

**Emergency-Based Predatory Capitalism:
The Rule of Law, Alternative Dispute Resolution, and Development**

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In a state of emergency, ordinary political life is suspended. To exit from a state of emergency by curing its causes or addressing its consequences is the “target” constructed as being in the interest of everybody and as the end that everybody must pursue. In a state of emergency, no critique is acceptable, and there is no place for a loyal opposition. Everybody must be on board in pursuit of the target. The state of emergency thus is a desirable condition for power. It is a highly effective way to avoid opposition—perhaps the only effective way in a pluralist political scenario such as a parliamentary democracy or the unstructured global political arena. Thus, the state of emergency is a stabilizing political strategy, a true foundation of “predatory capitalism,” which is how I define the realized form of the current system of global production. In turn, predatory capitalism requires and develops ideological apparatuses to sustain it. A state of emergency thus serves as false consciousness. A thick ideological layer constructs as in the interest of everybody what is in fact a project of domination of the powerful few over

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the powerless many. In this project, the law serves a double purpose as at the same time a coercive and an ideological apparatus of domination—a stick and a carrot.

This essay explores current global developments in which general states of emergency are “invented” or “exaggerated” to sustain legal transformations that, while presented as being in the interest of everybody, cover projects of domination.¹ From the perspective of the law, we will discuss three instances.

The first is the rule of law, which is presented as an objectively desirable device of governance, while in fact, it functions as a predatory device to privatize the public domain. The invented emergency is in this case the lack of the rule of law, which denies legal legitimacy and respectability to any alternative to the Western vision of legality. Thus, an emergency is created to introduce the rule of law in societies lacking this benefit of civilization.

The second is alternative dispute resolution (ADR), which is always presented as a cure for the emergency created by the so-called “litigation explosion,” a spectacularly exaggerated condition of adjudication in current times. Grounded in this state of emergency, ADR systematically favors the stronger economic and political interests against the weaker ones while at the same time effectively taming social dissent and silencing the demand for justice. The emergency here is the impossibility of delivering ordinary public access to justice and the consequent beneficial nature of any kind of private alternative.

The final instance is the ideology of development, an entirely abstract and thus invented ideology presented by the dominant media and by an apologetic chorus of academics as the ultimate target in a progressive evolutionary process. Development

promises happiness and well-being to poor countries while in fact functioning as a strategy of political and economic intervention. Thus, the ideology of development, indisputable in every emergency, serves the interests of strong political actors seeking to plunder the underdeveloped. The emergency here is seen as the prevalence of poverty, an idea organized around capitalist-generated consumer needs, while development, rather than being blamed as responsible for many of the policies generating poverty, is in fact presented as the only cure for it.

My arguments do not address any particular legal system. Rather, they discuss global legal transformations produced in different geographical and political settings by the hegemonic corporate forces of predatory capitalism. The impact of such forces can be variable across geographical space, and its predatory success depends on the strengths of the complex aggregate of resisting forces. Nevertheless, what we will encounter here are trends that are clearly visible in most areas of the world.

The Rule of Law

It is hard to imagine another expression of Anglo-American political discourse, that is as well known and prestigious at the global level as “the rule of law.” There is debate as to the exact date when the term was coined, but there is agreement as to the place where it was born: glorious England, maybe from the era of the Magna Charta or maybe some centuries later in the famous *Fuller’s Case* (1607–8), in which the legendary judge Sir Edward Coke argued that “the king in his own person cannot adjudge any case” because the common law, as a system of “artificial reason and judgment,” had been built

up over centuries and could be understood only by those who had carefully studied it. The king lacked the knowledge that was the basis of judicial legitimacy. Centuries later, an icon of English constitutional law, Albert V. Dicey, condemned the traditional Continental (Napoleonic) state administration as irreparably authoritarian because it lacked “the rule of law”: on the Continent, unlike in the Anglo-American world, the ordinary judiciary has very limited jurisdiction over state powers. The U.S. Constitutional experience provided a fundamental boost to the prestige of the rule of law. Specifically, in *The Federalist Papers* (in particular in Madison’s Number 10 and Hamilton’s Number 23), the rule of law was conceived as the only way to guarantee political stability in a society characterized by inequalities and in which wealthy landowners were in the minority and had to be defended against the majority of the population who did not own property. The rule of law, which entrusts to courts possessed of legal wisdom the protection of private property, remained an essential institutional guarantee for property owners in the post-Revolutionary American constitutional order destined to gain the current worldwide hegemony².

