

3 | Before Neo-liberalism: a Story of Western Plunder

The European Roots of Colonial Plunder

Recent writings about globalization, and the globalization of law in particular, recognize Americanization of the international legal order or at least the presence of a heavy American imprimatur on transnational ideas and practices related to the rule of law. Such recognition, however, is ahistorical for the most part, linking the Americanization of the international rule of law with the rise of contemporary neo-liberal hegemonies.

A more historical view suggests that this process of Americanization did not begin recently, nor did it originate in the United States. Instead it originated with transfers of law and people centuries in the making. In attempting to reconstruct this picture, we will mostly focus on the intellectual and political roots of American imperialism. Because of this focus, most of our attention is given to the English roots, leaving to one side the Portuguese, Spanish, French, and Dutch roots of Western plunder. Influential books such as Blackstone's *Commentaries* (1765)¹ allowed European doctrine and British common law to gain currency early on in the English-speaking Americas. Thus, any story about the Americanization of the transnational rule of law needs to consider its European genealogy and its philosophical underpinnings. Indeed when we speak about the Americanization of the rule of law, it may be more precise to note that it is a Euro-Americanization in both political and economic dimension. Thus the interest of discussing the two, in relationship with each other and in relationship to settings of reception of the rule of law and of plunder therein.

Both Europeans and Americans used law as part of their colonialist and imperialist rule, with colonizing powers imposing their own ideas of law on their colonies. Today the imposition of law is more a result of transnational efforts at homogenization for purposes of capitalist expansion, but law is still the vehicle for legitimizing plunder. The rule of law is undoubtedly one of the more powerful "civilizing" devices used, and plunder, yesterday as today, might well be the most powerful force behind the unfolding of the Western ideology of the rule of law. Most likely its power stems from persuading other societies that they lack the rule of law principle, a strategy often accompanied with the promotion of harmony as another fundamental value of civilization.

Mainstream scholarship blames many contemporary post-colonial settings for the "lack" of rule of law, but at the same time it neglects the history of that rule of law principle in connection to plunder. In this chapter we attempt a re-telling, one that includes the historical dimension in understanding American hegemony through legal ideology in the contemporary world.

The Fundamental Structure of US Law as a Post-colonial Reception

By the early part of the twentieth century, US law had already received from Europe, and digested in a genuinely original way, the fundamental components of its legal structure. The English common law tradition had transmitted to the former colony the ideal of judges as oracles of the law, and of a strong, independent judiciary as the institutional framework in which judges could best perform their role as guardians of property rights. American law has developed the legacy of Sir Edward Coke and expanded it to the point of inventing constitutional adjudications. American judges are not only oracles of the law and the leaders of the professional legal system, they have also the power to declare, in the process of adjudication, political decision-making as unconstitutional.² This outstanding extension of judicial power within American law generated the belief (noticed as early as de Tocqueville³) that any political problem might be, sooner or later, decided by a court of law within the *neutral* logic of the rule of law. This belief was carried to its outermost extension in the Nuremberg trials, and possibly to its very limit in *Bush v. Gore* a case that we discuss further in Chapter 7.

Thus, the colony functioned as a mirror for England, and yet revolutionary America reacted against the colonial power to a large extent because of its

intrusion in property rights and interests. A written constitution, the oldest in the West, was a reaction against the unwritten mysteries of the British constitutional system. England was a deeply centralized legal and political system. In contrast, the US legal system became the most decentralized one imagined thus far.

The continental European legal tradition (civil law) also transmitted to the United States some fundamental modes of thought that US law busily incorporated and transformed during the nineteenth and twentieth centuries. French-refined natural law tradition conveyed to the United States the idea of universal individual rights, once again rooted in an absolute ideal of the sanctity of property rights typical of the bourgeois state. These merely “negative” rights, considered as protections of the individual from government, rather than sources of government obligations to provide for the individual, have been enshrined in the US Constitution, influential as they were on a majority of the founding fathers.⁴ Not only has the universalistic ideal been carried to the extreme, as witnessed among other things by notions of universal jurisdiction of US courts in the vindication of such rights,⁵ but negative rights, in the absence of thick notions of sovereignty and statehood, as developed by the Jacobins, became a genuine limit to the redistributive activity of the American government. Notions of freedom from government intrusion have guided constitutional adjudication throughout the history of the United States. A strong limit to any proactive government can be seen as the result of these early imports from Europe.

