PLUNDER
WHEN THE RULE OF LAW IS ILLEGAL

Ugo Mattei and Laura Nader

Blackwell
Publishing

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In memory of Edward Said

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Preface

This book resulted from an almost casual scholarly encounter. Independently from each other we produced, from our different academic perspectives, papers dealing broadly with the issue of legal and institutional transformations produced by the globalization of the economy. Having been good friends and UC colleagues for quite some time, we exchanged drafts. At the end of the reading, we concluded that we shared a vision about the past and present role of the law in violent political and economic transformations such as the ones we are living through today. Thus, we decided to deepen our exchange in order to make this common vision take better shape and possibly materialize in some joint effort.

It quickly appeared from our conversations that the issues we were discussing had broad political meaning and were potentially of general interest. They had to do with the role of law and politics in corporate capitalist expansion. Ideas such as the promotion of the "rule of law," a key tenet in American discourse on foreign policy, part of the "modern trinity" (democracy, the rule of law, and Christianity) whose promotion Woodrow Wilson considered an obligation of the US government, had rarely been the object of public discussion: this positive connotation has mostly been taken for granted, right up to recent dramatic global events.

Today, in the name of democracy and the rule of law, an intense wave of US-led war has crashed upon Islamic populations in the Middle East. It thus appears that while Christianization is no longer by itself a sufficient ideological justification for wars of aggression, the rule of law seems to have taken on its role in persuading public opinion in the West (particularly

the United States) of the moral acceptability of military aggression and occupation of foreign countries. We believed it was important, for more educated political discussion of these fundamental civic questions, to explore the dark side of law, discussing its oppressive uses in a variety of social and historical contexts.

The book is thus fundamentally a comparison of the role of the rule of law in Euro-American practices of violent extraction (what we call plunder) by stronger international political actors victimizing weaker ones. Because of the breadth of our theme, we have selected our materials so that our examples, with different degrees of detail, cover quite a large part of the world. Because our main worry is to understand the present with the help of the past, we devote particular focus to the current dominating political power, the United States. Thus, the rule of law is discussed both domestically and in its international dimension. Our ultimate task was to remove the rule of law from its pedestal of sanctity by showing it as an institutional construct that can be used for good or – very often – for ill.

Among the many colleagues who helped us to shape the arguments of this book we need to mention Tarek Milleron, Ellen Hertz, Roberto González, Rik Pinxton, Charles Hirschkind, George Bisharat, Richard Boswell, Teemu Ruskola, James Gordley, Duncan Kennedy, Richard Delgado, Meir Dan Cohen, Elisabetta Grande, Mariella Pandolfi, Luca Pes, Jed Kroncke, George Akerlof, Monica Eppinger, Mark Goodale, Liza Grandia, David Price, Rob Borofsky, James Holston, and Elizabeth Colson.

We also contracted debts in the process of selecting a publisher that, perhaps because of the many friends that the rule of law has within the US intellectual industry, this time proved particularly long and difficult. We wish to thank Rosalie Robertson and anonymous referees at Blackwell Publishing, Brat Clark and anonymous referees and members of the editorial committee at Monthly Review Press, and Marion Berghahn at Berghahn Books.

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Laura Nader benefited from discussions with many colleagues at conferences at the Max Planck Institute in Halle, Germany; at the University of Edinburgh, Scotland; at the University of Ghent in Belgium; and at the World Bank. She thanks Professor Rik Pinxten of Ghent for his early support of this project. She is particularly grateful to Ralph Nader for his early perusal of this work and for his advice on civic fundamentals.

Introduction

> The only truly political action . . . is that which severs the nexus between violence and law.[1]
>
> *[source] Giorgio Agamben*

With all that has been written about imperialism and colonialism, it is remarkable what scant notice is taken of the role of law therein. While theoreticians of Euro-American imperialism profess to recognize the rule of law as keystones of the "civilizing process," its dark side has been neglected. Law has been used to justify, administer, and sanction Western conquest and plunder, resulting in massive global disparities. Thus, we argue, imperial uses – past and present – of the rule of law are behind the current less-than-ideal practices of distributive justice. They are cultural projects that merit explicit theoretical attention because they structurally thwart the use of law to explain the disparity in world wealth.

An ethnocentric configuration of institutions and belief systems has produced a powerful Euro-American use of "rule of law" ideology as key to colonial and imperial projects, whether exercised by British, French, American, Belgian, Dutch, Spanish, Portuguese, German, or Italian colonial interests in pursuit of their enrichment. The general story we seek to convey in this book also concerns the contemporary period and the appropriation by dominant powers of resources and ideas belonging to other peoples, sometimes justified using notions of civilization, development, modernization, democracy, and the rule of law. Our story is about the incremental use of law as a mechanism for constructing and legitimizing plunder. Our intent

is to examine the extent of the law's dark side and to explain the mechanics of such imperial uses of it.

