

4 | Plunder of Ideas and the Providers of Legitimacy

Hegemony and Legal Consciousness

American legal hegemony can best be seen (and is much more relevant from a political point of view) as a change in legal and political consciousness rather than as a pattern of transplantation of formal legal rules and institutions. Legal reception is a highly creative activity, and transfers of law would be severely misunderstood if approached only as a mechanical import–export exercise of codes or legal institutions. A better approach is to monitor the diffusion of professional ways of thinking about the law, and to address, in colonial or imperial contexts, major intellectual changes in elites. Viewing legal globalization with a state-based lens on the production of norms (e.g. focus on the diffusion of law from France, Germany, and the United States) is not useful for perceiving the nature of the post Cold War legal order. Such perceptions are too strictly connected with territoriality and they fail to understand the mighty role of transnational institutions of global governance (the World Bank, International Monetary Fund (IMF), and World Trade Organization(WTO)) as well as that of transnational corporate actors in the private production of law. Similarly, the colonial project is perhaps best appraised as a relationship – initially and often violently – involving a variety of colonizing actors, both public and private, rather than a discrete relationship between one mother country and one colony. A territorial, state-based perception of the colonial relationship would be too narrow. It would focus on formal institutions and miss the international dimension of both the colonizing effort and of the resisting forces.

Both the colonial relationship and current hegemonic globalization include a persuasive ideological dimension. Subordinates, or at least a significant portion of them, must be persuaded of the superior nature of the dominant order and civilization compared to their own. Without such an ideological component, oppression would be a much more costly exercise. An outright display of physical violence is not a viable long-term strategy. Soft power is much more efficient than hard power, and the establishment of the ideological apparatuses supporting its construction is a crucial aspect of any project of plunder.

While power sometimes uses outright propaganda, professionalism proves more effective in persuading the more educated sectors of the population. Particular professional elites acquire, at the international level, the influence necessary to provide legitimacy to hegemonic power. Their role, most importantly, is to target local intellectuals and public discourse in order to use the prestige of a local influential social class to narrow the costs of physical domination while maintaining foreign control and, ultimately, plunder. Such international and domestic intellectual support allows the imperial project to credibly promise to the local populace, civilization, wealth, development, and liberation. It is an ideological exercise, the province of mainstream ideologues, to render outward plunder invisible and the practices supporting it as acceptable to most because of its benevolent nature.

The function of providing legitimacy is sometimes institutionalized, as in the case of Catholic missions in colonial times. Sometimes, it is more decentralized, as in the case of a much-admired solo scholar lecturing through the world of academic invitations. The non-critical posture of such persons over their own legal and political system might itself function as a powerful ideological justification for the state of subordination because it ultimately provides conservative role models for local elites.

Programs such as the Fulbright grants for lecturing abroad, or a variety of other similar, often commendable, initiatives are examples of what we mean. In this case, to be sure, nothing forbids the traveling lecturer from being critical. Nevertheless, the process of selection and the psychology of the role, make self-critique highly unlikely. In 2005 Professor John Yoo, the author of the notorious torture brief, was Fulbright Professor at the University of Trento, in Italy. It is problematic to ascertain whether Henry Sumner Maine's prestigious views of social progress were congenial to the colonial project because he was expressing them as a colonial official or whether he accepted a post of colonial office because he held such views.

Similarly, it is difficult to establish whether a leading scholar in, say, law and economics becomes influential worldwide because he already holds views that are congenial to the dominant neo-liberal ideology or whether he absorbs such an ideology because such are the expectations of his hosts at economics departments worldwide. Possibly the question is not even interesting. It is though a fact that a vast majority of leading intellectuals at the center hold imperialist (or colonialist) views and because of such views their voices are amplified by the aggregate of institutional factors that might be called the ideological apparatuses of global governance. Such views, prestigious as they are, provide professional legitimacy to the imperial project.

In this chapter we shall therefore provide a discussion of some "providers of legitimacy," a diverse group of intellectuals who help in the construction of a legal consciousness coherent with imperialism. Such intellectuals do not need to share any particular motivation except perhaps some "professional project" dictated by loyalty to their scholarly discipline. As individuals, their motives can be indifferent.

We shall begin our discussion with materials on plunder in the domain of ideas. We will then discuss how legalization of plunder is provided by the development of a shared legal consciousness among intellectual elites developing a variety of self-serving strategies. We shall begin with economists, today operating in the USA in close contact with lawyers and policy-makers, to see how their professional project first colonized American legal thinking and then claimed a global role in the providing of legitimacy to legalized extraction or plunder. In order to discuss continuity we will then turn to anthropologists, in particular those concerned with the law, because of their extraordinarily important role in legitimizing colonial plunder.

