1 | Plunder and the Rule of Law

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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

colonial times, tradition, invented or otherwise, served this disempowering function. These are the kind of continuities we explore.

Generalization and the construction of stereotypes for control purposes is one of the most powerful strategies aimed at downplaying the complexity of different social settings, and then justifying their domination and plunder. The "other" is described as simple, primitive, basic, static, lacking the fundamentals, in need of the simplest and obvious things, thus proving a basic incapacity for self-determination. This process, part of a tacit dimension of dominating cultures, can be seen at play both in past colonial times and today. For example, the current Islamic Middle East, composed of more than 25 countries, with a very complex variety of laws, cultures, people, and institutions, is constantly described as the "Arab world" or the "Muslim world," as if these were the same and as if there were no variations within one or the other.[18] Similar unfortunate simplifications are also at play in the exportation of the rule of law.

Export of the law has been described and explained in a variety of ways, for example, imperialistic/colonial rule, or imposition of law by military force, as during military conquest. Napoleon imposed his Civil Code on French-occupied Belgium in the early nineteenth century. Similarly, General MacArthur imposed a variety of legal reforms based on the American government model in post World War II Japan, as a condition of the armistice in the aftermath of Hiroshima. Today, Western-style elections and a variety of other laws governing everyday life are imposed in countries under US occupation, such as Afghanistan or Iraq.

A second model can be described as imposition by bargaining, in the sense that acceptance of law is part of a subtle extortion.[19] Target countries are persuaded to adopt legal structures according to Western standards or face exclusion from international markets. This model describes China, Japan, and Egypt beginning early in the twentieth century, and, indeed, contemporary operations of the World Bank, IMF, the World Trade Organization (WTO), and other Western development agencies (United States Agency for International Development (USAID), European Bank of Reconstructive Development (EBRD), etc.) in the developing and former socialist world. This model of legal imperialism is the least explored by scholars, although it is the most interesting because of the complex individual and institutional motivations in the exercise of power.

A third model, constructed as fully consensual, is diffusion by prestige, a deliberate process of institutional admiration that leads to the reception of

law.[20] This third model is considered the most diffused one. It diminishes the direct power dimension and cultivates a stereotype of Western superiority that needs to be fully appreciated. According to this vision, because modernization requires complex legal techniques and institutional arrangements, the receiving legal system, more simple and primitive, cannot cope with the new necessities. It lacks the *culture of the rule of law*, something that can only be imported from the West. Every country that in its legal development has "imported" Western law has thus acknowledged its "legal inferiority" by admiring and thus voluntarily attempting to import Western institutions. Turkey during the time of Ataturk, Ethiopia at the time of Haile Selassie, and Japan during the Meiji restoration are modern examples. The institutional setting of the admiring country is thus downgraded to "pre-modern," rigid and incapable of autonomous evolution. Interestingly, if the transplant "fails," such as with clumsy attempts to impose Western-style regulation on the Russian stock market, or as with many law and development enterprises, let alone elections in troubled war-torn countries, it is the recipient society that receives the blame. Local shortcomings and "lacks" are said to have precluded progress in the development of the rule of law. When the World Bank produces a development report on legal issues, it invariably shows insensitivity for local complexities and suggests radical and universal transplantations of Western notions and institutions. The inevitable failure of such simple-minded strategies, blamed on the recipient, reinforces Western hubris and self-congratulatory attitudes, while radicalizing the recipient countries.