Other imperial projects, such as Chinese, Japanese, Islamic, or Soviet conquests, have had and have their own configurations surrounding appropriation, but the key question in our book does not concern these other geographic areas although eventually it might be useful to compare the ideological institutions that govern plunder by peoples of different times and places. What *is* of interest to us in this book are the mechanisms through which the transnational rule of law, as a deeply Western idea, has led incrementally to patterns of global plunder, a process initiated by the expansion of Euro-American society worldwide, and now continued by nations, in particular the USA, and multinational corporate entities independent of explicit political or military colonialism.

Our book traces the evolution of the role of law in practices of what we call plunder, often violent extraction by stronger international political actors victimizing weaker ones, in two apparently separate phases of the history of Euro-American international human relations – colonialism and present-day neo-liberal corporate capitalism. Though discrete, these historical moments share a variety of communalities, patterns of continuity and actors, although important differences cannot be excluded. Because our main intention is to understand the present with the help of the past, we focus on the United States in particular – the current dominant world political power, the likes of which has no precedent.

Rhetoric attendant to the rule of law has flowed throughout Euro-American expansions and with repetitive frequency to camouflage the taking of land, water, minerals, and labor as happened in countless locales to native peoples under colonialism. When legal scholars or practicing lawyers speak of law, they commonly refer to the purposeful functions of the law – a process for facilitating and protecting voluntary arrangements, or as a process for resolving acute social conflicts, or as a process necessary for orderly continuities. But Euro-American law cuts two ways. The nefarious functions of the law are adumbrated in research on European colonialism, on "legal orientalism," on law and development as legal imperialism, or work on the "war on terror" and its transformative effect on the rule of law both in the foreign arena and on the domestic front. Here we build on such a body of work. Using a variety of examples and episodes we contend that throughout Euro-American history, law commonly justifies plunder by hegemonic nations or other powerful actors. The law, as constructed today by means of

the World Trade Organization (WTO) agreement, the International Monetary Fund (IMF), and World Bank contexts of conditionality, and the ethnocentric nature of many rights discourses, is a rule of law that justifies looting to the paradoxical point of being itself illegal. At issue is whether the rule of law, operating in the context of colonialism and imperialism, results in disorder rather than order, providing for continuity in oppression rather than interruption of the colonial practice.

The transformation of the rule of law *ideal* into an *imperial* ideology has accompanied the move from a need of social justice and solidarity towards the capitalist requirements of efficiency and competition. To wit, for instance, Argentina in the 1990s,[2] when Wall Street became richer at the expense of the Argentinean people. Other examples of plunder legalized by the imperial rule of law we find in Iraq. As Tariq Ali notes: "Force not law . . . has been used or threatened to impose new laws and treaties,"[3] thereby recognizing the lawlessness inherent in such privatized justice as Paul Bremer's edicts. These are not grounded in legitimating bodies and result in rooting the current hydrocarbon laws, powerful vehicles of the transfer of Iraqi wealth to multinational corporations, assisted by illegal forces of occupation.

Ideas such as the promotion of the "rule of law," a key tenet in American discourse on foreign policy – a major part of the "white man's burden" – have been avoided in public discussion because their positive connotation has always been taken for granted. Today, in the name of democracy and the rule of law, the American public has been persuaded of the moral acceptability of military aggression and occupation of Iraq, utilizing once more George Kennan's "straight power doctrine" to protect both extractive and ideological objectives.

Educated political debate on fundamental civic questions must include a critique of the imperial uses of the rule of law in Iraq and elsewhere. How has American law been transformed into imperial law? How do these changing laws support American political and economic dominance in the world today – a dominance that is problematic for many world citizens who suffer its consequences? To what extent has the rule of law worked in the colonial past and how does it work today as a powerful ideology concealing plunder?[4] Have we reached the point in which such ideology, promoting human rights discourses, notions of democracy, development, and this rule of law, should be exposed for what it is and abandoned? What are the alternatives to this rule of law in the long path of civilization, and when is it illegal?

Law as fictional jurisprudence is a place to start in giving a roadmap of the instances in which we describe the rule of law being fundamentally illegal,