With such a celebrated chorus presenting the rule of law as the ideal solution to every abuse of political power, it is almost impossible to find someone willing to argue against a political system based on such sacred idea, despite its clearly conservative origins as the protector of the privileges of a landed aristocracy. This is like arguing against a “fair” legal system, an “efficient” economic system, or a “tasty” meal. In short, “the rule of law” is the kind of idea that everybody places on a sacred pedestal, protected and defended on almost every side. This is a truly “bipartisan” notion and is held sacred by conservatives and liberals alike (paradoxically, since the latter are supposedly more

devoted to change than to the preservation of the status quo), an icon as much to the English constitutional monarchy as to the heirs of the American Revolution. Some years ago, Niall Ferguson, a Scottish historian whose political views were very close to the “Third Way” of Tony Blair and Bill Clinton, published a book, *Empire*,³ with the same title as the controversial book written by Michael Hardt and Antonio Negri.⁴ The central thesis was that English imperial expansion most certainly produced mischief in the form of wars, genocide, plunder and deportation, but that it also benefited its victims by providing them with an invaluable legacy: the rule of law, which he claims is capable of transforming a traditional system of government, a system (such as prevailed in India) that otherwise would have developed according to an Eastern autocratic tyranny, into a modern democracy.

There is never a high-level international meeting in which “the rule of law” does not become the concept that brings everyone to agreement. For example, in July 2005, at the closing of the G8 Summit meeting in London, Tony Blair—still shaken by the terrorist attacks in the city of few days earlier—nevertheless presented his “Plan for Africa” and promised (in the context of general commotion and approval) that debt forgiveness would depend solely on the African’s willingness to develop “the rule of law.”⁵ Two years later, the promise of debt cancellation still existed only on paper, but to make up for this, the G8 Summit meeting organized an important conference specifically dedicated to the rule of law. And what other concept has the ability to lead to a consensus between Hillary Clinton and Condoleezza Rice, two of the most powerful women in the world, in the middle of an electoral campaign? If you look through one of the recent issues of the *Berkeley Journal of International Law*, you will find the response.⁶ Both

spoke about the rule of law in a seminar organized by the powerful American Bar Association. I crossed out the names and circulated the two papers among the students in one of my seminars at Hastings Law School. I asked them to figure out who wrote which piece, and it proved to be impossible for the students to distinguish between the two papers, because as the papers reported exactly the same trite point of view.

At the end of the 1990s, Puntland, in far northeastern Somalia, was trying to strengthen a situation of relative peace in a zone left out of the massacres that followed the Operation Restore Hope intervention by the U.S.-led United Task Force in 1992–93 to attempt to guarantee the delivery of humanitarian aid. The region requested United Nations financing for the reconstruction of a parliamentary building for a political meeting between traditional leaders. They did not receive any funds for reconstruction, but in its place obtained the participation of a handsomely paid international team of experts who were mandated to supervise the respect for the rule of law in the “transitory constitution” that the Somalis were trying to negotiate.⁷ This proved to be difficult to achieve, because Somali political culture is based on agreed-upon solutions reached through constant negotiations between groups. In fact, the rule of law, as its purely Western history demonstrates, is nothing more than a model in which the decision-making power in microconflicts is principally assigned to a professional jurist legitimated by his or her legal-technical knowledge. Therefore, who is to settle a dispute is neither a subject that is endowed with religious, moral-philosophical, or traditional legitimation, as in the case of the Islamic judge (*qāḍī*), nor does it involve a politician (as in the case of socialist systems) who could appeal, in many cases, to some degree of democratic legitimization. It is easy to see, at this point, the main reasons according to which the

professional culture of jurists, under the guise of upholding “the rule of law,” expropriates much of the decision-making power belonging to the religious and political authorities.