Germany also transmitted to the United States one of its fundamental characteristics: the presence of strong, independent academic institutions as another circuit of professional check on the political process. Only because the law was considered a science, was it natural to argue for its teaching in university settings. Otherwise, law in America could well have remained a practical business, as it continued to be in England until well after the Victorian age. American law schools (professional schools staffed with faculty who regard themselves as academic scholars) are the only ones in the world (Japan is recently following) that offer basic legal education at the graduate school level. Consequently, and paradoxically for a system based on a “professional school,” the average American lawyer is exposed to more years of academic training than any other colleague in the world. Moreover, because of this further expansion as compared to academic undergraduate legal education in Europe, and because of the economic strengths of private institutions such as the Ivy League law schools, American academia can well

be seen today as the global lawyer’s graduate school, in the sense that ambitious lawyers worldwide complete their undergraduate legal education with a graduate degree in the United States.⁶

Thus, at least four traits of present-day “global” notion of the rule of law can be traced back to the US experience: (1) a written constitution; (2) constitutional adjudication; (3) individualistic rhetoric based on negative rights; and (4) legal professionals as “social engineers” active in a highly decentralized system organized to protect property rights.

A Theory of Lack, Yesterday and Today

The imperial side of law has a long history even if we restrain our analysis to America. Indeed, it was present before the American Revolution of 1776. It was already present in doctrinal thinking of the early time of plunder, when British colonists arrived in North America and encountered Native American communities.

The rule of law has justified genocide since the beginning. We need only recall that European doctrines of discovery principle hold that “European explorers’ discovery of land in the Americas gave the discovering European nation – and the United States as successor – absolute legal title and ownership of American soil, reducing Indian tribes to being mere tenants.”⁷ The rule of law, grounded in natural justice, was used to justify and validate land appropriation, and the discovery principle remains to this day one of the most entrenched legal doctrines undergirding US federal Indian policy to the detriment of Native Americans.⁸ This in the face of the Declaration of Independence that “all men are created equal.”

Validation of appropriation was also inherent in the philosophy of John Locke’s *Two Treatises of Government* (1698).⁹ Native American properties could be appropriated by command of the Christian God, “As much land as a Man tills, plants, improves, cultivates and can use.” Later on, Swiss scholar and statesman Emerich de Vattel was equally explicit in his *Law of Nations* (1797), a work which also gave legal justification for the colonial appropriation of lands:

The earth belongs to all mankind . . . All men have a natural right to inhabit it . . . All men have an equal right to things which have not yet come into the possession of anyone. When, therefore a Nation finds a country uninhabited

and without an owner, it may lawfully take possession of it. In connection with the discovery of the New World, it is asked whether a Nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes whose small number cannot populate the whole country . . . we are not departing from the intentions of nature when we restrict savages within narrower bounds.¹⁰

Because the United States were born as a nation out of an anti-colonialist revolution, such origins played a role both in erasing from the national consciousness the original internal colonial plunder and in characterizing the style of US imperialism in contrast with European colonialism. Thus, for example, in their early relationship with China, whereas the European countries favored territorial control by physical apprehension (the British in Hong Kong, the Portuguese in Macau), the United States favored one-sided “open door policies” from the nineteenth and early twentieth centuries, quite conscious of their own economic advantage in international expansionist competition with the Europeans. By so doing, the United States could, on the one hand, confirm themselves as anti-colonial champions, by blaming as colonialist the European physical occupation, and on the other hand, they could fully exploit, for the purpose of plunder, the time-honored policy of market liberalization. Within this open door policy, the rule of law, in the form of sanctity of contracts and of property rights security, was crucial to the interests of American investors and was thus “promoted” by the American government through the use of extorted agreements of extraterritoriality and immunity from Chinese jurisdiction. Such self-serving practice was ideologically promoted as offering a “civilizing” model for reform of local law, a condition for the eventual admission of China into the “family of civilized nations,” subjects of international law.¹¹ This episode can be seen as a century-old preview of present admission of China to the World Trade Organization (WTO), though the power ratio seems dramatically changed.