since concepts such as *terra mullius* (empty lands that are not empty) have been used to justify plunder since the beginning of European expansion and are still in use today, as we indicate further on (see Chapter 3). This is a clear example of rule of law rhetoric used as a cover, a camouflage, or as propaganda when engaging in lawless or criminal operations. Paul Bremmer's dictates in Iraq, or privatization laws used to transfer the loot to foreign powers, as in Afghanistan and elsewhere (see Chapter 5), are a contemporary example of what happens when force and violence are used to create the law of the oppressor, when ends justify the means. The rule of law can be deemed illegal when it is applied criminally, arbitrarily, and capriciously, victimizing weaker subjects, or when it violates the spirit and the letter of treaties such as the Geneva Convention, aimed at limiting war related plunder, or when those in power purposefully and systematically do not enforce the law or enforce it based on double standards or discriminatorily. We consider the rule of law illegal when without legitimacy it is rammed through impotent legislatures without adequate disclosure, debate, or hearings (see Chapter 7), or when it uses unlawful or deceptive promises to co-opt or buy legislators, as happened when the WTO and NAFTA were enacted. Law can be said to be illegal when produced by legislators elected in faked, imposed or polluted elections, in which only insignificant minorities actually vote or in which voters are forced to participate. These are some of the pathologies of the rule of law that we will expose in this book and that we capture with the idea of plunder as illegal rule of law.

Western countries identify themselves as law-abiding and civilized no matter what their actual history reveals. Such identification is acquired by false knowledge and false comparison with other peoples, those who were said to "lack" the rule of law, such as in China, Japan, India, and in the Islamic world more generally. Similarly today, according to some leading economists, Third World developing countries "lack" the minimal institutional systems necessary for the unfolding of a global market that now serves (as in the past) to further the construction of Western superiority.

We argue in this book that foreign-imposed privatization laws that facilitate unconscionable bargains at the expense of the people are vehicles of plunder, not of legality. The very same policy of corporatization and open markets, imposed today globally by the so-called Washington consensus, was used by Western bankers and the business community in Latin America as the main vehicle to "open the veins" of the continent, to borrow Eduardo Galeano's metaphor, with no solution or continuity between colonial and post-

colonial times. It was used in Africa to facilitate the forced transfer of slaves to America, and today to facilitate the extraction of agricultural products, oil, minerals, ideas, and cultural artifacts in the same countries. The policy of violently opening markets for free trade (especially of weapons), used today in Afghanistan and Iraq, was used in China during the nineteenth-century Opium War, in which free trade was interpreted as an obligation to buy drugs from British dealers. The policy of protecting Western industry by means of tariffs and barriers to entry, while at the same time forcing local industries to compete on the open market, was used by the British empire in Bengal, as it is today by the WTO in Asia, Africa, and Latin America. In all these settings the tragic human suffering produced by such plunder is simply ignored. In all these settings law played a major role in legalizing and legitimating such practices of powerful actors against the powerless. Yet, this use of power is scarcely explored in the study of Western law.

The dominant image of the rule of law, we argue, is false historically and in the present, because it does not fully acknowledge its dark side. The false representation starts from the idea that good law (which others "lack") is autonomous, separate from society and its institutions, technical, non-political, non-distributive, and reactive rather than proactive: more succinctly, a technological framework for an "efficient" market. Because of these false representations, good governance that ostensibly characterizes the law's purposes becomes the backbone of naturalized professional arguments that are marshaled to legitimize plunder.

We argue that the rule of law has a bright and a dark side, with the latter progressively conquering new terrain whenever the former is not empowered by a political soul. In the absence of such political life, the rule of law becomes a cold technology, and the dark side can cover the whole picture as law yields to embrace brute violence. The political empowerment of the bright side of law can stem from a variety of places, not necessarily rooted in justice. During the Cold War, for example, there was some incentive to practice a democratic rule of law in its positive functions of order, conflict management, principled and fair decision-making. But the change in the balance of power after the Cold War nourished the law's dark side, removing the political bite to the law. The United States' ruling elite no longer needed to persuade other countries and people of the values of democracy and the virtue of the rule of law which after communism, in its Soviet realization, had collapsed under corruption and illegality. Gradually, incentives for institutional virtues declined in the West. A public shift from justice to profit, from

respect to thefts, followed within an atmosphere of silenced political debate, overwhelmed by self-congratulatory rhetoric, such as the end of history, through the 1990s. Later the political silence accompanying plunder was further normalized by talk of patriotism, "detainees," "enemy combatants," and special tribunals reminiscent of earlier nineteenth- and twentieth-century authoritarians including anti-law phases as in "tort reform" or torture policies. Such post-September 11 praxis, as well as its perennial power surrender to corporate actors, takes us a long way from an American model of legality and democracy that, though rhetorical and hypocritical in many ways, has been admired worldwide and arguably contributed to the ending of the Cold War.

Because of the scope of our project, we have selected materials and illustrations that include large parts of the world but are not meant to be comprehensive. In our examples, the uses of the rule of law are discussed in the past and in the present, both domestically and in their international dimension, taking into due consideration the declining role of states as compared to large corporate actors. When large corporate actors dominate states or become knitted with them, law becomes a product of the economy, and what was once "Western" domination is now multinational corporate capitalism. Democracy, rule of law, development, international human rights, and arguments about "lack" are in the present legal landscape a strong part of the rhetoric of legitimization of international corporate extraction.