The rule of law is in fact one of the malleable notions in which everyone can see the values in which he or she believes. Thus, the World Bank, by following the teachings of the some University of Chicago guru, imposes the rule of law as part of the “structural adjustment” necessary as the condition for granting loans. By doing this, the World Bank secures foreign investments as a form of private property based on the sanctity of contracts. Similarly, when a young volunteer endowed with good intentions—and who we can easily imagine is of liberal political opinions—takes part in a program for the enhancement of the rule of law financed by an American university, an NGO, or a government (there are many of these programs, for example, the ones that Italy finances in Afghanistan or that Canada underwrites in Mali), he or she reads into the rule of law the protection of fundamental human rights and believes that the development of the rule of law might really be useful for the protection of some oppressed minority.⁸

Between these two fundamental ideas of the rule of law—the protection of property rights and the protection of human rights—there is a historical antinomy. There is certainly the rule of law in the first sense in a system such as Alberto Fujimori’s Peru, Augusto Pinochet’s Chile, or Horacio Serpa Uribe’s Colombia in their acceptance of investment guarantees, protection for property rights, and the sanctity of contracts. From the same perspective, Evo Morales’s Bolivia, Hugo Chavez’s Venezuela, and Fidel Castro’s Cuba are generally considered to lack the rule of law, since foreign investors are put under very strict controls and sometimes exposed to the risk of nationalization, to the

point that conservatives would like to ban these countries from the community of civilized nations.

From the point of view of human rights, according to the other meaning of the term “the rule of law,” one can certainly find many systems (including the last three mentioned) where fundamental human rights (shelter, sanitation, education, and so on) are very much protected, while property rights are not, because private property and contractual freedom suffer severe limitations in the public interest. As a historical example, think of Salvador Allende’s Chile, but also of many European social democracies, beginning with the Scandinavian countries. As Naomi Klein claims, and as many others before her have claimed, respect for the rule of law in the first sense, respect for private property, is incompatible with the respect for the rule of the law in the second sense, respect for the effectiveness of human rights, since developing fundamental human rights cannot avoid the redistribution of resources, something that is incompatible with the intangibility of property and of contracts.⁹ But this obvious conflict is hidden by the use of a common denominator, “the rule of law.”

It is worth noticing that whatever sense of the term we choose the meaning of “the rule of law” finds its roots in the deepest self-consciousness of Western civilization. It is certainly remote from non-Western political experiences. The “Orientalism” that altogether dominates Western political discourse feeds on the perception of the “other” (the non-Western) as lacking “the rule of law” and therefore lacking “law” itself, and consequently the basis of human rights. This discourse rejects the idea that the legal profession is just one of the ways in which conflicts can be governed in a complex society. It perhaps may be a “better” technical instrument, but certainly is not a more

legitimate one from a democratic perspective, since jurists lack democratic legitimacy. From this perspective, the narrative around the legal history of people considered “without history” is false beyond all limits.¹⁰ According to the Orientalist account, certain Islamic countries can have known the rule of law thanks only to the efforts of legal modernization at the beginning of the twentieth century, while many others are still in the darkness of *sharia*. In the same vein, Latin American countries should thank the colonizers and Saint Ignatius Loyola. African countries, after rejecting colonization and the legal benefits described by Ferguson, had to wait until the fall of the Berlin Wall, after which the international financial institutions have been allowed to intervene in their legal systems, which are not seen as any longer as political entities, but as simple infrastructures of their economic systems. Finally, China, it is said, incrementally and cautiously, was able to understand the importance of the rule of law after a long history in which it underwent a transition from Confucian antiformalism to Maoist antilegalism. In this account, even Russia needs to be helped to open her eyes and acknowledge the continuity, despite the Revolution, between Czarist autocracy, the horrors of historical Communism, and Putin’s revanchistic personalism. They all lack the rule of law, a gap that only Western corporate capitalism can help to fill.¹¹ They all have to solve their “legal emergency” before they can be admitted as fully respected and reliable members to the “family of civilized nations.”

