PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL by UGO MATTEI and LAURA NADER
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How should one see the development of the international order and the global economy? Should we call contemporary developments 'progress' or 'regress'? Attempting to answer such questions, a legal scholar and a legal anthropologist have written a book on the current state of world order. Along the lines of critical scholarship, the authors urge us to shift our paradigms, re-orient our gaze, and invert our perspectives: what we see on the surface is neither the full story nor the true story.

Their mission is to challenge mainstream stories concerning law and development. Mainstream legal stories exalt the concept of 'rule of law' while ignoring its dark side. Order is supposedly inextricably linked to the law, whereas disorder is perceived as the antithesis of the 'rule of law'. Similarly, 'development' stories present the neo-liberal economic policies pursued by the main international bodies and treaties as the best way of resolving the predicaments of local as well as global economies. Local economies should be open to competition and to the global flow of capital, free trade should govern, privatization should be pursued, and 'structural adjustments' or 'comprehensive development', whenever needed, should be undertaken by 'Third World' countries. Indeed, the 'rule of law' and the 'free market' have become the main conditions for joining the 'civilized nations'.

As a counter-narrative to the dominant fairy tale (law and prosperity), this book constructs a story of lawlessness and plunder. The argument is not merely that the 'rule of law' at times creates disorder and that notions of 'market efficiency' occasionally conceal plunder. Quite the contrary: rather than plunder being the exception, it is the rule:

> Plunder . . . is an important concept to unify and portray, *as the rule*, distortions in the model of capitalist expansion that are at most acknowledged as exceptions. Perhaps plunder as the rule rather than the exception allows the reader to get outraged. (p. 7, emphasis in original)

The book is an enjoyable, easy read. It does an excellent job in sketching an alternative understanding of the current world order. It is an ambitious book and it is admirable that the authors, in spite of their denial (p. 6), attempt to provide a comprehensive analysis of the connecting lines between different developments. Thus, the book lends itself to the critique that it is too short to be able to discuss compellingly the different subject-matters. Yet, it is rich in detail and examples. This richness is significant since it is occasionally the case in left-wing scholarly discussion of the ideology of law that it overlooks the materiality of law: that is, its effect on real people and real situations. The book is passionately argued, and rightly so. And it is in the nature of this kind of project that it provokes a wide range of questions.

In this short review I present the main arguments of the book, then briefly discuss three recurring themes of the book and problematize them. What underlies these critiques is my sympathy with the project that the book represents and its understanding of capitalism, neo-liberal policies, and American policies. This understanding to my mind is superior to mainstream stories. One hopes that a different and critical understanding will inform a different kind of practice.

DEMYSTIFYING THE RULE OF LAW

There is a false appearance, the authors argue, of discontinuity between brutal colonialism in the past and international legality that respects the rights of peoples in the present. A closer scrutiny of developments in recent years, such as the invasion, destruction, and looting of Afghanistan and Iraq, will challenge the idea and appearance of international legality.

The United States of America occupies a central role in the story. In spite of a long practice of military intervention, the United States is associated with democracy and the rule of law, and has consistently used these themes to justify its foreign policies. These were powerful tools in the Cold War era and are even more so today. The collapse of the Soviet Union and the end of the equilibrium gave the United States an unprecedented position and the connection between the rule of law and plunder became more apparent. Neo-liberalism became the unquestioned dominant ideology of the age. The West is associated with the rule of law, while the underdeveloped and primitive others are associated with the lack of rule of law or, more precisely, lack of Western notions of legality. The fact that military interventions and economic policies pursued by the West lead to destruction, disorder, and increasing poverty is not allowed to enter the picture of the benevolent and civilized West.

Against the backdrop of this interventionism, the authors argue that international law 'has become a politically impotent institutional system' (p. 153), and that *ad hoc* international courts, as in the case of Yugoslavia, represent an 'ideological use of international law' and serve as 'an *ex post facto* legitimization of war' (p. 150).