Law, Plunder, and European Expansionism

One could begin with tragic images of poverty, death, and exploitation in the silver mines of Potosi, in what is now Bolivia, where an estimated 8 million enslaved Indians lost their lives, to understand the causes and the lethal consequences of colonial plunder. The human and social costs of "opening the veins" of Latin America[21] have been so high that only today, after half a millennium, has demography given back a majority to natives in Latin America. The obsession of sixteenth-century Spanish conquistadors for gold and silver, tragically satisfied with genocide in the Americas, sets a scene. But the historical set could be as easily placed 200 years later in modern-day Bangladesh in order to immediately refute Western revisionist arguments on the benign nature of the British rule of law as a colonial legacy. Bengal was

described by Ibn Battuta, a legendary medieval Arab traveller who had explored most of the world in the fourteenth century, as one of the richest lands that he had ever seen. In 1757, the year of the battle of Plessey (decisive for British domination of the subcontinent), its capital Dacca, a center of cotton trade and textile industry, was as rich, thriving, and big as the city of London. An official inquiry of the House of Lords shows that by 1850 its population had declined from 150,000 to 30,000, that malaria and jungle fever were taking over and that Dacca, "once the Indian Manchester," was becoming small and poor. The city never recovered and it is today one of the most impoverished places in the world. The scene could also be set in western Africa, where hard data of population depletion caused by the slave trade are appalling. According to much of the best historiography, such depletion, in a West African country that has traditionally suffered from population scarcity, is the most significant cause of low development and poverty.

Behind the early colonial efforts of the European powers lay the need to finance the tremendous economic necessity of the newborn centralized systems of government, essential for capitalist development to happen. Without gold, silver, cotton, and human beings coming from faraway lands, it would have been impossible to finance the institutional system that eventually paved the way to industrialization and development.[22] At the beginning of the eighteenth century, the East India Company a quasi-private, pre-colonial agency, handled more than half of British trade, and the fortunes that it generated for its shareholders were beyond imagination.[23]

From the perspective of the powerful, plunder is a rational maximization of utility, the loot being a return for the investment in military and political might. Plunder thus captures a variety of practices, from slave capture and trade, to extraction of gold and resources in faraway "no man's land," that have long been construed as illegal by international and domestic law. Such theft describes activity that is highly objectionable from a moral viewpoint because the pursuit of profit takes place without regard for the interests, rights, and needs of other weaker human beings or groups. Nevertheless, when such practices accompany powerful ideological motivations, they become acceptable as the dominant moral standards of a given time. Thus, the Crusades used religious zeal to justify mass murder and looting in the Arab East. In a manner not dissimilar to how many crusaders justified the need to defend the holy sites, the rule of law shows a continuous record of justification of oppressive practices, as we will see in Native American settings and the use of the concept *terra nullius*, empty land as rationalized by law.

Today, international law bans occupying powers from engaging in plunder, both directly and indirectly in the aftermath of armed conflict, thus seeking to restrain the strong from carrying on its "natural" behavior of abusing the weak. Consider, then, the current war in Iraq. It is still the rule of law, lacking in Saddam Hussein's days, that is used in some circles to justify, according to international law, the current illegal occupation of the country by the USA, Britain, and a few allies. It thus appears that the rule of law, no matter if domestic or international, can both be used to justify plunder and abuse of the weak, and to attempt to limit abuse. Thus, the contemporary pursuit of dominant positions in oil-rich areas in Central Asia and Iraq is camouflaged by the need to export democracy and the rule of law, showing a remarkable pattern of continuity, and only perhaps a different level of ideological sophistication, in the way in which the West dominates the rest. This picture is in need of deeper scrutiny.

One of the most important and dramatic developments of the second half of the twentieth century was decolonization. In 1961, the year of Africa, as many as 17 former colonies gained independence. Today, we recognize that colonial rule was a complex construction of laws, practices, economic relationships, political platforms, and ideologies, with plunder as a central organizing principle.[24] The very construction of the prototypical colonial relationship followed a strategy by which the brutal and violent extraction was to be transformed into legal hegemony by a variety of discursive practices, and of economic embrace aimed at obtaining local "consent." For example, by the second half of the eighteenth century, 90 percent of the military forces occupying India were made up of indigenous mercenaries: *indirect rule*. Because such strategies were more successful than not, it should be no wonder that the local police force is the most common target of attacks in Iraq today.