Intellectual Property as Plunder of Ideas

The immediate aftermath of the Cold War was opened by the invention of the world wide web protocol on the internet. It is enough to browse the internet once to see its American cultural imprint. The quantitative and qualitative advantage of US-based English language sites is yet further evidence of the very strong cultural hegemony of the United States in this network, the ultimate symbol of globalization and progress. The so-called "digital divide" demonstrates the appalling growth of the difference between rich and poor countries, created and dramatically expanded through the internet by what

can be seen as another ideological apparatus of global governance: intellectual property. Information is today perhaps the most important source of wealth. Intellectual property, rooted as it is in an extreme Western individualistic notion of property law, is incompatible with existing modes of property and fundamental communitarian values of many societies. Western intellectual property ideas are expanded worldwide through the internet and enforced by TRIPS (trade-related aspects of intellectual property) agreements, the intellectual property “branch” of the powerful WTO. Intellectual property formalizes the disparity of wealth and power that technology yields, through granting to the global market-dominating minority an advantage seemingly impossible to overcome. The non-territorial nature of intellectual property as symbolized by the internet and the claim of universality and of objectivity of its justification is producing more institutional imperialism.¹

Global legitimacy of intellectual property is rooted in the notion that individual creativity deserves a prize and that exclusive property rights constitute such a prize. We are back to Locke and to natural law justifications of individual ownership, the same previously discussed line of thinking that granted legitimacy to early genocides and looting in the “vacant” Native Indian lands of North America. Nobody would farm without guarantee of exclusive property on the outcome of his/her labor. Nobody would have incentives to create if there were no intellectual property rules granting a monopoly on the benefits of his/her creativity. Nobody would genetically modify seeds without guarantee that the legal system would help impose such technology on farmers worldwide, forcing them to abandon communitarian practices of seed sharing and swapping.² Such eighteenth-century rhetoric, reinforced today by simplistic neo-classical legal and economic models, denies notions of alienation and exploitation and the simple fact that intellectual property rights can very often freeze the *status quo* rather than promoting innovation and change.

The general universalistic individual-centered philosophy propagated by intellectual property rights and by the institutions created to enforce it worldwide (World Intellectual Property Organization, TRIPS),³ serves the needs of powerful corporate actors. Patents and copyrights are monopolies. In the name of efficiency and innovation, it promotes the notion that ideas, like every other resource, should be placed on the market to become the property of whoever is willing to pay more for them, thus increasing social wealth. This seemingly neutral justification hides the relationship between willingness to pay and capacity to do so, thus naturalizing the continuously increasing advantage of the stronger market actors.⁴

The hegemonic aspects of the intellectual property revolution are very easy to perceive both in their component of power (economic and political pressure to force non-Western countries to accept international intellectual property protection agreements) and in their ideological component, indispensable to reach consent (intellectual property justified as a universal natural law conception and as a modernizing, efficient idea needed for development). Of course, as with all institutions of hegemony, intellectual property uses double standards not only in its intellectual justification but also in its actual use. In the first perspective, it promotes monopoly as efficient, otherwise an anathema for economists. In the second, it is sufficient to compare the generic anti-AIDS drug saga in South Africa (where as many people die of AIDS every week as the victims of the September 11, 2001 events) with the treatment and the respect that the intellectual property of the German-based Bayer pharmaceutical multinational company has been granted by the Bush Administration in the aftermath of the “anthrax crisis” in the fall of 2001.⁵ As our readers might recall, the Bush administration had single-handedly allowed generic production of the antidote drug whose patent belonged to Bayer, and the pharmaceutical industry, strong with the weak in South Africa but weak with the strong in America, has immediately shown generosity in disregarding its patents and willingness to cooperate with the American administration.

Our discussion of plunder of ideas has to return once more to the European roots of American law, because our story here is about Euro-American, not Islamic or Asian, appropriation of other people’s resources and ideas. The examples we use fall in the intellectual property rights’ area, a Western law of copyrights, patents, trademarks, and trade secrets that, by individualizing global knowledge, make it easily appropriable and transferable to whoever is willing (and able) to pay more for it. The basic assumptions that facilitate the function of law as a technique of appropriation become clear when, in transcending national boundaries, such ideas collide with non-Western assumptions, challenging, for example, notions that one cannot patent old ideas in the service of the group rather than the individual. To fully understand contemporary issues about intellectual property, a cross-cultural comparison is useful.