The policy of using forced market liberalization rather than direct colonial control was similarly key to British success throughout Latin America both during Spanish and Portuguese colonization and after San Martin and Bolivar achieved formal independence in the first part of the nineteenth century. In fact, through the era of colonization, official Spanish and Portuguese plunder of raw materials (especially metals) was mostly used to service the debt owned by the Crown to bankers in the city of London. After formal independence, Great Britain waged war, directly or by proxy, on multiple occasions to guarantee the opening of the markets to its companies, allowing

continuing plunder of raw materials yielding astronomic profit, and precluding the development of internal markets that could simply not compete with cheaper goods industrially manufactured in Great Britain. The few measures of local governments daring to protect local business in the hope of avoiding the tragic decline of a promising young industry were systematically denounced as contrary to the rule of law, protecting the global rights of the British companies to do business with a guarantee of return.¹² The few local leaders that attempted to resist – by limiting the “sanctity” of exploitive contracts of labor, or those of private “mining rights” acquired at trivial costs from their corrupted political predecessors, or the *latifundio* structure, favoring a local upper class notorious for its extravagant, very expensive, consumption habits – were simply forcibly removed from office, and their legacy officially despised for centuries. Among such leaders, one should at least remember Jose’ Artigas from Uruguay, who dared attempting a land reform in 1815; Juan Manuel de Rosas of Argentina, defeated by British and French warships in 1852; or Francisco Solano Lopez of Paraguay, murdered in 1870 after a 5-year heroic war of resistance against Argentina, Uruguay, and Brazil, who waged a proxy war for Anglo-American capital against what was at the time the country that had reached the highest point of independent civilization ever in Latin America.¹³

Open door policy remained the official creed well after the Monroe doctrine (1823) still wrapped in anti-colonial rhetoric, was established, ostensibly to avoid a colonial scramble between European powers in South America. In fact, as we know, the doctrine has served as an effective claim to reduce Latin America to a US backyard, granting to US companies (such as United Fruit) trade monopolies in the region. Clearly, “open doors” never really meant free competition.

An instructive example comes from the recent history of Brazil, where President Gertulio Vargas dared threaten the interests of the US iron industry in 1954, by behaving as a rational economic actor, preferring to sell the metal at much higher prices to the Polish and Czechoslovakian governments rather than at the price that US companies were willing to pay. He was almost literally driven to suicide, as witnessed by his last letter placing the blame of his tragic decision on the international pressures precluding him the possibility to serve the interests of his country. The principal beneficiary of Vargas’ death was US Hanna Mining, which could keep exploiting the Pareopeba valley, which contained the richest iron reserves on earth (worth around \$200 billion). After all, Hanna Mining lawyers could argue that their client had paid almost \$6 million (!) for the control shares of the British firm

St Johns, which had exploited Brazilian mines since the early days. No matter that St Johns had no legal title to transfer over the metal. New titles were created. The exploitation could then continue until 1961, when President Janio Quadros signed a bill annulling the illegal rights of Hanna Mining and restored the Minas Gerais to the national reserve to which it belonged. Four days passed and President Quadros was forced to resign by the armed forces. In his dramatic farewell address he blamed the tremendous international pressure for forcing him to go. Vice President Joao Goulart succeeded in power but, quite unexpectedly, maintained his predecessor's policy. Hanna Mining challenged the Quadros bill in front of the Brazilian judiciary, but its validity was upheld. Next, Brazil explored the possibility of directly shipping and selling iron to Europe (both socialist and capitalist), but this proved too much for US interests even before happening. A coup in March 1964 overthrew Goulart and brought to power Castelo Branco, a murderous dictator and an anti-communist fanatic. By December 1964, Hanna Mining got Castelo Branco to cancel the Quadros bill, and got full power to exploit the mines and even a rich government subsidy to build its own port and a railroad serving it from the mines. US Steel, another big corporation from the north, received similar rights on the Sierra de Los Carajas mines. The dictator said that Brazil lacked the capital to exploit its wealth. Eduardo Galeano reports a few comments:¹⁴