Contemporary mass cultures operate within a short timespan. Most Western intellectuals do not grasp that it is because of previous expansionist empires that cultures become connected with one another and share a good deal of world history. Worse, many intellectuals do not acknowledge that it is exactly because of the plunder of gold, silver, bioresources, and more that development accelerated in the West, so that underdevelopment is a historically produced victimization of weaker and more enclosed communities and not the disease of lesser people.

Prevailing short-term and short-sighted opportunism must be overcome. Far too many politicized people exist in today's world – as demonstrated by the worldwide opposition to the US invasion of Iraq – for American imperialism to be sustained. A narrative history of the imperial adventure rendered in historical and contemporary legal terms opens up a possibility for a radical rethinking of a model of development defined by Western ideas of progress, development, and efficiency. A vision of a just society necessitates that we eschew an idea of freedom that allows for massive inequality because

the rule of law is invariably used to protect the bottom line. Liberation is a better word than freedom. Liberation cannot exist without authentic democracy, and no democracy exists without just distribution of resources. Does the rule of law still have a role in attempting to establish the conditions for liberation?

Perhaps empowering its bright side and fully exposing the dark aspects of the rule of law can transform it into a tool for taking control of a runaway world, fueled by an economic dynamic called neo-liberalism. Perhaps the rule of law cannot be reformed and only revolution can disentangle it from the lethal hug of plunder. In both cases, understanding plunder is a precondition for action. New directions call for a recognition of the configuration that has accompanied the different waves of Euro-American expansions. A reconfiguration would mean, first and foremost, a clear rejection of an ideology of inherent superiority of Western culture that does not recognize that the West is itself part of something much larger. After all, the discovery of agriculture and three great world religions – Christianity, Islam, and Judaism – had their origin in the Middle East. Most importantly, for our purposes we propose a hard-nosed look at what is behind the rule of law as an undisputable value of current corporate-dominated capitalism.

Several outstanding thinkers today, in and out of academia, are suggesting that the problems we are facing are systemic to a several-hundred-year-old system of Euro-American expansion and domination based on extraction and plunder, a system that is now adopted by India and China. Cultural and material destruction has proceeded at an accelerated pace at least since the eighteenth century. The two legitimizing strategies, one motivated by a universal concept of justice, the other by a universal concept of efficiency (the former commonly associated with colonialism and the latter with modern Americanization) are deeply flawed and no longer acceptable. The "lack" argument, where a comparative absence is created that can only be remedied by transferring law from a Western source, is, also, outrageous when seen as yet another imperial move. Similarly outrageous is law as a social and political tool that empowers local elites to interface with the global economy in the face of increasing social inequities. Plunder, we suggest, is an important concept to unify and portray, *as the rule*, distortions in the model of capitalist expansion that are at most acknowledged as exceptions.

Perhaps plunder as the rule rather than the exception allows the reader to get outraged. The Enron scandal, the mutual fund scandal, and other examples portrayed as exceptions (such as torture in Abu Ghraib, Guantánamo Bay, and

Baghram Air Force Base or the use of illegal weapons of mass destruction in Falluja) in fact are the rule of corporate capitalist development; workers are victimized; people lose their savings; innocents are killed; peasants are starved. The distinction between what is legal and what is illegal blurs in a world in which the rule of law is reduced to a dull rhetoric or to Orwellian double-speak. How much more suffering do we need to realize that similar tragedies are the rule and not the exception? How much more time do we need to recognize the civilizing failure of corporate capitalism and the need to organize radical alternatives to its destructive models of development?

Chapter 1, "Plunder and the Rule of Law," attempts an anatomy of plunder and introduces the main thesis and method of the book. It shows the reader the multiple meanings of "rule of law," the hegemonies facilitating Euro-American expansion, the colonial project linked to its imperial present, and how the end of the Cold War equilibrium has facilitated the construction of the current empire of lawlessness. Chapter 2, "Neo-liberalism: Economic Engine of Plunder," begins with a concrete example of plunder in contemporary Argentina, as originated by mighty and respected institutional actors such as Wall Street firms and the International Monetary Fund. It also introduces the idea of structural adjustment, comprehensive development, and conditionally imposed rule of law as germane to plunder. Chapter 3, "Before Neo-liberalism: a Story of Western Plunder," approaches the issue of continuity, tracing the roots of current neo-liberal policies to Euro-American colonialism. Chapter 4, "Plunder of Ideas and the Providers of Legitimacy," begins with a concrete example of plunder – that of ideas, in the form of Western patents and intellectual property rights imposed on resources belonging to weaker peoples. It also introduces lawyers, economists, and anthropologists as providing legitimacy to practices of plunder justified by the rule of law. Chapter 5, "Constructing the Conditions for Plunder," begins with the concrete example of the legally facilitated plunder of oil in Iraq, and discusses a variety of other current geographic and political settings in which rule of law ideology has proved effective in constructing the conditions of interventionist plunder. Chapter 6, "International Imperial Law," develops a theoretical explanation of the various examples thus far provided focusing on the role of the law. It discusses the way in which the Anglo-American conception of the rule of law has become hegemonic, describing the global legal transformations as an unfolding of imperial law. Such transformations, we argue, have prepared the present empire of lawlessness scenario. Chapter 7, "Hegemony and Plunder: Dismantling Legality in the United States," tackles