The case of the Kayapo in Brazil has been fully documented. Article 27 of the TRIPS agreement maintains that for an invention to be patented, it must be “non-obvious” (substantially altered from a natural state), useful, and novel, and it must be the product of a specific individual. The Kayapo conception

of what constitutes human invention differs radically. The Kayapo consider knowledge to be a product of nature and not of human nature. Next, for the Kayapo, knowledge is not always translated into “useful products.” Whereas the TRIPS agreement requires an invention not to have been known, indigenous knowledge is passed down from generation to generation. Any Kayapo can know a cure – it is in the public domain. The final criterion that it be considered the product of a specific individual would not fit the Kayapo context, for their knowledge is communal and difficult to attribute to one particular person and thus consequently more difficult to commercialize. Thus, Western intellectual property rights are not composed of values expressing the full range of human possibility but rather are composed of beliefs reflecting the interests of the Western market-dominating minority and then universalized. Note that exactly the same story could be told for the individualization of property over commonly held cultivable land in western Africa, a super-imposition of Western individualistic conceptions germane to free transferability to whoever will pay most for it. Invariably, individualization and privatization policies, supported by international financial institutions, favor Monsanto and other multinational corporations interested in buying land otherwise not available on the market for experimenting with GMO (genetically modified organisms) technology.

The Kayapo are only one example. The literature is replete with episodes of “fishing expeditions” in which Western scientists in the field observe practices or cultural expressions based on centuries-old local knowledge. Not only scientists, but also “cool hunters,” observing juvenile communities to get inspiration from shared ideas of what is cool (tattoos and piercing in the Amazon, or the hip hop symbols of the African-American ghetto such as the hood, would be good examples). They then return home to obtain “new” intellectual property rights for the purpose of global exploitation of these common ideas in the music, fashion, or pharmaceutical industries. Often, once the individual property structure imposes itself on this knowledge, a global market emerges for the raw materials, raising prices and consequently stripping the locals of all possibility of keeping the traditional use, simply because they have no capacity to pay the new “Westernized” price.

The best-known example is the Indian *neem* plant (the village pharmacy), traditionally serving many health purposes. Western scientists “discovered” the active principle and then obtained a patent for oral hygiene use in Florida. Its wide commercial application in the West (for toothpaste) made prices rise to the point of making it unaffordable to its traditional users whose

oral hygiene is dramatically declining. In western Africa a very similar story can be told for *karité* butter, now coveted by the Western cosmetics industry (which often pretends to operate within fair trade principles⁶); other examples abound. African scientists, often after long years of study and sacrifice, are faced with a dramatic alternative: either to remain idle and poor, working at best for public institutions and laboratories, lacking all funds because of structural adjustment program (SAP)-mandated cuts in research and education, or to accept working for Western private “fishing expeditions,” in air-conditioned, well-equipped laboratories. Such private laboratories “improving” the *karité* butter or other traditional processes and ideas, often the only ones subsidized by Western donor governments, eventually patent their inventions. Of course, in accepting the latter alternative, these scientists give up all claims for their “inventions,” many times the fruit of shared communal knowledge of their villages of origin.

Creative and impoverished African singers, whose rhythms now enrich the Western media industry or creators of tattoos, necklaces, and piercing, now copied and commercialized through Western malls, enjoy no returns as the real inventors. These individuals only look for minimal resources to express their creativity, often the product of accumulated local knowledge: recording places, art laboratories, etc. To be able to work and express themselves, they “transfer” to the companies that allow them these minimal facilities the exclusive intellectual property rights, usually of communal origins: plunder.

While the ideological nature of the idea that individual intellectual property stimulates creativity is exposed by such facts, one can observe how Western institutions actively promote the legal instruments of such plunder. For example, the European Union, an important “donor” in Mali, conditions research and other cultural grants to the Malian government to the passage of new, stricter intellectual property law. This conditionality serving the Western industry is shamelessly spelled out in writing, because the development benefits of intellectual property law are now taken for granted.

Solutions to the fundamental tension between individualistic ideas and communal knowledge have been proposed, such as new legal concepts based on a more culturally inclusive depiction of intellectual property that recognizes the collective rights of indigenous people as “collective inventors.”⁷ Others, more imbedded in the intellectual property/creativity equation, suggest the use of contracts between extractor and extractee, or promote ideas of “creative commons.” There has been an explosion of published solutions to these issues (such as James Love’s proposal to circumvent the patent

system), but it is not our purpose here to examine proposals or to review this literature. Rather, we need to better understand the significance of the current challenge to elucidate the means by which recent trade laws have been legitimized, and why commercial interests do not just take what they want, by persuasion or power, but instead invent legal circumventions.

A powerful ideology has developed around intellectual property, allowing it to become a sophisticated instrument of plunder. Western ideas and conditions are universalized, taken for granted, and naturalized by such ideology, which is mostly produced by the different intellectual elites that we will discuss in the next sections. For example, the natural law notion of “first possession” of vacant spaces, sometimes rendered with the idea of “first come first served” is used, almost unchallenged, in the allocation of “domain names” over the internet. Anybody, by paying a moderate fee, can occupy a free domain name that after occupation can be used, as in any form of individual ownership, only by obtaining his consent. Thus an efficient market of domain names is created, granting to everyone equal possibilities in this new frontier of human wealth. What seems more natural, fair, and efficient to anybody owning a computer, internet access, and \$15?