- *Fortune*: "the revolt that overthrew Goulart last spring arrived like a last minute rescue [for Hanna Mining] by the 1st Cavalry."
- US Ambassador Lincoln Gordon: "the success of the plot might be included with the Marshall Plan proposal, the Berlin blockade, the defeat of communist aggression in Korea and the solution of the Cuban Missile crises as one of the most important moments of change in mid twentieth century world history."
- *The Washington Star*: "Here is a situation in which a good, effective, old style coup by conservative military leaders might well serve the best interests of all the Americas."
- US President Lyndon Johnson (in a message congratulating interim president Ranieri Mazzili): "The American people have watched with anxiety the political and economic difficulties through which your great nation has been passing and have admired the resolute will of the Brazilian community to resolve these difficulties within a framework of constitutional democracy and without civil strife."

While the last comment overwhelms all the others in hypocrisy, what we have here is a chorus, saluting plunder stemming from "open door policy," a double standard version of a free market. The continuity, if one observes present-day conversations on the role of law in economic development, is just too staggering not to be noticed. Modern rule of law, a fundamental guarantee of open markets, is still presented as promoting modernity and rationality, a "civilizing process." The "civilized" still require the guarantee of the law to do business in faraway countries. The rule of law significantly contributes to the *ex post* rationalization of unlimited Western profits amounting to plunder. What has changed, if anything, is only the rationalization and justification policy behind the Western filling up of what amounts to an ideological constructed local "lack."

The same strategy seems to have been used for a very long time to force the Western rule of law upon weaker economic settings, thereby "opening up" the markets for plunder: by the ideological use of the "lack" argument, a comparative need is created that can only be remedied by the unique possibility of transferring law from the dominating Western source (be it German or US law in China, or current "law and economics" as a basis of law reform in South America). Moreover, because the rule of law, endorsed by international law-enforced standards of civilization, is constructed as a socially and politically neutral tool, local oligarchies are empowered with a cross-cultural tool of self-empowerment, becoming capable of interfacing with the global economy (introducing open door reforms) while maintaining traditional social inequalities.

Contemporary examples of cultural property appropriations illustrate this dynamic. Activists like Vandana Shiva note that the principal arguments used today to justify patenting of local collective knowledge are still based on Locke and de Vattel's notions of the rule of law as a protection of property rights and of "lack" in traditional conceptions of knowledge. As a universal instrument, law calls upon this key principle of control – the notion of lack – to legally justify plunder. Indigenous lack modernity and development; they lack the capacity and knowledge that allows full utilization of their environment; they lack law, they lack treaties, they lack a legal culture. More generally, the international legal mainstream has deployed a similar strategy in the years following the establishment of US hegemony in Latin America, with regard to the local civil-law-inherited legal tradition. Latin American states, the successors of European colonial powers, are thus depicted as inept imitators of obsolete European legal style. This attitude does not spare any peripheral legal context; all local legal traits are described as impairments to market-based development.

Today, we hear repeatedly that China lacks law or was and is averse to law. Such statements are often accompanied by arguments as to the difficulty of bringing the rule of law to China. One American lawyer has stated that: "Basically, the bar must be invented as a profession without any guidance from Chinese tradition or China's recent history."¹⁵ Beyond lacking law the Chinese are now charged with ignoring the law they had: in the dominating Western vision, *li*, grounded in 2,500 years of Confucian tradition, is no law but just *social propriety*, while *fa*, its legist's counterpart, also more than 2,000 years old, is considered mere coercion and criminal sanction, itself a primitive instrument, too narrow to qualify as real law. Thus erasure becomes part of the policy of creating the need of neutral professionalized Western law, preferably based on common law notions. The strategy is transcultural. Islamic law, itself a venerable scholarly tradition, is itself described as mere *religion* not really law.¹⁶ As such it is irrational (said Max Weber), immutable, and incapable of providing an efficient framework for economic development. Thus, what has buttressed the hegemonic scope of law is an internal cultural logic, based on lack or emptiness that has had lasting power over centuries of Euro-American dominance, even though perceptions of lack may change, with the change of the hegemonic legal systems.