While classical colonialism was a straightforward looting, backed by military force, neo-colonialism achieves similar ends under the cover of 'development', 'rule of law', and 'efficiency'. Indeed, one can 'substitute the term "colonization" for "development"' (p. 54). The main international economic institutions, the World Bank, the International Monetary Fund, and the World Trade Organization, condition the transfer of financial aid to underdeveloped countries upon performing internal reforms. These reforms, named 'structural adjustment' or 'comprehensive development', are presented as technical and universal and not as political or ideological. The effect of these policies, however, is to promote a Western neo-liberal agenda

that advances the interests of large international investors and increases the dependency of 'Third World' countries against the backdrop of imbalance of power. The needs of the international market are given priority over the needs of local populations in these countries. Consequently, 'Third World' countries are transformed into consumer societies of commodities produced by Western corporations. The results of the reforms and the liberalization of markets are devastating: 'massive unemployment, economic recession, hyperinflation, and social unrest' (p. 63). Thus, international economic institutions serve as political actors promoting instability rather than 'financial stabilizers'.

Indeed, the lack of rule of law under neo-liberalism is the lack of a 'minimal institutional system necessary for the unfolding of an efficient market' (p. 74) that allows 'unlimited Western profits' (p. 71). Yet, the authors wonder, why it is only when political power controls the law we define it as a lack of the rule of law, not when business interests control the rule of law (p. 98)?

The centrality of the United States is also evident in the transformation of United States law into the imperial rule of law and the leading role that American lawyers and courts play. Through universal jurisdiction in cases of holocaust compensation litigation and of the Alien Tort Claims Act, international law has been 'swallowed' by United States law. Its courts have become a 'forum of all the world's grievances' and '*de facto* judges of world history', thus establishing legal hegemony (p. 159). The claim of the lack of rule of law abroad serves to justify the consideration of these cases by the United States. Indeed, the status of United States courts in the world resembles that of the Judicial Committee of the Privy Council of the British Empire (p. 167).

The underdeveloped countries are not the only victims of these developments. Legality is being dismantled in the United States and '[e]very American today is the victim of corporate plunder' (p. 173). The legal system is deferential to the political process which in turn is controlled by the lobbyists. Thus, the system is 'market-friendly' or – in the authors' lingo – 'plunder-friendly'. The courts are reactive institutions which are capable only of playing a limited distributional role. Plunder is observable in the economic scene (Enron), the electoral scene (Bush v. Gore), civil liberties (the war on terror and post-September 11 legislation), and the silencing of dissent.

Therefore, the current conception and practice of the rule of law 'is an effective limit on any challenge to the *status quo*. This is because it confers a degree of ethical respectability and moral acceptability' to domination and exploitation (p. 197). The rhetoric of rule of law prevents people from understanding the need for 'a radical redistribution of resources and a dramatic break in the institutional structure' that makes the rich wealthy because the poor are poor (id.). The authors call for a different conception of the rule of law that is 'grounded in a social sense of justice and responsibility, which alone can give life to the law' (p. 210). This, however,

cannot be done without 'a fundamental restructuring of the political field' that demystifies the 'rule of law' (p. 215).

A CRITIQUE OF THREE THEMES

In the remainder of this review I would like to highlight three of the book's main themes.

1. *Illegality and role of law*

The subtitle of the book is 'When the rule of law is illegal'. The argument is that the rule of law conceals, justifies, legitimates, and sanctions lawlessness or plunder (appropriating the world's resources and channelling them from the hands of the weak to the hands of the strong and wealthy). Thus, the authors say, the rule of law is illegal. The use of the word 'illegal' here is particularly interesting. The authors leave many questions open as they make this argument. What theoretical understanding underlies this argument? What assumptions of law do they have in mind when they say 'the rule of law becomes illegal'? Is it a natural law, Lon Fuller or Ronald Dworkin-like understandings, that is, is there something inherent in the notion of law or rule of law that is violated by these practices? That 'the law,' by definition, is not supposed to do these things? The authors come close to this kind of understanding of legality when they speak of 'the rule of law's moral claim to help the weak against the strong' (p. 153). But it is not clear if the main complaint is directed against the rhetorical use of the rule of law, which claims but does not deliver and produces opposite effects to its claims in practice; for example, the authors write: '[t]he dominant image of the rule of law … is false historically' (p. 5) or 'the rule of law is reduced to a dull rhetoric' (p. 8, and also p. 172). Or is the claim directed against the very definition of the rule of law?