These conditions, however, are neither natural nor universal. It is no surprise that American companies now “own” the domain name “Yanomani.com” or “SouthAfrica.com,” thus positioning themselves legally to claim returns on future uses of these names. People and countries, disadvantaged by the digital divide, might have to pay to use their own names in the global space of the internet. Just as the Yanomani people and other general losers of the globalization processes will have to pay for newly patented subsistence necessities which are privately owned, such as genetically modified seeds developed in corporate-owned cultivable land: plunder.

Providing Legitimacy: Law and Economics

Economics is widely perceived today as the “queen of social sciences.” It is the only one officially recognized as a “true science” to the point that, among the so-called social sciences, a Nobel Prize is granted only in economics. Liberal guru Sir Karl Popper recognized economics as science, while denying such status to sociology, law, anthropology, or psychology. It is no surprise that within the neo-liberal project, economists have become more and more influential in policy-making, providing “neutrality,” “scientific knowledge,”

“objectivity,” and ultimately a powerful intellectual justification for the ban on redistribution of wealth in society. An Austrian economist, Friedrich Von Hayek, can be considered the intellectual mentor of the Reagan/Thatcher revolution.

Although economists can differ much among themselves in political beliefs, they almost unanimously share a faith in positivism. They believe that a descriptive dimension can be distinguished from a prescriptive or normative one. Consequently, they accept political divisions in the world of “ought to be” while their professional project is to describe, explain, and predict the world of the “is.” Economists, moreover, consider the “profit motive” (described as utility maximization) as the sole human motivation capable of being an object of “scientific study.” They consequently consider even altruism as maximization of individual utility. The altruist is someone who derives selfish utility from being generous. The justice motive is thus reduced to a subform of utility-maximizing behavior.

Universality is an important aspect of the behavioral “laws” that economists describe, so that economics can be considered to be the same in New York, Paris, or Bombay. True, some economists assert that institutions or cognitive biases matter, and have consequently paid more attention to the institutional or even cultural context of their prescriptions.⁸ Nevertheless, the sense is still that local fundamental differences do not affect the validity of the “universal laws” according to which markets work. Institutional differences can be tackled in the normative dimension by harmonizing, in order to obtain some universal conditions of efficiency. Alternatively, differences can be “exploited” within a competitive pattern itself aimed at efficiency. Notions of “good governance” and “structural adjustment” share the belief in an evolutionary pattern of development that poor countries should walk in order to reach the “optimal conditions” of market capitalism. What anthropologists believed a century ago and then abandoned is today the common creed of the queen of social sciences.

We do not aim to caricature the work of economists. Their scholarly discipline is highly sophisticated and formalized, so that non-professionals cannot even understand much of their knowledge. Nevertheless, as already described in a previous section, policy prescriptions derived from economists (think of the Chicago Boys in Chile), being ultimately political, must be discussed and criticized in political terms. Even when in good faith, and even when open to the cutting edge of the discipline’s developments (paying due attention to institutional and cognitive biases), economists invariably present

peripheral countries as so feeble that they are not even able to accomplish very basic recipes for economic success and development.⁹ The mainstream economic profession has thus deeply internalized, ultimately because of its utilitarian axiology, both the self-congratulatory attitude of the West and its condescending, humiliating, and often racist attitude towards the rest.

Equally simplistic are the shared perceptions within the economic profession of the reality of the legal system, both in Western settings and *a fortiori* in peripheral countries. Nevertheless, as often happens, short of being understood as a disciplinary limit, simplistic analysis and simple prescriptions are key to the success of a literary genre. Thus economic pundits transmitting such dominant, simple-minded approaches to the general debate through newspapers and other media are relevant here as influential policy-makers and legitimizers of the global “rule of law” as an instrument of plunder. It is the roots of this influential professional dialogue in the United States that interests us in this section.

The encounter of interest between the legal and economics professions happened at the height of the Cold War, when an anti-formalist form of legal reasoning, known as *American legal realism*, intellectually dominated US legal culture. American legal realism can be described as a candid approach, recognizing that the law is mostly the product of the decision-maker’s policy decisions, often stemming from his political vision of society. Such an approach was in sharp contrast with previous formalistic ideas of the rule of law as a pre-existing order that the legal interpreter was only supposed to discover by almost mechanically applying to factual situations, relevant statutes, and precedents.¹⁰ In the realist vision, the lawyer was to operate as a social engineer, balancing conflicting interests and thus “creating” the legal framework for future social interaction – a dramatic departure from a “textual” tradition of lawyering that still dominates outside the United States, but still a clear recognition of the “normative” nature of legal reasoning. A leading legal realist, Herman Oliphant, created a successful motto for this American anti-formalist legal approach, by suggesting that lawyers should “Get out of the libraries!” According to this vision lawyers should immerse themselves in the study of social interaction to search for the best possible institutional solutions. The belief, which had long been the entire universe of mainstream Western lawyers, that rules can be “discovered” in previous statutes and precedents, had to be abandoned.