In the US-dominated context of the rise of economic interpretation of the law, this theory of lack has been rationalized as a lack of efficiency or a lack of "professional" institutions, thus substituting "natural" justice (typical of early civil-law-dominated natural law) with economic efficiency as a new, prestigious, legitimizing ideological tool of plunder.¹⁷

Nowhere is this dynamic more evident than in examining twentieth-century law and development movements, sponsored by powerful US institutions such as the Ford Foundation and the leading law schools, in a time when US rule of law prestige was at its zenith. Lack remained a central feature. For example, South American countries lacked sophisticated academic legal institutions. Latin American legal culture lacked skills of social engineering, something that could be found only in the US academy, thus justifying transfers of law. James Gardner made this point early on in his pioneering work *Legal Imperialism* (1980).¹⁸ It was a work ahead of its time because in the 1980s Americans did not want to admit that imperialism couched as development aid or progress was what the law and development movement was about:

The handmaidens of democracy sometimes turned out to be the handmaidens of a dictatorship or authoritarian state. [Ibid., p. 281] . . . [I]t became clear that

American legal missionaries were engaged in a process that was ethnocentric in origin, character, and implementation, and that law and development service to the Third World was an insignificant measure oriented toward the implicit transfer of American legal models . . . the basic question remains: why are American legal missionaries interested in legal assistance, and in the transfer of American legal models? [Ibid., p. 283]

The strategy of de-politicization of law, presented as a value-neutral technology rather than a political instrument in the hands of local and international power elites, allowed "development work" to be done disregarding the politics of the local context. The law and development work in South America was directed at Brazil's authoritarian state, Allende's socialist Chile, and Colombia's "democracy," and was not much different than today's plans of law reform; World Bank-originated comprehensive development plans (structural adjustments) are aimed at Brazil, Ecuador, and Uruguay's left wing leaning governments and at Colombia's authoritarian administration. It would be impossible to understand such phenomena without taking into consideration that many of such legal missionaries were genuinely moved by justice motives, though they probably forget to ask themselves, as every "neutral" scholar should always do, who was paying their salary.

Recent criticism has followed up on early analysis of law and development and on its current resurrection.¹⁹ The work of US development lawyers who sought to directly transplant American institutions into Brazil, Chile, and elsewhere to promote democracy by legal means illustrates how, 30 years later, there have been massive changes in legal education resulting in the repositioning of faculties of law and the state, the reproduction of knowledge-governing elites, and the making of elite hierarchies, ultimately germane to neo-liberal projects and US domination. This new class of lawyers connects the local and the international, speaking alternatively for one side then the other, all the while dependent on American modes of legitimization: "the import and export of dominant US expertise is shaped by national agendas and national histories." Thus the cosmopolitan elite deploys the "linguistic and cultural baggage necessary to accede to the new places of privilege in the international (re) production of knowledge and power. These new places are above all the great law schools of the East Coast."²⁰

Lawyers and law professors from Latin America acquire social capital in their native countries (because they fill the lack) through US doctorates and legal know-how. Law is central in chronicling American expansionism and in

understanding American imperialism since “law and legal institutions provide cover for activities that cannot be spoken about in polite cosmopolitan circles.”²¹ We describe such activities as plunder. New legal activities are oriented toward the United States in the service of neo-liberal economics. This discourse shuts out discussions of law in the service of justice. In the service of corporate capitalism, law becomes a structural, economic, or technological component, never a moral or cultural, let alone political, one. Efficiency dominates today, but the discontinuity is only apparent. Plunder is still the motivation and the outcome.

In the contemporary neo-liberal view of the law, less developed economies are seen as lacking something very simple and universal. They lack the simple and universally valid minimal institutional system necessary for the unfolding of an efficient market. In a seminar for senior bankers at the World Bank, Judge Richard Posner of the United States Court of Appeals in Chicago, a leading author in law and economics and one of the protagonists of the triumph of this movement in the American academy, set forth the basic theoretical underpinning of neo-liberal strategy. According to him, three very simple things are needed in order to develop the efficient institutional system necessary to make capitalism work: secure property rights; freedom of contracts; and a system of independent courts as agencies of enforcement and of case law development. At the same seminar, another leading American author, Professor Bernard Black of Texas added that even a system of independent courts might be too complicated to obtain because of the fundamental “lack” of legal professionalism and organization characterizing developing economies. According to this scholar, the World Bank should aim at the creation of a “self-enforcing” legal system, something that does not even require tackling this fundamental and context-specific lack.