Yet, few colonial practices, despite the demise of that obsolete model of formal domination, have been effectively abandoned after decolonization, thus telling a story of continuity. Revisionist ideas emerging today in the West are the result of arrogance, cynicism, frustration, or simple lack of understanding of plunder, the single most significant factor producing and sustaining poverty in the world. An impressive pattern of continuity can be found behind formal independence of former colonies, and today a nostalgic colonial rhetoric of modernization and the rule of law is re-emerging.[25] Nobody has put it more clearly than the Tanzanian legal scholar Issa Shivji: "The moral rehabilitation of imperialism was first and foremost ideological

which in turn was constructed on neo-liberal economic precepts – free market, privatization, liberalization etc., the so-called Washington consensus. Human rights, NGOs, good governance, multiparty democracy and rule of law were all rolled together. . . ."[26] With the increasing visibility of illegalities, rule of law rhetoric becomes more ubiquitous, as in earlier viable efforts of justifying the take.

The need to justify the international policy of the dominant Western minority in the world population, resulting in increasing social inequality, has produced much social (and individual) denial. This denial, facilitated by international progressive legal instruments such as bans on slavery, aggressive warfare, the arms trade, or genocide, has prospered as a powerful political factor allowing the perpetuation of practically all such officially banned activities, under the ideological umbrella of Western "democratic" ideals of policy-making justified by law. But discontinuity between a past of ruthless violation and plunder (colonialism) and a present-day, international legality respectful of the rights and the independence of all the peoples of the world, is merely superficial. The observer who does not wish to be ensnared by the dominant rhetoric must be highly suspicious of formal legal "success stories," such as decolonization or even the ban on slavery. One can learn from the past, for example, that slavery had been banned well before the formal colonial partition of the African continent that took place at the end of the Berlin Conference in 1889. At the time of the generalized ban on slavery between the 1830s and 1860s (but in England the Commons had already banned slavery by a statute introduced by Lord Wilberforce in 1807), the so-called "dark continent" was already depopulated to a point that has made recovery impossible to this day. Certainly the slave trade was a largely recessive business for Western capitalists, carried out mostly by local African chiefdoms.

The Berlin Conference signed the beginning of the "scramble for Africa." Participating Western powers presented the struggle against the slave trade still carried on by some African chiefs as the single most compelling moral argument for the civilizing mission of colonization. Again, there is a remarkable continuity with the moral argument of the Catholic Spanish conquistadores, seeking to civilize the Maya and Inca people accused of practicing human sacrifice. In light of this history, contemporary human rights activists crusade in good faith against female circumcision or the *burqa* without considering the possibility of their being instruments for the justification of plunder, which thrives in Africa or the Middle East victimizing the very same populations whose women they struggle to liberate.

Today, global public opinion is divided as possibly never before in its interpretation of the present. As is usually the case, the division is largely between the "haves" and the "have-nots," between the winners and the losers, between the included and the excluded, between the north and the south, or between the right and the left. However, the complexity of the international scenario and the multiplicity of the possible narratives make divisions even deeper, cutting across groups and social classes to individual motivations and moral characters. One side believes that the dominant corporate capitalist model of development, also known as the "end of history,"[27] is the best possible path to prosperity and liberation of everybody everywhere. According to this vision, largely the product of cynicism and self-indulgence,[28] but sometimes shared in good faith by some true believers, the solution is only to make the superiority of the capitalist model of development understood by those that are not yet directly benefiting from it. Readers sharing such a vision might reject the notion of plunder that we are articulating, arguing that such a notion is structurally incompatible with the rule of law. Plunder would be an intimate contradiction, an "illegal" rule of law, at most an exceptional pathology that the rule of law would cure rather than produce.