For this purpose, lawyers needed the guidance of other social scientists, such as sociologists, anthropologists, or economists. Karl Llewellyn, for

example, another leading legal realist, knocked at the door of anthropologist E. Adamson Hoebel to explore forms of “legal life” outside of libraries.¹¹ And many other realist lawyers, too, felt that non-lawyers were needed in the law faculties in order to develop non-textual paradigms of thought. Among such non-lawyers appointed to teach in the most prestigious law schools in the 1950s, we find many of the founding fathers of “law and economics,” leading Chicago economists such as Aaron Director or Ronald Coase.

Lawyers, to be sure, did not limit themselves to using their guides for an intellectual journey outside of textual reasoning. Not many of them were looking for progressive approaches aimed at challenging the *status quo* of the law. Not many were seeking, with economic tools, better approaches to examine “dark places.” In Western countries, dominated by the rhetoric of democracy, when lawyers candidly perform their often-contested role of law-making, acknowledging their own policy platforms, they experience a loss of legitimacy. In a very interesting public recent example, one can use the confirmation hearings of Chief Justice Roberts of the US Supreme Court. This skilled lawyer successfully used the metaphor of the judge as a “neutral umpire,” just applying the law as he finds it, thus gaining confirmation by denial of any personal policy platform.

Many American lawyers, particularly those located on the more conservative side of the political spectrum, felt that decades of dominant legal realism required a restructuring of the lawyer’s legitimacy as a neutral umpire. The law, they held, needed to be refurbished, reclaiming some objectivity and neutrality if legal scholars and judges were to keep a social role as “hidden law givers” in a politically legitimized representative system of government. Considering law as the policy preference of the last decision-maker, like realists did, exposes the legal profession to a fundamental challenge: if law is as biased as the political preferences of the decision-maker, why should the decision-maker be a professional lawyer rather than a politician, a doctor, or a car dealer?

As we have discussed, in Western jurisprudence, the rule of law – vested as legal science and a specialized form of knowledge – has served the purpose of asserting the special role of lawyers, decision-makers lacking political legitimacy, at least since the time of Sir Edward Coke. If the time-honored metaphor of the lawyer as biologist (appellate cases being his laboratory specimens), discovering a pre-existing legal system and then applying it to facts with a geometric deductive reasoning, no longer could serve the purpose, having been ridiculed by decades of legal realism, “social science” could now do the legitimating trick. And first among social sciences was economics, in

whose DNA one finds the denial of any legitimacy of normative discourses such as those typical of lawyers.

Economics could, at the same time, offer a good guide outside the black letter of the law, and a new strong source of legitimacy. After all, economists were dealing with incentives, and incentives meant focusing on the behavior of the recipients of legal precepts – something happening beyond the legal text. Economists, moreover, beginning in the 1950s, applied their “scientific” analysis to the behavior of politicians and other institutional actors. By claiming that politicians are rational maximizers of their chances to be re-elected, they developed an approach known as “public choices,” claiming to be able to predict the content of legislation and regulatory activity by focusing on the connection between legislators and special interests. By so doing they were still focusing on something outside the legal text understood as the outcome of the political process. Their worry centered on the production of norms, on law in the making, the processes and the forces determining its content (so-called “rent seeking,” studied by Nobel Laureate James Buchanan). While traditionally lawyers were focusing on legal norms and precepts *as they are* (or as they should be), economists were claiming that the focus should be turned on what comes before (public choices) and after (incentive-reactive behavior) the legal precept. The focus should be on *the process* and on the social consequences of its outcome.

As to legitimacy, economics handbooks were full of rhetoric grounded in science and objectivity. The early success of economic reasoning in legal matters can thus be justified by at least two factors: (1) once the focus is on the process, then all would accept that the process should be efficient; and (2) efficiency was claiming objectivity, something essential in a strategy of legitimization. While justice is the domain of subjective feelings, efficiency is the domain of objectivity based only on a few simple, clearly spelled out criteria.¹²

Economists had an agenda too, so the dialogue with lawyers not only served the need to provide legitimacy to the lawyer’s role but also would eventually further the political role of the economist by involving them in law-making and legal interpretation. And the agenda was common to conservatives and progressives. The more open-minded of the economists, such as the early Ronald Coase (himself a Nobel Prize recipient), felt that segregation between the two disciplines was absurd. After all, at an earlier stage, law and economics were not even separate domains of knowledge: the founding father of modern economics, Adam Smith, was a professor of law.