the domestic impact of post Cold War scenarios, addressing transformations of the American rule of law as an ideal justification of plunder. It shows how such transformations, perhaps unavoidable in an imperial setting, have facilitated what we call plunder of liberty, a process of social transformation creating the ideal soil for further corporate plunder. Finally, Chapter 8, "Beyond an Illegal Rule of Law?," attempts to draw some conclusions based upon recognition of the uses of the rule of law in imperial adventures as no longer in any people's self-interest, a central challenge to law's legitimacy in the twenty-first century.

1 | Plunder and the Rule of Law

An Anatomy of Plunder

The expression "rule of law" has gained currency well outside the specialized learning of lawyers, where it displays a long pedigree, having been used at least as far back as the times of Sir Edward Coke in late sixteenth-century England. In recent times, however, it has reached political and cultural spheres, and entered everyday discourse and media language. Pronounced in countless political speeches, it promenades on the agendas of private and public actors, and on the dream-lists of many activists.

Unfortunately, as almost invariably happens to buzzwords used in a wide variety of semantic contexts, the term has incrementally lost clarity and is today interpreted in widely disparate ways. Today the concept is by no means reduced to a technical legal meaning. It is not specific even in lawyer's lingo, let alone in common everyday use. Few of its users seem to mind this lack of precision, which derives from the wide variety of new meanings that the concept has gained through time, space, and different user communities. "Rule of law" is almost never carefully defined as a concept; users of the expression allude to meanings that they assume to be clear and objective but that are not so. Rule of law has thus become part of that dimension of tacit knowledge, described by Polanyi in his classic study of human communication.[1] Naturally, this would be a perfectly innocent and common phenomenon, not worth an inquiry, were it not for the weighty political implications of the phrase in different contexts.[2]

We can begin observing that the connotations of the expression "rule of law" have always been implicitly positive. The nineteenth-century legendary

constitutional scholar Albert V. Dicey, for example, argued that the "rule of law" was the defining trait of British liberal constitutional civilization as opposed to the French authoritarian tradition based on administrative law. Today, the concept is inextricably linked to the notion of democracy, thus becoming a powerful, almost undisputable, positively loaded ideal. Who could argue against a society governed under democracy and the rule of law? Indeed it would be like arguing against the law being just, or against a market being efficient. In this book we are not moved by the desire to argue against the rule of law. We only wish to gain a better understanding of this powerful political weapon, to question its almost sacred status, by analyzing it as a Western cultural artefact, closely connected with the diffusion of Western political domination. We will try to disentangle its connection with the ideal of democracy, and on the contrary recognize its close association with another notion, that of "plunder."

Let us clarify, before we continue, what we mean by the term "plunder." The *American Heritage Dictionary* defines "plunder" as "to rob of goods by force, esp. in times of war; pillage," and "plunder" (the noun) as "property stolen by fraud or force." It is the latter definition that especially brings to mind the dark side of the rule of law. We address both looting by force and looting by fraud, both wrapped in the rule of law by illustrious legal practitioners and scholars. We trace the development of the critical supporting role that the rule of law has played in plunder. But what of plunder itself? The term conjures up images of ragged conscripts struggling with chests of gold, centuries ago. In what follows, we will expand what is commonly meant by plunder far beyond these connotations. For part of the supporting role that the rule of law has played is to constrict the very meaning of the word plunder to acts most of us think that we are incapable of committing.

An overly broad definition of plunder would be the inequitable distribution of resources by the strong at the expense of the weak. But take that approach to the problem and narrow it to include notions of legality and illegality. Narrow it to the point where children are starving amidst scenes of catastrophic violence, while thousands of miles away (or only a few miles away if we observe the deprivation of "illegal" uninsured immigrant children in California's Central Valley) the more advanced in age ride in a 3-ton, gas-gulping SUV (sports utility vehicle). Now draw a connection between the two: plunder. Or take a farmer who has no "legal" right to use the types of seeds he and his forebears have planted for centuries and trace a line from those seeds to obscene profits now generated by their new corporate owners: plunder.