The other side believes that it is precisely because of the current model of corporate capitalist development that the division between the "haves" and the "have-nots" is so dramatic and irremediable. Thus freedom and prosperity for the rich, with their exaggerated patterns of consumption and waste, is possible only by a conscious effort to avoid liberation of the poor and disenfranchised. According to this second vision, the rich and the powerful not only use instruments of governance to maintain and enhance their privileges, they also resort to propaganda to show that everybody will ultimately benefit from the current state of affairs.[29] An anatomy of plunder frames a way to understand whether plunder can be cured by the rule of law. Can the path of development be changed by political practices compatible with legality, or can change happen only outside of the current legal order, by means of revolutionary transformations in the political space? Can a new legal order capable of exorcizing plunder come about? How? These are some questions that can be answered only by carefully dissecting the imperial uses of the rule of law, analyzing them in their historical unfolding of the present.

The rule of law has faithfully served plunder through history, to the point that some trace of Western conceptions of legality can be found at least at a superficial level in almost all the legal systems of the world.[30] The end of the Cold War, however, changed the conditions of international competition

post World War II conditions that justified the pursuit of the rule of law as a Western strategy of liberation. The unfolding of an international monopoly of "legally" organized violence that characterized the so-called "end of history" (also known as Pax Americana, the Washington Consensus, or, more simply, empire) has produced new conditions. The perceived strength of the rule of law in the United States made its law highly prestigious and later hegemonic worldwide through the Cold War and its aftermath. The rule of law has thus been capable of hiding its connection with plunder, itself protected by its highly respectable companion. This arrangement, though undeniably hypocritical, can occasionally limit plunder in its brutality, by counter-hegemony or incidental empowerment of weaker social actors, while plunder continues unbounded in the post Cold War scenario.

In the aftermath of September 11, 2001, we witness even more damage to that already quite feeble form of rule of law known as *international legality*. Inaugurating the state of exception as its new companion, with a skillful manipulation of the emotional impact of that act of terror, US President George W. Bush's administrative officials thrust aside international law and ridiculed it as an impotent and expensive bureaucracy. For example, the Guantánamo concentration camp, where large number of innocent prisoners, mostly singled out by race, have been denied basic rights, and the shameless attitude of the US Supreme Court in justifying such horrors, has shown the impotence of international law against imperial power. For those still credulous the substantial irrelevance of the International Court of Justice ruling against the Israeli wall has shown how the imperial exception applies also to faithful US allies. The revelation of a systematic practice of torture in the prison of Abu Ghraib, Iraq, and the reluctant prosecution of minor scapegoats as the only official reaction to it, has possibly inflicted a definitive blow to the US rule of law ideal.[31]

The destruction and occupation of Afghanistan and Iraq by the United States and its few allies, while yielding gigantic economic returns for dominant corporate players, from the promise of oil extraction, to reconstruction contracts, to military supply, to privatization of security, to new fiscal havens, have made the *liaison* between plunder and the rule of law difficult to hide. It thus becomes crucial to dig into assumed moral virtues, to subject to strict scrutiny the liabilities in a model of corporate capitalist development that seems continually more questionable.

Any inquiry into the rule of law is not free of responsibilities. One could argue that because even hypocrisy is evidence of a sense of limit, it is better

that plunder and the rule of law entertain a hypocritical connection than to have total brutal lawlessness grounded in the state of exception. Exposing rule of law practices is still a citizen's duty. It is worth illuminating the historical and present relationship between plunder and the rule of law in order to restore legal civilization, and argue for a more radical and revolutionary departure from the present model of "development".

Institutionalizing Plunder: the Colonial Relationship and the Imperial Project

In the colonial relationship, the law sanctions a pattern of subjugation of weaker populations by stronger ones. This relationship, whose origins are old and variable in different geographic areas, painfully and openly continued through the twentieth century, producing strains in the relations between colonial powers that caused, among other factors, the outbreak of World War I. Socialist thinkers in the West, such as Friedrich Engels and Karl Marx analyzed, challenged, and exposed this legal subjugation. It was formally abandoned, at least as a relationship sanctioned by international law, with the decolonization movement in the aftermath of World War II. But it left permanent scars in the collective consciousness of millions of people affected by domination.