Economists have long worked with universal legal models that have never existed in any real legal system. Such models of property, contracts, and enforcement rooted in God or in reason but never in history, have been directly inherited from eighteenth-century natural law thinking as received by Adam Smith, the founding father of the economic profession, and rarely re-discussed by the following mainstream generations of economists.²² Such ideas are those advanced by natural law thinkers such as de Vattel and Locke, providers of legitimacy for eighteenth-century colonial genocide in America.

The revival of naturalism in the leading American school of economics thus plays an important role: developing countries lack something very simple and universal. This position, emphasized in widely circulated and highly

influential documents such as the World Development Reports²³ produced by the World Bank, serves a dual function. To begin with, it emphasizes the inadequacy and lesser quality of peripheral elites, labeling them incapable of creating something as basic and natural as market corporate capitalism. Countries on the periphery are thus intellectually humiliated, creating the psychological conditions for the acceptance of foreign hegemony. Consequently, such elites are in need of training by the main agencies of Western cultural hegemony, the great academic institutions of the United States. Once trained by such institutions, the third world’s elites are co-opted as staff of the international financial institutions providing some formal but, practically speaking, very limited diversity. Frantz Fanon, in his classic work,²⁴ has identified a very similar phenomenon in the tragic French colonial relationship with Algeria.

Today, the Bretton Woods institutions are provided with the means to implement a clear-cut strategy: build a simple and universal rule of law capable of stimulating efficient transfers of property from whoever values them less to whoever values them more. This exercise indicates the tackling of property rights (e.g. that of intellectual property, which needs to be Westernized), of contractual freedoms (e.g. contractual restrictions serving labor security must be banned), and of institutional structures (either by reproducing US-inspired patterns of “adversary legalism,” which we call reactive institutions, or in the apparently contradictory exploitation of alternative dispute techniques (ADRs)).

Although the arguments for neo-liberalism spread through a coalition of diverse institutions, law is central. In the field of legal practice, US law firms have been able to define the role of international lawyers operating in the global market of legal services. In discussing the successful transplant of the corporate law firm, it is important to mention that firms are often granted their own extra-legal, pseudo-governmental space by weak governments “outsourcing” their government duties to the private sector.²⁵ The entrepreneurial style of American lawyers is transforming the Western legal cultures of Europe as well, although traditionally Europeans de-emphasized the use of lawyers as political lobbyists and business negotiators. In the present competitive climate, the French are said to lack competence in procedures and in formal legal requirements. The same thrust would include the “New Europe” and the post-Soviet bloc as sites for new legal imperialism.

Recent scholarship points to American legal logic that has affected the entire system of Japanese law because “the flourishing of economic approaches to

law encourage bureaucrats and legal scholars to look more to Common Law notions which has had implications for the structuring of hierarchies within the legal academy.”²⁶ This is not to say that such “universal” or “global” principles are not subject to local interpretations, but at the same time, the successful promotion of the American entrepreneurial style of lawyering worldwide has led to an increase in attention to international law, at least as a strategy of “branding” American law schools. New York University Law School has made international law the centerpiece of its “global law” program, the explicit aim of which is to encourage the “export of American legal ideas and concepts throughout the world indicating a further intensification of ‘Americanization’ and internationalism within the US itself.”²⁷

Scholars are now seeking to understand the centrality of law in globalizing processes, and the mechanisms driving the law’s diffusion. Depictions of lawyers at the service of power elites reflect reality. What we are assessing here is the role of plunder as a powerful force behind legal diffusion. Yet, reaching the consciousness of the role of plunder in the diffusion of the rule of law should not necessarily play into the hands of inevitability thinking. The rule of law might carry today, as it did in the colonial past, a degree of counter-hegemony.²⁸

The possibility of counter-hegemony certainly needs to be considered, in order to attempt an evaluation of the rule of law and of its relationship with plunder. As we will discuss in the next section, it certainly seems that such a possibility has produced yet another level of plunder-driven transformations, both in the past and in the present.