Let us begin with tracing the notion of the rule of law to the very origins of the Western legal tradition: the highly symbolic moment in which law and politics divorced, bringing to humankind the miracle of a government of laws and not of men. In a government of laws, we preach, even today, to such countries as China or Cuba, the most powerful ruler must also yield to the rule of law. It was Sir Edward Coke, possibly the most influential common law judge ever, who used the concept of the rule of law (rooted back to the "constitutional" nature of English monarchy as established by the Magna Carta) to foreclose the King's participation in deliberations of the common law courts. According to this early notion, there exists a domain of learning that is specialized and belongs to lawyers. The King (James I, 1603–25), no matter how powerful, was not legitimated by this specialized learning, thus he could not sit as a judge in "his own" courts of law. The case, "Prohibition del Roy" (1608 12 Coke Rep 63), was decided during a very harsh period of English history eventually leading to regicide and the interregnum. During this political struggle, the common law courts (jealous of their jurisdictions) were allied with the barons, sitting in Parliament, themselves long suspicious of every attempt at modernization that the monarchy, beginning with the Tudors (especially Henry VIII), was endeavoring to carry out. Indeed modernization was a threat to the privileges of the landed aristocracy, and the alliance with common law courts successfully protected the Englishman's long established rights to property.[3]

Thus, the birth of the rule of law, whether we place it at the time of the Magna Carta or at that of Sir Edward Coke, had nothing to do with notions of democracy, unless we wish to assert that the English Parliament of the time was a democratic institution! As widely recognized by contemporary historians, the birth of the rule of law was actually the triumph of medieval social structure over modernization. It has only been the subsequent Whig rhetoric of English scholars, accompanied by the narrative of continental Roman Catholic historians aimed at libeling Henry VIII, that has reconstructed this story in a quite opposite way, convincing us of the false notion that progress and civilization were protected by the alliance between Parliament (democracy!) and the common law courts (the rule of law).

Thus, the rule of law, an early tool used by lawyers to claim a special professional status as guardians of a government of laws, was in fact born out of their role as guardians of a given, highly unequal, and certainly non-democratic distribution of property in society. This very same background clearly emerges from the Federalist papers (particularly Nos 10 and 51)

where James Madison seeks to justify the need of a constitutional order based on checks and balances as a way to avoid factiousness and the oppression of the majority over a minority. Here again, despite the elected nature of the US Congress, the rule of law is received as a protection of unequal property distribution, favoring the minority of the "haves" against the majority of the "have-nots": "But the most common durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed different interests in society."[4] The protection of the unequal distribution of wealth (to a large extent plundered from Native Americans with the take justified by natural law), is thus at the very root of the founding fathers' worry about the possibility that the majority could actually decide to redistribute property more equitably. The democratic ideal had to be limited by a variety of skillful legal techniques (including federalism and the electoral system) most importantly, once again relying on the professional check of lawyers whose very elite would sit in courts, the institutional guardians of the rule of law.

Because of its long pedigree as a darling of the ruling elite, the rule of law has always been portrayed as a "good thing" and nobody is expected to argue against it in the present dominant political discourse. Of course, one could recall notions of law as a superstructure of the economy – a traditional critique of the very idea of bourgeois legality. Nevertheless, the conception of the law as an autonomous (or at least semi-autonomous) social field is so persuasive that today both Marxist scholars and social observers agree with it. Thus, bereft of any powerful intellectual critique, the rule of law lives today in a comfortable limbo, stretched to fit the needs of every side of the political spectrum as a symbol or an icon rather than as a real-life institutional arrangement with its pros and its cons to be discussed and understood as those of any other cultural artefact.

Recently, Niall Ferguson, an academic historian[5] with remarkable access to the dominant media and public discourse, has offered an example of such legitimizing power of the rule of law by introducing a (moderately) revisionist case for the British empire. One would want to incidentally observe that the very term "loot," a diffused synonym of plunder and pillage, is a Hindu word introduced into the English vocabulary after the spoliation of Bengal. A nostalgic observer, Niall Ferguson argues extensively that the rule of law as a global legacy of the British empire is such a precious asset left to humankind worldwide that the brutal violence used to impose it (including war, plunder, slave trading, massive killings, ethnic cleansing, and genocide) cannot

be condemned *tout court*. Similar revisionist arguments, based on broad notions of civilization, can be seen as re-emerging also in France, where a recent statute urges history school-text writers to put colonialism in a more balanced light.

In what follows we examine the rule of law as deployed by European colonial powers in their colonies and trace its evolution and transformations into the reign of the present hegemonic power, the United States. Not surprisingly, the Western rule of law, while defining its legal letter as does a train that lays its own tracks, is very often an instrument of oppression and plunder and thus ironically swells with a spirit of illegality.