The colonial state was created and constructed on the European model as an aggregate of legal rules and institutions of governance. It is thus based on the law and also on a variety of informal discursive practices that legitimize the law. Lawyers are crucial suppliers of such discursive practices, as sometimes are foreign colonial functionaries (or anthropologists) and locals who share with the others a foreign training. One need not assume a mean-spirited motivation in such suppliers of colonial legitimacy, nor the same motivation in each one of them.

As indicated, law has at least a double dimension stemming from the motivation of its users: oppression and empowerment. Colonial powers, often allied with missionaries and anthropologists (as we later indicate), no matter if in good or bad faith, use law for lowering resistance to outright plunder, seeking legitimacy for exploitive activity. They use propaganda and construct law as an aspect of a superior civilization, claiming resources as a matter of right rather than as the fruits of plunder. Resources have to be given up to foreigners in consideration for the development and civilization that foreigners

bring to the "underdeveloped beings" inhabiting the colonial setting. Law thus gains the support of Western-educated local elites, and then functions as a device for centralizing power. An alliance between local elites and colonial personnel thus develops early, with law reform and modernization the notions around which such alliances are organized. First and foremost was the social pacification necessary for plunder underwritten by law.

Without legal institutions and stable local organizations, it would have been impossible to secure the advantages of the "first come first served" model of appropriation typical of early colonialism but unsustainable in the longer run. Such early activities were best symbolized by the brutality of the East India Company's extractive practices, criticized as early as 1776 by Adam Smith.[32] The founder of modern economics denounced what he referred to as "the Company that oppresses and dominates Oriental Indies." He denounced that three or four hundred thousand people died every year of starvation just in Bengal (under control of the East India Company from 1757, well before formal British colonization) because of the policies of this private machinery of war and plunder.

Official state colonization, wrapped in the law, and based on the privatization of land and private entitlements to local cronies of the colonial power, was necessary to avoid the permanent scramble between competitive colonial powers that invariably followed the early take of possession. Eventually the colonized elite, sometimes due to international circumstances, sometimes by mobilization of the masses, got rid of the colonial power and established themselves as formally independent states. But independence is a formalistic idea that needs to be appreciated in context. The colonial relationship, in the form of neo-colonialism, remains based on local elites extracting a price for their services as agencies of hegemony. Thus, not only legal colonization but also formal decolonization appears as the outcome of international competition in which the law had an important role to play. This appears, for example, in North America, Oceania, and perhaps South Africa, where European newcomers, after engaging in genocide, established themselves as a new colonized class eventually able to free itself from colonial domination by the former mother country. More often, mostly for demographic reasons (in Latin America and India, for example), a colonial class had to come to terms with local populations.

Colonial models of exploitation developed, exhibiting some degree of cooperation by the local people, a fundamental source of cheap labor necessary for extractive economies (impoverished natives were massively used in mining

throughout Spanish Latin America and elsewhere, and natives were staffing the army and most colonial institutions in Imperial India). Alternatively, labor could arrive in the form of slaves harvested in western Africa, as in the plantations of the southern United States, the Caribbean, and Brazil, allowing ships to sail the "triangle" always fully loaded. For example, British ships would leave London, Manchester, or Liverpool for the African West Coast loaded with all sort of artefacts for the African slave trading elites. They would leave packed with slaves bound to plantations; and they would return to Europe loaded with American loot, in the form of metals, guano, wood, cotton, etc. Similar arrangements were in place on the east trade line with some variations, such as those engaged in the forced sale of Indian opium to China. At the height of the British empire, modes of indirect rule through law governed and extracted resources in the interest of London over more than a quarter of the surface of our planet.[33]

A Story of Continuity: Constructing the Empire of Law (lessness)