Before Neo-liberalism: Colonial Practices and Harmonious Strategies – Yesterday and Now

As mentioned earlier, adversarial and conciliatory models play important roles in globalization strategies today as they did throughout the construction of colonial legality. In fact, we have traced the classic Western notion of rule of law back to the protection of property interests of the landed aristocracy, within the adversary common law model of adjudication typical of the courts of law at Westminster. Today, an alternative to this idea, based on conciliation and harmony rather than adjudication and conflict, is rapidly expanding both in core Western systems and, as part of law reform packages, is being exported to the developing world. Plunder is not foreign to this remarkable structural change of the rule of law. Consequently we need to trace this story too.

Explorations among the mountain Zapotec of Oaxaca, Mexico and elsewhere²⁹ first led us to understand the use of harmony ideology in the success of European *non-military* global colonization tactics. Coercive harmony is a mode of cultural control. Soft institutional settings work well for colonization projects, whether during the colonial period, or in the present. Harmony ideologies may be used to suppress people’s resistance, by socializing them toward conformity by means of consensus-building mechanisms, by valorizing consensus, cooperation, passivity, and docility, and by silencing people who speak out angrily. The use of coercive harmony is present in the United States and also in international settings. Harmony law models, such as ADR, are thus most likely part of a hegemonic control system that spread throughout the world, along with European political colonization and Christian missionizing during colonialism, an earlier globalization, where fear of resisting violence made extra-legal conflict management appealing.

We have already discussed (Chapter 1) how, whenever modern law could incidentally empower the colonized, an alliance quickly developed between the colonial power and traditional elites to preclude the use of courts. Plunder requires avoidance of counter-hegemony that might stem from the rule of law. Thus understanding the diffusion of American harmony law models – sometimes called ADR, sometimes IDS (international dispute settlement), and sometimes referred to as extra-judicial – is an integral part of a study of plunder. Such informal procedures are found operating outside or even inside ordinary courts, in non-governmental organization (NGOs), in taking care of disputes with the international financial institutions,³⁰ in peacekeeping strategies, peacemaking, and reconciliation,³¹ and in colonizing policies.³² Informal procedures are also used in the settlement of environmental disputes such as international river disputes,³³ or in business disputes, or most obviously perhaps in the various trade agreements such as GATT (General Agreement on Tariffs and Trade) and NAFTA (North American Free Trade Agreement). These are all examples of how governance operates without following adjudication procedures, regardless of legal implications, and commonly justified by reference to economic or political crises. Yet, their powers and implications for plunder may have been vastly underestimated. ADR, as the rule of law, is usually assumed to be benign, so a hard-nosed look is in order.

Just as adversarial law models are loaded with value assessment in relation to their being part of a path to progress and development, so too are harmony legal models. Indeed, both models play an important role in the diffusion of American values of efficiency and pragmatism, because ADR is

presented, domestically as abroad, as a pragmatic advantageous alternative to possible excesses of adversary litigation. In this perspective, the rule of law, once fully developed and professionalized, might experience a growth crisis, sometimes presented as a “litigation explosion,” that ADR can cure at low social cost, therefore being an efficient alternative to litigation.

Mainstream thinking deems ADR to be beneficial in less developed countries that, “lacking” a high level of legal professionalism, might find it hard to properly organize a machinery of adversary adjudication. Thus, the World Bank (that actually makes mandatory the use of mediation to solve conflicts with assisted countries) promotes conciliation and mediation of disputes as a pragmatic alternative for development. ADR moreover is often presented as more “culturally sensitive” to the difference of mentality of countries “lacking” the rule of law. The Western mainstream still largely perceives non-Western legal systems as a caricature-like image of the Qadi (Islamic judge) dispensing (expediency-based) justice sitting under a tree, made famous by Max Weber and once used even by US Supreme Court Justice Felix Frankfurter. Thus ADR, with its emphasis on informality and case-specific justice, is deemed congenial to local needs, because it is closer to what is stereotyped as “oriental” mentality.