It was only positivism, an approach that by the late nineteenth century had conquered both disciplines, that almost paradoxically created a cultural impasse to communication between them. For economists, as we already know, positivism meant the full separation between facts and values, between the “is” and the “ought,” between positive and normative discourses.¹³ For a long time they simply could not communicate with lawyers, given the constant confusion between these levels of discourse that characterizes how lawyers talk about justice. The few economists, such as Thorstein Veblen or John R. Commons, who attempted to overtake the logic of economic positivism by maintaining a dialogue with lawyers and institutions, themselves focusing on issues of distributions, were accused of socialism and marginalized by the economic orthodoxy.

For lawyers, on the contrary, positivism meant full separation of the domain of law from that of morality, politics, society, and whatever is “outside” of what the authority *poses* as law. Positivism meant, in terms diffused by leading Austrian jurisprude Hans Kelsen (himself, as Hayek and Popper, a refugee in England), a *pure theory* of the law. In this perspective, economists were tainted by their constant policy discourses, something beyond the pure idea of the legal system.¹⁴ Naturally, the pure theory of law, granting legitimacy to the rule of law simply because it is the rule of law, does not second guess its use however oppressive it might be. It thus introduces the idea that the law, once posed and effective, is self-legitimized, can never be “illegal,” and can never serve plunder, a term *per se* evoking illegality and not the rule of law.

This separation of legal and economic thinking has extracted a high toll that became very visible when the oil crisis of the 1970s compelled the rethinking of priorities. From the lawyer’s side, the welfare state had been constructed with very little attention to the economic effects of its regulations, so that by the time of the oil crisis, sustainability started being questioned, more and more successfully, particularly in England and the United States. On the economist’s side, Keynesian policy, so crucial in recovering from the crisis of the 1930s, was developed without considering the legal structure of its implementation, in particular the autonomy and strengths of the legal and bureaucratic structure, capable of defeating, by complex patterns of resistance, any macro-reform.

Consequently, while some economists were eager to better understand the legal picture, hence overcoming the costs of decades of incommunicability, others used the new Chicago creed to attack Keynesian policy because of

its emphasis on the role of the state. They also scrutinized the political process within a public choice model, to claim back to “the market” (to the private domain) what Keynesianism had transferred, arguably unsuccessfully, to the public domain level of (redistributive) state intervention in the economy. Public choice theorists monitoring the distortions of the political process (in particular of legislation and regulation) were finding their natural allies in the early work of apologists of the common law tradition, such as Chicago scholar and Reagan appointee to the federal judiciary, Richard Posner. Under this alliance, in the name of efficiency and objectivity, issues of distribution and substantive justice – so crucial to traditional legal analysis and to the realist legacy of the New Deal – were simply left behind.¹⁵ The normative dimension was de-legitimized in the legal discourse that was to become “positive,” like that of any other social science.

The economic approach to legal reasoning would not have achieved a global role if it had not been leveraged, beginning in the Reagan years, by a fully fledged political agenda, a real industry capable of flooding with cash any movement giving cultural prestige to deregulation and other reactionary politics of those years. It is sufficient to look at the early, very lukewarm reception of these new ideas in Europe to understand how much lawyers were willing to resist efficiency and privatization in the name of justice and distribution. But the multiplication of academic chairs, endowed research facilities, fellowships, and the like in a prestigious context such as the United States academia (today’s global graduate school) was a certain recipe for global success, including its spread to China, India, and elsewhere.

Historically, the way in which a new, politically powerful paradigm of research is able to seize a leading position in a plurality of cultural contexts is often by making previous approaches look obsolete and primitive.¹⁶ This has certainly been the strategy by which the economic approach to the law has been able to seize a global role, by offering an expansive, universalistic model that expresses itself in English (the new lingua franca) and which claims to be the latest natural legal order of the global age.

Within these assumptions, any approach to the law that still considers it a political institution which cannot be understood and described in graphs and numbers is disposed of as obsolete. Any approach that requires something other than a reactive minimal philosophy of governance (Hayek’s political theory) has been entirely out of fashion since the fall of the Berlin wall. Any approach claiming a normative and openly value-guided role for lawyers marginalizes them from the much coveted company of social scientists.

For the economic approach, law is supposed to create incentives for market actors. The skilled lawyer and policy-maker is not appreciated if his suggestions require a proactive and expensive activist posture of governments, let alone if he argues for economic redistribution by taxation or other obsolete Keynesian measures. The legal scholar can only count on the natural existence of markets: his role is to produce a correct set of market incentives. The quintessential example of this attitude is the celebrated “self-sufficient” model of corporate reform produced by leading American scholar Bernard Black for the Russian Federation.¹⁷

Nothing is natural in all of this. As we have seen, the relationship between economists and lawyers has a history and is contingent, politically motivated, and historically driven. It is important to consider this in order to rebuke the narrative of necessity and natural evolution that characterizes so much of the imperial project, which to the contrary is today, as in the colonial past, a *project by design*.