Alternative Dispute Resolution

In the previous section, I tried to demonstrate how the rule of law, as a legal notion and political scheme that is largely embraced by both the political right and by

liberals, shows a hidden, dark, imperialist side that is difficult to discern due to the ambiguous semantic politics of the term. A structurally similar phenomenon involves the notion of alternative dispute resolution (ADR), which is exalted both by the right and by liberals as a solution to the problems of access to justice.¹²

It should be noted that in many Western countries, including the two that I have been specifically studying, Italy and the United States, justice is scarcely available to those that do not have sufficient financial resources and considerable patience. In fact, the costs involved in the justice process are quite significant, accompanied by epic waiting times. In many cases, it requires years to receive a judgment, even in the case of a simple dispute arising out of a contractual default, a divorce, a termination of employment, or a car accident. In most industrialized countries, investment in the public justice system did not follow the growth in needs for adjudication in progressively more complex settings. Beginning in the 1980s, many countries reduced investment in access to justice as part of a generalized dismantling of the welfare state. Even in this sector, the mantra of privatization promised miracles to cure “the litigation explosion.” The exponential increase in lawsuits being filed and brought before courts of justice was thus taken to be an objective condition causing problems for justice. A heavy case load, rather than insufficient public investment, could be singled out as the structural incapacity of the public justice system to render timely decisions. Despite empirical studies (the most notable being those of the U.S. legal sociologist Marc Galanter) that have demonstrated that the “litigation explosion” is a phenomenon largely exaggerated, if not completely invented, the assumption that we need an emergency cure for it remains dominant.¹³

An impressive ideological mechanism was put in place at the end of the 1970s, creating a favorable climate for any alternative that promised to reduce the burden on the courts: ADR. Such a mechanism, a real industry featuring a newly organized profession of “mediators,” new academic chairs and departments, and a booming academic and popular literature, supports and at the same time hides interests having very little to do with the proclaimed desirable goals of ADR: to be an instrument to make justice available and accessible to everyone. In fact, judicial delay encourages strong corporate interests to choose arbitration as an alternative to litigation, a private (confidential) solution praised by the dominant legal cultures as a major cultural and technical advancement. Of course, such enthusiastic judgments concerning arbitration are not completely unbiased, given the elite status of the judicial profession, academia, and practicing attorneys who are involved in civil arbitration (above all, but not exclusively, in dealing with international questions), obtaining, as they do from such private alternatives to ordinary litigation, a most important source of their income.¹⁴

It should therefore be easy, from a critical standpoint, to understand the forces that have progressively contributed to enlarging the spheres of arbitration, let alone the various forms of legislation and transnational organizations that place this private alternative solution on an incrementally favorable light. The latter include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, established under UN auspices in 1958; The UN Commission on International Trade Law (UNCITRAL), established by the UN General Assembly in 1966, the Principles of International Commercial Contracts prepared in 2004 under the auspices of the International Institute for the Unification of Private Law, also known as UNIDROIT, an independent,

intergovernmental organization based in Rome, and so on. Paradoxically, because of the political-cultural forces supporting it, arbitration in fact makes the ordinary judicial process increasingly inaccessible, despite the political and cultural rhetoric that celebrates it as a solution to the problem of access to justice. Arbitration is in fact nothing more than a simple form of private justice, more agile, more efficient, and of course much more expensive than the ordinary forms of justice. The ADR industry manages to render its adjudication increasingly impermeable to the ordinary jurisdictional challenges that operate by way of scholarly judicial and legislative interventions, to the point that this form of ADR becomes independent and completely self-sufficient, thus serving the interests of the wealthy class that can enjoy its own “law.” This fact is not new in the Western legal experience. The old tradition of the *lex mercatoria*, a system of customs and practices enforced through merchant courts, was highly developed as early as the fourteenth century and unfolded unchallenged until the early twentieth century, when the great Swiss legislator Eugen Huber began to stress its political incompatibility with the idea of equality before the law.

The success of privatized justice thus is not much different from the success in the package-delivery field of an express courier service such as DHL. It is more convenient and more efficient than the public postal service for those without budgetary constraints. Moreover, through arbitration, merchants once again can be sovereigns of their own law, the new *lex mercatoria*, and re-conquer the status of “more equal than others” that as a class they had lost at the beginning of the twentieth century. This new law, as a judicially viable alternative, carries its own potentially distinctive values, which “the industry” succeeds in describing as perfectly compatible with, if not more advanced than, the

ordinary laws of the land. Thus the idea of a special law serving the interests of the “class” of “merchants” is being reintroduced.