Around the completion of decolonization, in the core of the Cold War years, it is easy to detect a pattern of continuity beneath an image of separation. New "sovereign" local elites kept ties with former colonial powers, or established new relationships in the bipolar political world, extracting substantial benefits from skillfully playing the Cold War chessboard or even, such as in the case of Nehru's India, profiting from the Sino-Soviet division of the late 1950s. Local lawyers, often trained both in the West and in socialist countries, figured prominently in these new settings. The debate on the benign or oppressive nature of Western rule of law was resolved in favor of the former even by socialists such as Julius Nyerere of Tanzania or by leaders such as Ghandi (himself a lawyer) in India, not to be re-opened again here. Thus, one constant – the recognition of the rule of law as a benign force on the path to development – emerged reinforced in the aftermath of decolonization. Its role in colonial plunder appears underestimated even in the more polemical political rhetoric of the emerging nationalists and "post-colonial" scholars and novelists.

Through the twentieth century, for example, the so-called Monroe Doctrine (1823) kept Latin America solidly under US influence, and the European colonial legacy yielded to a process of American hegemony. In this

setting, organizations like the CIA (Central Intelligence Agency) provided the straight power and political brutality, while the first *law and development movement* provided a robust rhetoric of the rule of law and of its lack. These forces, regardless of their very different motivations, ended up supporting fascist dictatorships, invariably favoring plunder by large US corporations, such as that of the notorious United Fruit Company.

Asia was marked by war in Korea and Vietnam and by a fierce competition both within the communist bloc and outside of it. In this turbulent period, Western ideas of legality, a legacy of the nineteenth century that forced open markets by economic and military means, were possibly confined to a very marginal layer of the complex political patchwork. Nevertheless, the anti-law attitude of the Chinese "great leap forward" and of the "cultural revolution," never obtained final regional hegemony, contrasted as they were by Kruschev's legalistic and Brezhnev's bureaucratic vision of socialism. Ironically, by relentless Western propaganda, the lack of the rule of law was eventually cited as responsible for the post Vietnam War horrors in South East Asia, making US rule of law rhetoric successful today even in an area where its violent imperialism appeared with the gloves off.

Warfare, violence, racism, and delicate international Cold War confrontation characterized the situation in the Middle East and more generally in Islamic North Africa. The issue of the relationship between Islam and legal modernization was early on the desks of legal reformers, and its importance was witnessed by the tremendous prestige and influence through the area of the most important legislative products of such efforts: the Egyptian Civil Code of 1949 and the Iraqi Civil Code of 1953. Western notions of rule of law and of statehood have helped subvert the relationship between Islam and government, putting government (the state) in control and politically dividing the community of the faithful. Meanwhile, notions of backwardness, rigidity, and the immutability of Islamic law have been advanced even in the most otherwise respectable legal literature, with the final result of getting rid of those aspects of Islamic law (such as solidarity, and the duty to care for the poor) less friendly to the neo-liberal order.

A setting in which the fundamental unfolding of colonial, post-colonial, and imperial legal continuity appears is the most recently independent region of sub-Saharan Africa. Here, a staggering plurality of legal forms accumulated on top of each other, producing a degree of stratification and of pluralism difficult to find elsewhere. Moreover, it is here that, through the Cold War, the political dimension of the formal legal system was widely acknowledged

and was highly symbolic. Constitutional documents succeed each other with the same intensity as coups and revolutions. The international financial institutions and the most powerful Western agencies of development adhered to a "hands off the legal system" policy that is itself an acknowledgment of the political connection between local law and international political competition. Despite some limited US efforts towards modernization in the domain of legal education in the 1960s, law was considered too "political" to be an area of intervention in Africa through the Cold War. But when the Cold War ended, law in Africa started to be constructed as a "merely technical" device whose legitimacy was to be based on economic efficiency measured by the capacity to attract foreign investment. In the new post Cold War scenario, financial support became available for law-related projects of development and a new law and development movement blossomed to facilitate the unfair opening up of markets of intellectual property, raw materials, and cheap labor via elaborate, legally complex trade agreements.