At one point the authors criticize positivism and the separation of law and morality, saying that it leads to the conclusion that law, once enacted, cannot be 'illegal' (p. 93). But, surely, positivists do not say that the law cannot be unjust, wrong or oppressive. The surprisingly short discussion of this issue in the book does not explain what is meant by 'illegal'. Does it mean that bad law is not law?

The authors explain that they mean 'illegal in a fundamental sense' (pp. 199, 202) because it is against notions of social justice and against what they call the 'people's rule of law'. It is unclear, however, why the authors do not say simply 'unjust' or 'illegitimate' instead of illegal. In fact, Mattei and Nader use 'illegal' in different contexts in the text to convey different meanings. It would have been much more helpful and analytically clearer had they differentiated between these meanings. They could have used: 'illegal' (the violation of international law – such as the Geneva Conventions

– or domestic law, p. 4), 'unjust' (contrary to social justice), 'formally illegitimate' (employing power without following the recognized procedures as in unduly elected official or unduly enacted legislation, p. 4), and 'substantively illegitimate' (the legal or social order is incompatible with a normative conception of the ideal conditions for human existence).

It is most likely that the authors are using the notion of illegality to shock the reader and highlight a contradiction or hypocrisy in comparing what the 'rule of law' is in fact doing with what it claims – or is supposed – to be doing. Legality here runs afoul of lay understandings of legality that frequently conflate law with justice. But legality can not do the work the authors assign to it. It does not tell us what should be our normative position concerning, say, the 'legal' economic sanctions imposed on Iraq by the international community (1991–2003) causing the death of half a million Iraqi children, as opposed to the 'illegal' Anglo-American war against Iraq in 2003.

It seems that the book moves between two themes of ideology without distinguishing between them and without making it ultimately clear what is precisely the argument. On the one hand, one can argue for 'concrete determination' (that is, ideological elements observed in the substance of particular legal pronouncements). On the other, one can argue more radically for 'form determination' (that is, the form of law, rather than being merely the will of the powerful, is the inevitable effect of capitalist economic relations).[1] Accordingly, the rhetoric in the book fluctuates and it is unclear if two different readers will reach the same conclusions on this point upon reading different parts of the book. The rhetoric seems to escalate in the closing chapters, while in the beginning it seems generally more cautious. In the opening chapters, Mattei and Nader talk about the dark and light sides of rule of law (the development of the 'West' and the underdevelopment and domination of the 'rest' of the world), hegemony and counter-hegemony, empowering and disempowering effects (oppression and unintended empowering effects, see pp. 18, 22, for example). Then they move to talk about 'the nature of rule of law' and the 'inner structure of the law' (pp. 124–5). Afterwards they argue that there is an 'intimate connection' between law and plunder (p. 180) and 'the essence of the rule of law thus seems to be about protecting the "haves" against the "have-nots"' (p. 197).

2. *Empire*

Another central theme left undiscussed in a satisfactory way is empire. The terms 'empire' and 'imperialism' have been widely used by different

1 For a useful discussion of these issues see for example: A. Hunt, 'The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law' (1985) 19 *Law & Society Rev*. 11, at 22–3; and M. Tushnet, 'Review, Perspectives on the Development of American Law' (1977) *Wisconsin Law Rev.* 81, at 102.

scholars and it would have been useful had the authors outlined the differences between their usage and that of others.

One can extract from the book four attempts at a definition of imperialism:

(i) neocolonialism: a second phase of European colonialism, a different form to achieve similar ends (p. 17);
(ii) international corporate domination with the United States as a key and dominant player (p. 17);
(iii) end of history: a 'dominant corporate capitalist model of development' (p. 24) in a post-Cold War world order characterized by the 'unfolding of international monopoly of "legally" organized violence' (p. 25);
(iv) Americanization (p. 64).