While it would be grossly exaggerated to claim that efficiency reasoning enjoys a dominant role as an approach to legal scholarship worldwide, we can nevertheless see that it is the main intellectual vehicle used to diffuse expansionist and universalistic American legal ideas, including tight notions of intellectual property.¹⁸ The new producers of global law, private and public international institutions of global governance (the WTO, World Bank, IMF, mega law firms, rating agencies etc.), implement policy based on the value of legal efficiency. Moreover, the merger of law and economics has produced the now diffused general understanding of *law as a technology* (a refurbished strategy for its de-politicization), as witnessed by the significant numbers of “centers for the study of law and technology” created by lawyers and economists through the major US law schools, usually funded by large intellectual property law firms.

A very clear bias in favor of the efficiency of common law adjudication promotes courts of law and (quite paradoxically) alternative dispute resolution (ADR) as the most important actors of a reactive legal system, structurally incapable of the redistribution of resources in favor of the weak. Privatizations of every possible domain, including that of ideas, and structural reforms, sustained by the international institutions of global governance, make economic reasoning in the law one of the most important vehicles of diffusion of self-centered American ideology worldwide.

Powerful organizational structures, producing a flood of professional literature, were created to transplant in Europe, Latin America, and elsewhere the idea that the law should be grounded in economic efficiency rather than

in social justice. Organizations like the European or Latin American and Caribbean Society of Law and Economics began their operations as early as the late 1980s. Once transplanted outside the USA, economic reasoning in the law displays the high level of ambiguity that actually allows it to flourish. Conservative scholars admire its intellectual elegance and share its political biases. More progressive and liberal scholars see its potential in subverting the highly formalistic and black letter flavor of local conceptions of the law (still based on legal positivism) and claim that the conservative political bias is something that can be left on the other side of the Atlantic Ocean. Because of this de-politicizing force (though former Mexican President de la Madrid served as Honorary President of the Latin American Society of Law and Economics), the economic approach to legal reasoning was able to persuade many “global” legal professionals that issues of distribution were better tackled by taxation than by adjudication and that, as a consequence, efficiency should become the pole star of legal interpretation. Such lawyers were paving the way to a mode of thought subversive of the traditional relationship between law and the market, which emphasized the need of the former to regulate and check the actors of the latter.

Since the 1990s, the relationship between law and the market began to be gradually subverted in US legal theory. The law, it was posed, should be without values, efficient, and serve the function of facilitating rather than constraining transactions. As a consequence of this philosophy, the law should be “market friendly,” that is it should limit itself to protecting property rights, freedom of contracts, and enterprise. The law should be adapted to the necessities of the market, domestically and in particular in the so-called “emerging markets” – today’s version of the colonial concept of India, symbolized by the India Company – both eastern (Asia) and western (America). Because of this ideological revolution, carried out by leading American scholars and funded by conservative foundations, today it is the corporate dominated market governing the law and not the other way around. Moreover, because of the re-emergence of bold development discourses, efficiency reasoning in the law gets exported by means of forceful practices of imposition (e.g. conditional loans) rather than freely chosen as a prestigious approach to the law by lawyers worldwide. Developing efficient i.e. corporate friendly legal systems in the third world thus becomes a new civilizing mission in which many do-gooders or more cynical actors eagerly engage with generous financial support from a variety of powerful sources. This strategy

of de-politicization of the law is necessary for the international financial institutions that, as a consequence, fund it abundantly. In the bylaws of different institutions belonging to the World Bank group, for example, there is an explicit ban of political intervention; through the Cold War this was interpreted as limiting its activity to strictly economic issues, thus not to the law because of its political content. Today, the notion of “comprehensive development,” the new World Bank priority, attracts the law (governance as opposed to government), which has been duly de-politicized by its economic transformation, to the core of economic development. Consequently, intervention in developing legal systems is not banned but actually encouraged.¹⁹

Not surprisingly, in the era of global single thought, with the triumph of transnational corporate actors over the state, the relationship between the law and the market has been reversed. Positivistic notions of the omnipotent sovereign state whose values and priorities, reflected in the law, could be carried out at any price (or without paying any attention to such prices) have withered. The notion of the law as a set of incentives rather than as a pyramid of binding orders, as a carrot rather than a stick, has been critical in unseating state centerism from its dominating jurisprudential status. The idea that market forces produce the law is now accepted. On the one hand, public choice economists “demonstrate” how regulation and legislation are “captured” by the special interests sustaining political campaigns of politicians, described as rational maximizers of their chances to be elected. On the other hand, scholars in law and economics work out all sorts of Darwinian evolutionary theories showing how “investment” in litigation resources produces “returns” in terms of the survival only of the more efficient rules. Seen from this perspective, the law, produced by the legislature or by courts in the process of adjudication, “naturally” favors business interests “investing” in the rule of law. This new concept easily walks the path of saying not only that the law is up for sale, but also that this is “natural” and it should be so.