Someone inquiring into the ultimate meaning of the popular expression "rule of law" soon realizes that the idea has at least two different aggregates of meaning in the dominant liberal democratic tradition, both of them, to be sure, sharing nothing with plunder. In the first, the rule of law refers to institutions that secure property rights against governmental taking and that guarantee contractual obligations. This is the meaning of rule of law invoked by Western businessmen interested in investing abroad. International institutions such as the World Bank or the International Monetary Fund (IMF) often charge the lack of a rule of law as the main reason for insufficient investment by rich countries in poor ones. The rule of law is thus interpreted as the institutional backbone of the ideal market economy. The synonym "good governance" is also used to convey this meaning. Normative recipes for market liberalization and opening up of local markets to foreign investment (often paving the way to plunder) thus come packaged with the prestigious wrapping of the rule of law.

The second approach relates to a liberal political tradition rooted in "natural law," a school of thought developed by the fifteenth and sixteenth-century Jesuit jurists at Salamanca and later becoming a dominant jurisprudence through Europe (including Great Britain), in the more secular form of "rational law." According to this tradition, society should be governed by the law and not by a human being acting as a ruler (*sub lege, non sub homine*). The law is impersonal, abstract, and fair, because it is applied blindly to anyone in society (hence the time-honored icon of justice as a blinded deity). Rulers might be capricious, arrogant, cruel, partisans – in a word: human. If the law does not restrain them, their government will end in tyranny and corruption. In this tradition, echoed in the Federalist papers, and highly valued among the American founding fathers, a system is effectively governed by the rule of law when its leaders are under its restraint; it lacks the rule of law when authority is so unbounded that the leader can be considered a dictator. The

lack of the rule of law, in this second sense, is a worry for international human rights activists and institutions concerned with the consequences of unrestricted, ruthless governments on target populations.

Some conservatives might favor the first meaning, protecting property and contracts, and use the second to gain support for military intervention. The second meaning, providing rights, is a favorite of the moderate left and of many international human rights activists seeking to do good by the use of the law (the "do-gooders"). Perhaps someone located in the so-called "third way" would claim to be a champion of both meanings, which appear to merge in the recent, comprehensive definition of the World Bank: "The rule of law requires transparent legislation, fair laws, predictable enforcement, and accountable governments to maintain order, promote the private sector growth, fight poverty and have legitimacy."[6]

In both perspectives, the rule of law is interpreted as a *negative limit* to the power of intervention of the state. Consequently, on the one hand, the state has to provide and respect the rule of law as a kind of consideration for the concentration of power following sovereignty. On the other hand, the rule of law is conceived as something above the state, a legitimizing factor of the very state itself.[7]

A system can be governed by the rule of law in one or the other sense. There are systems in which property rights are worshipped but that are still governed by ruthless, unrestricted leaders. President Fujimori's Peru or Pinochet's Chile are good recent examples of such arrangements, but many other authoritarian governments presently in office mainly in Africa, Asia, and Latin America that follow the "good governance" prescriptions of the World Bank also fall into this category. Similarly, President Bush's United States, with the present imbalance of power heavily favoring the executive over any other branch of government, today only nicely fits the first definition of the rule of law (see Chapter 7).

In other systems, with good human rights credentials, governments interpret their role as significantly redistributive. Property rights may not be sacred, and a variety of "social theories" may limit their extension or curtail them without compensation. In such settings, quite often, courts and scholars might develop theories that limit the enforcement of contracts in the name of justice and social solidarity. Consequently, they might fit the second but not the first definition of the rule of law. Scandinavian countries, amplifying attitudes shared at one time or another in history by a number of continental legal traditions such as France, Germany, and Italy (or the United States'

New Deal), might offer such a model in Western societies. Perhaps present-day Lesotho or President Salvadore Allende's Chile might offer actual or historical examples in the south.

Western countries have developed a strong identity as being governed by the rule of law, no matter what the actual history or the present situation might be. Such identity is obtained – as is the usual pattern – by comparison with "the other," almost invariably portrayed as "lacking" the rule of law. A recent interesting example is a front page story of the *New York Times* called "Deep flaws and little justice in China's court system."[8] The author describes the case of an innocent Chinese man, framed by prosecutors, sentenced to death, and eventually released because of favorable circumstances. The article implies that such cases would not happen when the Western rule of law is in place. Unfortunately, the reader is never informed that hundreds of similar cases routinely happen in the US criminal justice system, and increasingly the "mistakes" are discovered only after the execution happens.[9] Thus, our self-portrait as governed by the rule of law forecloses understanding for what has been called legal "orientalism."[10]

The lack of rule of law has historically stimulated and justified a complex variety of patterns of interventions of powerful states or economic actors in relative power vacuums for purposes of plunder. The Western conception of the rule of law, serving the expatriate community, international investors, and the desire to organize authoritarian power more effectively, was imposed, with a variety of strategies, upon China and Japan in the late nineteenth and early part of the twentieth century in order to "open up" the Asian market for foreign plunder. Earlier, throughout the American continent, the "lack" of individual ownership, a symbol of the natural law conception of the rule of law, justified the taking of Indian lands deemed vacant by the Western "discovery" principle. Today the rule of law, still an undefined and under-theorized concept, is mightily sponsored by so-called structural adjustment plans (SAPs), the instruments through which the international financial institutions (World Bank and IMF) condition their loans. The lack of rule of law has also justified the relentless illegal bombing (through the North Atlantic Treaty Organization, NATO) of former Yugoslavia by the United States government, with the support of both right-wing and center-leftist European governments. It has again been used, together with a variety of other rationales, in order to attempt justification for the later invasions of Afghanistan and Iraq.

