely in distinctions such as 'education,

I feel that O'Donnell's point is still provocative. Social scientists are no doubt right to highlight the social inequality and unequal rights that often surround formal equalities, while also defending the distribution of rights to collectives as well as individuals. But perhaps they risk losing sight of those formal equalities in the process, which is why O'Donnell insists on them. Movements like Citizen Power could, as O'Donnell suggests, expand on the formal equalities of voting rights by extending them to civil rights such as freedom from arbitrary imprisonment, while at the same time working to address social inequalities through the substantive distribution of rights to health and education, for example.

Civil sphere ruling through law

While Eckert and Aguilar write of state law, the sociologist Jeffrey Alexander has argued that law can be just if it is under the thumb of the civil sphere. The civil sphere is made up, for Alexander, of organisations like the NAACP that fight for civic values in non-civil spheres such as politics, the market, family, community and religion. Being civil is about behaving in a way not dictated by self-interest or by some kind of dogma or by loyalty to a particular community. The civil sphere achieves its power over non-civil spheres through 'communicative institutions' such as the media and 'regulative institutions' that include voting, office and the law. With respect to law:

[L]aw comes in different guises, and in this sense it is misleading to speak of 'law' per se. Law often concerns itself with functional adaptation... with creating more efficient means of administration in order to allow actors more effectively to secure material goals or communities to promote their particular values...

Mattei and Nader also note the stress on 'efficiency' in many versions of the rule of law, but Alexander continues:

these noncivil purposes and effects do not exhaust what law is about... The aspiration toward which democratic law aims is a civil society. In fact, to the degree that the civil sphere gains authority and independence, obedience to law is seen not as subservience to authority, whether administrative or communal, but as commitment to rules that allow solidarity and autonomy... (2006: 152)

In other words, the civil sphere's rule of law differs from counter-hegemonic uses of state law in that it contests the state monopoly of law and also binds itself to law. First, law is 'democratic', for Alexander, when it is subject to the power of civil organisations rather than being a mere instrument of the state. Second, if the 'civil sphere' itself has

property, race, gender, and occupation' (p. 7). Turner has argued, furthermore, that formal equality is only ever one axis of citizenship, which also distributes rights according to differential contributions to the nation, so war veterans for example tend to have special rights (Turner 2001). I have kept formal equalities in the plural, though, because O'Donnell himself seems to conflate equality as citizens and equality before the law, which is not usually limited to citizens. The formal equality of individuals need not be incompatible, I would add, with a substantive distribution of rights to collectives (such as indigenous peoples).

power – as Alexander insists it must – it must hold its own power to the law. Civil-sphere organisations are themselves committed to law and that is part of what makes them civil.⁶ Alexander does not spell this out, but the civil rule of law must extend beyond legislation – having a say in law-making – to include how law is geared to constitutional principles, such as the civil rights on which O'Donnell insists, as well as how law is implemented and how justice is accessed. That may sound utopic, but Alexander insists that the US civil sphere has made headway in subjecting law to the civil – the role of the NAACP in the civil rights struggle is a key example.

Mattei and Nader and Holston would query aspects of Alexander's argument. Holston does posit an egalitarian drive in US society, although he does not necessarily identify it with civil society. In any case, Alexander's account of the inclusivity of the US civil sphere sits uncomfortably with Holston's account of the exclusivity of US citizenship, although the ACLU has defended immigrant rights in recent years. Meanwhile, Mattei and Nader treat Guantánamo as the plunder of liberty in the name of law, which makes Alexander sound rather optimistic:

[t]he nature and limits of torture for military prisoners have . . . been intensely debated in the American civil sphere, and efforts have been mounted to curtail the conservative government's violations of the Geneva Convention, culminating in Congressionally-supported legal guarantees. (Alexander 2008: 189)

Mattei and Nader would also worry about Alexander's focus on the USA and the fact that he refers to other countries mainly to note their lack of civility and rule of law. They might also wonder whether the civil rule of law is sustainable in the urban peripheries of Brazil or India or Mexico; whether it is dependent on US-style courts and, more broadly, on the common law tradition; and what happens to the sovereignty that arguably makes law, law.

I believe that Alexander's account of the push on law by US civil-sphere organisations could still inspire their Mexican counterparts. My informants shared many of Alexander's civic values, although inflected by Catholicism. Some of the more successful civil organisations also operated under the auspices of the Church – Citizen Power was sponsored by a Jesuit university and relied on the support of local parishes. That might seem to jibe with Alexander, who lists religion as a non-civil sphere, but he qualifies that by conceding that religion can often be quite civil (p. 191). More problematically, I have noted that Citizen Power, together with many of my informants, was deeply sceptical of law as a road to justice. There were, again, good reasons for that scepticism: I have mentioned the difficulties faced by Civil Alliance in using the *amparo* to achieve their civil ends. To give another example, a local human rights group to which I belonged in 1999 responded to the rape of a minor by trying to 'spread the word', since the prospects for judicial repair were so remote, not least because the perpetrator worked for the municipal government. Rather than admit defeat, leaving law to a state that has shown little commitment to it, I feel that civil-sphere organisations like Citizen Power could bring to bear on law the deep civic commitments shown by my informants.

6 Eckert finds that her informants did feel bound by law, although seemingly in terms of efficiency: they accept the idea of an Indian state regulating society (p. 56).

Conclusions

Both books suggest, then, that movements like Citizen Power as well as disciplines such as anthropology should take the rule of law quite seriously. The authors show how unjust the rule of law can be, as I have said, but they also hint at paths to a *just* rule of law that the Citizen Power leader should not dismiss so readily – and toward which anthropology might yet contribute.

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