An economic approach to the law thus locates itself in the conservative mainstream, restating the usual cynically ideological platitudes. What do you expect? The political process is captured and adjudication reflects investments! Once it conquered the mainstream status by marginalizing all openly normative and redistributive arguments, efficiency reasoning has thus transformed the choice for candor, typical of realist jurisprudence, in an even more extreme choice for cynicism. Discourses on distribution and on values have been abandoned. Transformation of an economic approach to the law

into an organized and corporate-funded intellectual industry has expelled any distributional worry from the cutting edge of academic and policy discourse. People worried about values, with just distribution of resources, with problems in accepting unconditionally the paradigm of the *homo oeconomicus*, are now depicted as bleeding-heart idealists, or naïve first-year law students, simply incapable of understanding the “scientific” logic that explains how things work.

Of course one might question the gain, in terms of legitimacy for the legal profession, in cynically recognizing that the rule of law is up for sale and that whoever can invest more in legal education and law-making (including hiring more expensive lawyers and lobbyists) will “naturally” benefit from the returns on such investments, by winning the case or obtaining a business-friendly legal environment. The rule of law should lose appeal as much from being controlled by political power as by business interests. Nevertheless, only the first distortion, blamed on socialist legality and on other non-Western conceptions, is constructed as *lack* of the rule of law. The second distortion gets constructed by strong corporate actors as the way things should be, in the name of economic efficiency and market expansion and development.

Universalized notions such as intellectual property, thus find in (bad) economic policy, rather than in law, their legitimating force. They are de-territorialized, “naturally” placed beyond the reach of the state whose only role is to enforce it, not to draft its limits and frame its content in order to reflect the needs of the people. Quite often, with the help of skilled lawyers, American corporations transfer their intellectual property, patents, trademarks, and even logos to other entities incorporated in fiscal paradises such as the Cayman Islands or the Bermudas. They subsequently pay royalties for the use of their own intellectual property. They can legally deduct such efficient royalty payments from their taxable income, thus hiding a large share of their revenues: plunder. They can do so because legislators of both parties cynically described as “natural maximizers” of their chances of being re-elected, behave according to the economist’s prediction. Efficiency is the powerful factor granting legitimacy to universal constructs such as intellectual property and to their expansion beyond reasonable limits.

To be sure, the rhetoric of property transmits a sense of perpetuity; so temporal limits are implicitly the exception rather than the rule. For example the small online publisher Eldritch Press has attempted to challenge the excessive duration of contemporary copyrights (between 50 and 70 years after the author’s

death), constantly and incrementally increased in lengths paralleling the increase in power of the entertainment industry. Eldritch’s action, aimed at re-conquering some knowledge for the public sphere, was defeated by the powerful Hollywood industry, investing in the political and judicial process according to the predictions of law and economics.²⁰ First, an investment in lobbying Congress produced the so-called Sonny Bono Copyright Extension Act (also known as the Mickey Mouse Act, because it aimed at taking care of the expiration of copyrights on Mickey Mouse, the *Wizard of Oz* and other valuable property of the Hollywood industry). Second, more investment in litigation (including the hiring of economic consultants) has shielded the act from a constitutional challenge that reached the Supreme Court. Obviously, the pro-entertainment industry decision of the Supreme Court opens fundamental strategic questions on the possibility and realism of using courts of law for progressive purposes. Clearly, exorbitant intellectual property instruments of plunder have powerful allies in high places.

Economic reasoning in the law has reached peripheral countries where a technocratic elite holds power. Today, professional associations of lawyers and economists are active from Latin America to Asia to Oceania. The leading books for lawyers written by American economists are translated into many languages, and examples of the tremendous worldwide influence of their modes of thought are too numerous to be described here. Economists from less developed countries educated in the United States serve locally as consultants and providers of legitimacy and prestige to – often corrupt – powerful elites. Internationally, they occupy positions in financial and policy institutions eager to show openness in their ranks for people from peripheral countries. But these elites, from Asia, Africa, and Latin America think like Westerners, because they have absorbed, in their prestigious academic study, the rhetoric of Western technocratic elitism. They thus serve the Western project of oppression and ultimately plunder by means of “efficient” law, of which intellectual property is but one example.

The story repeats itself. As the Church (as a colonial institution that would educate a local class) and anthropologists (who would provide the necessary degree of intellectual prestige to the colonial project) were facilitating colonial plunder, so today US academic institutions educate local ruling classes; economists provide the degree of intellectual prestige indispensable for carrying out plunder by means of an efficient law serving the needs of innovation and development.