Even though such “harmony” models have little to do with American ideas of justice and having one’s day in court, they are often taken for granted or deemed benign, with little attention to the fact that power disparity is even more pernicious in informal justice than it is in adjudication. We need to remember the pacification role of Christian missionaries and of their rhetoric of social harmony, under conditions of colonial domination or imperialistic conquests, in South America and Africa. There, notions of Christian resignation to a superior will of God have curtailed effective resistance, favoring plunder. Thus harmony ideology like ideologies of efficiency and the rule of law is germane to plunder.

Today, legal reforms worldwide increasingly standardize and ritualize ADRs or IDSs to fit global power strategies in a manner that *erases differences* caused by uneven power or diverse or competing cultural styles. In the process of standardizing ADR, thinking about the conflict becomes narrow and technical, and context shrinks. ADR thus becomes just another technical and professional system of justice, with its specialists and its professionals, only losing the empowerment factor (for the weaker party) that might come from the potentially counter-hegemonic use of public courts of law. ADR thus becomes a forum of private justice where “Anglo-American law firms in

international business transactions, the Uruguay Round of the GATT, and the formation of the World Trade Organization (WTO), . . . credit-rating agencies, and so forth³⁴ play a major role. The shift is from public courts to private panels, from formal adjudication to informal or negotiated justice, part of the more generalized movement to privatize everything from prisons to social welfare institutions, thus losing the empowerment and potential counter-hegemony that sometimes comes from the adversary nature of the judicial process. It is then no surprise to find ADR clauses in most standard contracts, with banks, insurance companies, telecoms, and corporate employers eager to offer their own “private justice” to their clients.

A regime of transnational commercial law, a hegemony of neo-liberal concepts of economic relations structured very much in an American corporate style, systematically removes constitutional and institutional protections and access to law, where victims of plunder could possibly complain and maybe occasionally even win. In this arena, international arbitration and the new specialties in conflict resolution are key legal mechanisms of control. Yet, none of these happenings are standing still, and the dialectic between plunder, adjudication, and ADR is variable and in constant flux. There seems to be a trend, as any history of the WTO can attest to. Originally, the WTO seems to have been written in the spirit of legalism; it “called for a vigorous dispute-settlement procedure which contemplated effective use of arbitration . . . and even appeal to the World Court in some circumstances.”³⁵

Structures governing international trade can change from one decade to another. It is thus instructive to sort out the relevant shifts in dispute resolution since the 1940s, from the rule of law principle, to pragmatism, to independent panels and consensus decisions and from earlier pleas for democratic legal procedures. One can see the jockeying for power by means of preferred disputing mechanisms.³⁶ Today, the power of the WTO resides in its dispute resolution panels allowing any WTO member country to challenge the domestic laws of any other member. These panels are held in secret, with no right of citizens or subnational authorities like State Attorney Generals to participate, and panel decisions are automatically adopted with no independent appeal, no written record, and selective enforcement. It is no light observation that states are conceding certain of their prerogatives to supranational entities. Even though the shifts from one type of disputing style to another are never total, that they occur at all is worth noting because it indicates how elastic models of dispute resolution, packaged as “rule of law,” are.

CHAPTER 3

Global reform trends seem to pursue elastic arrangements in dispute resolution to strengthen the advantage of the stronger bargaining partner. It is imperative to understand the makeup of the “soft” technologies of law such as ADR, and how such soft technologies might fit with plunder. It is, however, also important to understand that the contemporary muddled ideology of the rule of law can embrace both adjudication and ADR, sometimes in apparently contradictory ways. For example, the so-called Washington Consensus urges China to observe international patents or to create a court system to enforce business contracts, while at the same time urges Bangladesh to negotiate with India over the Ganges rather than take their complaints about water rights to the World Court. As Charlene Harrington observed, “Global business and finance seem to be astride a giant contradiction: while they campaign to dismantle legal restraints in one part of the world, the wealthiest societies, they are simultaneously urging poorer nations to adopt mainly ones that will protect private property from political interferences.”³⁷ However, the reality and the variations are even more complex, because the globalization process results in variant power interactions, commonly hidden in the shadow of US inspired law and quite often determined by plunder.³⁸