The end of the Cold War weighed heavily on these so-called post-colonial areas. By the early 1990s it became clear that US imperial power was unwilling to share access to Middle Eastern oil or to pay the ongoing rate to local ruling classes or to neo-colonial competitors such as France or other Western countries. The first Gulf War paved the way for the transformation of neo-colonialism, with a plurality of competing actors (France, England, etc.) into a US-dominated monopolistic setting. The United States claimed new imperial status, while the colonial order, rather than being substituted for by independence, liberation, and equality, has given way to an imperial order: the British still own the diamond mines in Sierra Leone; the mines in Bolivia are still run by multinationals fiercely struggling against President Morales' nationalization; oil in Nigeria is under the control of American oil companies.

The high concentration of military power in the hands of the monopolistic superpower seems to have transformed the competitive conditions in which the rule of law was developed in the colonies, as well as those of formal decolonization. Economic and political policy-making is organized around the Bretton Woods institutions (the World Bank and IMF) and is carried on by other non-politically accountable entities such as the WTO or the G8. The use of straight military power that enforces this neo-liberal hegemonic order is increasingly accompanied by a rhetoric of exceptional circumstances (war, terrorism, energy crisis, etc.) rather than by a rhetoric of

religion, civilization, or even law – more in the direction of the pre-colonial private plunder of the East India Company than in the direction that fueled the hopes of decolonization.

Significantly, in Africa, as in Latin America, Central Asia, China, and elsewhere, the law became a technological commodity, a mechanism that could be supplied by international development agencies or private firms. Intervention could fix the shortcomings and "lacks," blamed on the colonial (European) and post-colonial (communist) order or simply on caricaturized Islamic or Confucian local obsolete conceptions. Neo-liberal power could then impose, in striking continuity with the colonial order, a version of the rule of law that entrenches rather than restrains, or controls the giant corporate model of economic activity. This order, obtained by a relentless process of corporatization through legal and illegal means, favors the smooth transfer of natural resources at bargain prices from public ownership to the rich oligarchs. Technocrats, mostly economists, substitute in an increasing number of functions – colonial officials, lawyers, anthropologists, and missionaries – in the production of legitimacy. Local elites, once trained in Europe, are trained in the United States.

An American law firm can secure for its corporate clients their vision of the rule of law: a guarantee of the return of the investments in the gigantic pipeline to transfer oil from the Caspian Sea to the Mediterranean. By negotiating contracts and bilateral treaties, the newly created "right of free transfer of oil" can legally be enforced by private militia or by puppet governments. Other law firms specialize in contracts of reconstruction: "Take off the helmet put on the hard hat: reconstructing Iraq and Afghanistan" is the motto of one such large firm in the Washington DC area: plunder and the rule of law.

The last 10 years of the twentieth century were crucial in the refinement of imperialistic and hegemonic aspects of American law. Nobody has put it more clearly than leading international lawyer Richard Falk:

> The logic of hegemonic authority extends beyond the implications of unequal power and influence, to encompass the rather amorphous, yet significant, role of global leadership. Such a hegemonic role in an era of moderated international conflict is premised on military power, but crucially also includes normative reputation as a generally benevolent political actor, a provider of order beneficial to the global public good, and not just action driven by the national interests of the hegemonic power.[34]

The pursuit of "normative reputation" has stood on a simple ideological platform since the time of Woodrow Wilson. A strong emphasis on freedom, democracy, and the rule of law, as deeply rooted American values, has accompanied almost all US foreign interventions, invariably presented as in the service of the public good rather than in the interest of the intervening power. Such an idealized vision, often contrasted with an enemy face of Nazi fascism, communism, oriental despotism, etc., has allotted to the United States significant prestige as a benevolent international ruler, despite horrors such as Hiroshima and Dresden, for which the "Marshall Plan" has been deemed adequate compensation.