The idea that law is an instrument of oppression and of plunder competes with entire libraries of law and political science which exalt its positive

aspects. Because of such imbalances, a historical and comparative perspective is unavoidable for understanding an unfolding of plunder perpetrated by a variety of uses of the rule of law. One of the most historically significant of such interventions is, of course, colonialism, which will serve as a background for our principal goal – an understanding of the current situation as continuity rather than rupture, old vices rather than novel attitudes. The Western world, under current US leadership, having persuaded itself of its superior position (ethnocentrism plus back-up power), largely justified by its form of government, has succeeded in diffusing rule of law ideology as universally valid, behind whose shadow plunder hides, both in domestic and in international matters.

According to a poll of the Pew Global Attitudes Project, today 79 percent of the American people believe that it is a good thing that American ideals and values be spread in the world, and another 60 percent openly believe in the superiority of American culture.[11] While comparative data show significantly lower figures in other Western countries, it is a fact that such attitudes of Western superiority enable an expansionism and imperialism that only a very formalistic vision of law and sovereignty can consider a rupture with the colonial era.

Present-day international interventions, most significantly in Iraq and Afghanistan, led by the United States are no longer openly colonial efforts. They might be called neo-colonial, imperialistic, or simply post-colonial interventions. Although practically all of the European colonial states (most notably Portugal, Spain, Great Britain, France, Germany, and even Italy) regarded themselves as empires, for our purposes, "empire" describes the present phase of multinational capitalist development with the USA as the most important superpower, using the rule of law, when it uses it at all, to pave the way for international corporate domination. Colonialism refers to a discrete historical phase, terminated by formal decolonization, in which Western powers carried out colonial extraction in competition with each other. The substantial continuity between the two phases is found in the imperial uses of the rule of law to achieve and justify what can only be called plunder.

Plunder, Hegemony, and Positional Superiority

Our exploration of how the rule of law is used to justify plunder requires a variety of tools, including the notion of *hegemony*,[12] power reached by a

combination of force and consent. Power cannot be maintained long term only by means of brute force. More often it is imposed on groups of individuals who more or less "voluntarily" accept the will of the strong. In international relationships, the role of consumerism in the diffusion and final acceptance of US values in countries such as those of the former Socialist block clearly exemplifies the means by which such consent, the key to hegemony, can be reached.

While force is generally the province of repressive institutions such as the army or the police, consent most often is produced by institutions such as schools, churches, or media as illustrated by the US multibillion dollar effort in the war on drugs.[13] Such institutions are integral to hegemony and at the same time make its component ideology a cross-social-class concept, thus going beyond the narrower Marxist idea of ideology as a class-specific device.[14] Hegemony is hence at least in part reached by a diffusion of power between a plurality of individuals across classes. This diffusion of power becomes a key concept for refuting the idea that power is imposed from the top.[15]

The diffusion of power to build hegemony, however, that in the law accompanied the colonial development of modern Western-style adversarial legal institutions, resulted in the birth of *counter-hegemony*. Close examination of the use of law in colonial times[16] shows that "empowerment" is an unintended consequence of the formal rule of law. Subordinates often welcomed the advent of adversary courts in which to vindicate rights and obtain justice. Women, for example, availed themselves of this new opportunity to subvert patterns of patriarchal domination by using colonial courts. Because of this empowerment potential of the law, colonial rulers often entered into alliances with local patriarchal powers, limiting access to the modernized legal system and acknowledging "traditional" power structures (often invented). These linked ontogenies of hegemony and countervailing power are of crucial importance. In fact, the rule of law displays a double-edged, contradictory nature: it can favor oppression but it can also produce empowerment of the oppressed that leads to counter-hegemony. This is why powerful actors often attempt to tackle counter-hegemony by incorporating harmonious "soft" aspects aimed at disempowering potential resistance from the oppressed by limiting their use of adversary courts. Today, the worldwide alternative dispute resolution (ADR) movement functions as a strong disempowering device, that the dominant discourse makes attractive by the use of a variety of rhetorical practices, such as the need to remedy the "excesses" of litigation, or of promoting the desirability of a more "harmonious" society.[17] Just as in