To be sure, the authors do refer in a footnote to Michael Hardt and Antonio Negri's work but in the course of the book Mattei and Nader actually use 'empire' in remarkably different ways from Hardt and Negri.[2] While Mattei and Nader highlight the continuity, Negri and Hardt emphasize the discontinuity between former forms of imperialism and the new form of 'empire' (defined as 'a number of national and supranational organisms united by a single logic of rule'[3]). Mattei and Nader do share with Hardt and Negri the idea of a single logic of rule. While Hardt and Negri agree that the United States has a privileged position in this new form of empire, they also shy away from saying that it is the locus of this empire or that this is an American age. In contrast, Mattei and Nader do emphasize the American centre (p. 144). As for resistance, Hardt and Negri say that what needs to be done is not resisting these processes of globalization but rather reorganizing them and redirecting them towards new ends. Thus, it would have been useful for the clarity of the book's arguments had the authors discussed these differences and explained their take on them.[4]

Additionally, it is not self-evident whether and how one can demonstrate a single logic of rule for multiple processes undertaken by a variety of actors. It seems that serious work should be done in order to establish such an argument. Beyond evidentiary questions, however, the concern is that by outlining this single logic the authors lapse into deification of 'empire' (they call it the 'all-mighty empire', p. 213), while resistances are perceived as random aggregates that currently do not deserve the name 'project' (id.).

2 M. Hardt and A. Negri, *Empire* (2000).
3 id., p. xii.
4 Of course Hardt and Negri are only one example of the scholarship discussing imperialism. Another prominent example would be D. Harvey, *The New Imperialism* (2003). For a critical review of the scholarship on imperialism and its connection to capitalism, see J. Nitzan and S. Bichler, 'New Imperialism or New Capitalism?' (2006) 29 *Review* 1, available at: <http://bnarchives.yorku.ca/203/01/20060400_nb_new_imperialism_or_new_capitalism.pdf>.

3. *Plunder*

The book presents plunder as the unifying logic not only for empire but also for capitalism (pp. 7, 199). It is both: the motivation and the outcome (p. 74), the vehicle and the beneficiary of the imperial rule of law (p. 141). In other words, it is the function and the effect at the same time. It seems, however, much easier to prove effects rather than functions. It is hard to disentangle functions from effects. Whereas an analysis of a historical era might demonstrate these effects, it does not necessarily follow that the function of law has been revealed.[5]

This question is important because it is related to the issue of agency. Upon reading sentences in the book like 'The law has produced and attempted to remedy plunder, confirming the current hegemony of US law' (p. 38), or 'plunder maintains an ambiguous relationship with the rule of law, since it is capable of constructing notions of legality and illegality' (p. 39), one wonders who is the agent behind words like 'the law' or 'plunder'? It is not clear, especially when the authors move back and forth from international law to domestic law. In some of their formulations, the authors seem to be reifying the rule of law presenting it as a coherent entity travelling through history: 'The rule of law has faithfully served plunder through history …' (p. 24).

Additionally, plunder – which might remind some readers of David Harvey's notion of 'accumulation by dispossession'[6] – is treated rather expansively. Mattei and Nader move between different definitions and demonstrations of plunder: looting by force, looting by fraud, illegal inequitable distribution of resources (p. 11), 'liberalization of markets within an imbalance of power' (p. 62), and the violation of domestic civil liberties, the war on terror, Bush v. Gore, and Enron (chapter 7) or, generally, 'the takeover by corporate actors of the empowerment aspects of the rule of law' (p. 171). Lumping together these diverse practices under the same term raises a twofold concern: first, blurring analytical distinctions between them that might be useful to understanding them and secondly, downgrading the severity of the harsh practices among them by grouping them together with the 'light' ones.[7]

CONCLUSION

Plunder is an important contribution that stands in the intersection of different fields of scholarship. It contributes to critical scholarship on

5 See Hunt, op. cit., n. 2, pp. 27–8.
6 See Harvey, op. cit., n. 4, p. 137.
7 See a similar critique of Harvey's 'accumulation by dispossession' in R. Brenner, 'What is, and What is Not, Imperialism?' (2006) 14(4) *Historical Materialism* 79.

American policies, neo-liberal ideology, law's role, as well as the role of intellectuals, among other things. Some parts of the book will remind readers of Noam Chomsky's style. Other recent books examining the question of the role of law in legitimating suffering and injustice have embarked on a different kind of inquiry from the one chosen here (such as discussing social structures, notions of role responsibility, division of labour and compartmentalization, as well as citizens' complicity).[8]

More scholarship of this kind would be welcome to enhance our understanding of current predicaments. Nonetheless, as the above discussion of *Plunder* has hopefully demonstrated, an attention to clarity in analytics would certainly make the discussion of these issues more fruitful.

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8 See, for example, S. Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (2007).