To be sure, during the Vietnam War, US prestige dramatically declined worldwide. Nevertheless, the communist totalitarian alternative was enough to make a sufficient number of intellectuals – particularly lawyers – still ready to buy into the benevolent nature of US rule of law, its intimate connection with the capitalist economy, and ultimately with freedom. The present ideological construction of the Islamic world (as represented by Khomeini, Ahmedinejad, or the Taliban) also introduced a racist component, but the substantive charges against the "enemy" have not been changed: the adversity to American values of universal freedom, democracy, rule of law, gender equality, and human rights – a remarkable pattern of continuity. Of course, then as today, such values are presented as inextricably connected with the capitalist model of development, the natural outcome of a genuine pursuit of freedom.[35]

One could say that the nineties were the decade in which US international power and law entered into a more marked phase of hegemony. As we discuss in further chapters, legal and political hegemony implies a consistent effort to Americanize international institutions, promoting an ideological image of democracy and freedom in order to persuade the public of the benign nature of the international leader, sometimes by means of propaganda and manipulation. By the very early part of the new millennium, attempts to rule by "normative reputation" cower under an annual military budget of over $600 billion (2007 figure).

This book will not catalog the many occasions in which the new world order, born after World War II and accomplished after the symbolic fall of the Berlin wall, has been enforced by unprecedented military strengths and violence.[36] For the purposes here we can assume that force is today, as it had been at the time of the Crusades, of Pizarro, and of the British opening up of eastern markets, the most important instrument for imposing the hegemony of Western

values, although followed by legal justifications and outright propaganda.[37] Developing and accomplishing unchallenged primacy of physical strength has produced much of the hegemonic position of the United States.[38] Today the United States government spends more on its army than the aggregate nine countries beneath it in the ranking of the top spenders. Nevertheless, in a project of expansionism, force requires ideology to gain some consent both in the camp of the hegemonic power and among the victims. This is where the rule of law plays a crucial role.

Transformations into the rule of law have accompanied significant changes in the way in which the capitalist superpower attempts to rule the world. Plunder prospered even during the most "virtuous" phases, in which the American rule of law was at the peak of its prestige, spontaneously followed and admired worldwide as a possible model of liberation. Nevertheless, the weakening of the bite and of the credibility of the rule of law in more recent times made plunder even more possible, itself being transformed, emboldened, and able to reach new heights through corporate shaping of the law.

In the 1990s, as a result of the fall of the Soviet Union, most Western communist and socialist parties started a major self-critique. A large part of the intellectual elite that during the Vietnam era was critical of US imperialism, quite suddenly discovered the virtues of the "free market," thus weakening intellectual resistance to rampant Reagan/Thatcher capitalism.[39] According to the new, quickly developed, orthodoxy, the political apparatus of the Soviet model simply could not resist processes of internal corruption because the plan was a poor substitute for the market and because freedom and entrepreneurship were sacrificed. When Soviet political failure included all possible alternatives to capitalism, an idealized model of capitalism started to be compared with a historical and contingent realization of socialism. The reach of a time-honored hegemonic strategy consisted in comparing a favorable self-portrait with an essentialized other, a strategy already well developed in a variety of forms of "orientalism" through the colonial era.

Discursive practices are needed because in any society and in any complex aggregate of people, leaving to one side the cynical, there is space for both idealists and the resigned. In different times and spaces the ratio of such people can change, and legal institutions, as with the media or the dominant culture, play a major role in determining their proportions. Passive, disengaged individuals might facilitate hegemony, intervention, and plunder so that this kind of citizenry contributes in creating cynical environments in

which plunder triumphs. The early story of the crusaders in the Arab world and their easily triumphant plunder in the late eleventh century has been explained by such subdued and cynical attitudes.

In the next chapters we describe the techniques by which the plunder of resources and people happen – a guide to how a more technically sophisticated life of plunder has evolved, sometimes by use of the rule of law as its fig leaf, sometimes by using power as if it were law.