The risks of privatized justice, however, are very acute. As it is invariably the case when efficiency is used as a legitimating device, the “haves” come out ahead. Typically, on current arbitration panels, local as well as international, two private judges (most often professors or famous attorneys) are appointed by the parties and *de facto* serve as quasi-advocates being concerned with preserving their professional relationship with the lawyers who have appointed them. The third private judge, serving as the president, is nominated either by the parties in agreement or by some third party. The president, himself a private professional, is at high risk for being influenced by the interests of the most powerful party, because doing so can provide more potential future lucrative opportunities to serve as a private arbitrator.¹⁵

If at first glance the success of arbitration as a form of ADR seems to be merely that of a simple and desirable alternative for the upper class, in truth, this produces significant mischief for the ordinary person (*quibus de populo*) and more generally damages the idea of legality within a pluralist society. In the first place, what emerges is a particular system of governance under which any social class powerful enough is entitled to its own particularized law, as if unity were not a value in society and as if efficiency and the survival of the fittest were themselves the only justification for the law. In addition, the blooming of forms of ADR allowing the affluent part of society to access its own privatized law produces the ulterior degradation of the ordinary judicial system, which is systematically despised by the cultural industry that sustains ADR and which is eventually abandoned by everyone who can afford to do so. In fact, if all the best

professionals are employed in the very lucrative business of arbitration and strongly encourage its use by their wealthy clients, it becomes evident that the ordinary system increasingly worsens. This is just what has happened in the United States with public schools, compared with private ones.

But the risks to which arbitration exposes the legal conquests of the twentieth century, which at least formally produced equality between the social classes and as a result of which merchants could not invoke a sovereign law different from what applied to all other citizens, pale in comparison with those created by mediation, the second form of ADR and a form of more recent introduction. Here, too, you find the same rhetorical basis, the need to confront the “litigation explosion.” However, while in arbitration the idea persists of a solution to controversies based on notions of right and wrong established by legal professionals on the basis of neutral verifications of the entitlements of the parties, an idea that is deeply rooted in the Western legal tradition, mediation constructs a radically different form of justice. Indeed, the dispute in mediation is not decided by a third party—a judge or an arbitrator—on the basis of “objective” findings of right and wrong. On the contrary, in mediation, the parties come together to reach an “alternative” solution in by seeking a reasonable compromise. This process is quite often aided by a facilitator who is experienced more in the psychology than in the law. Notions of right and wrong disappear. What remains are cases that are adjudicated on the basis of an idea of reasonableness conceived in terms of a social model of the “good person,” someone who is submissive, integrated, not idiosyncratic, and who does not create “problems.” In mediation, the “harmony ideology” prevails (to use the title of the classic volume of Laura Nader),¹⁶ and the party who is praised is the one who is willing and able

to concede (under pressure from the mediator) at least some of his or her rights for an objectively favorable compromise. Those who seek to assert their rights are quite often seen as impulsive, rebellious, and potentially subversive. The result is the “medicalization” of the process, as the mediator becomes like a therapist facilitating consent and thus helping a deviant person (who still retains his or her rights) to achieve harmony with society.

In colonial Africa, traditionally weak social actors (for example, women) who sought adjudication in the modern courts established by the colonial powers were turned down and sent to seek “traditional justice” in the form of mediation, which was considered by the colonizers to be better adapted to tame people with more rebellious dispositions. During the Meiji period in Japan, and frequently today, the idea of citizens seeking to assert an individual *right* (a term that has only recently been added to the Japanese dictionary) was considered a subversive concept that rendered people incapable of conforming to collective norms and accepting traditional mediation.¹⁷ In modern-day China, in order to eliminate the trend toward the assertion of individual rights—a consequence of an increasingly more professionalized judicial system—the state invokes a return to Confucian harmony.¹⁸ Since the second half of the 1970s, during the tenure of Chief Justice Warren E. Burger at the United States Supreme Court, mediation in the United States became a powerful industry of social consensus and of the production of harmony. Despite speaking a language that is largely foreign to the American ideal of rights and the tradition of dissent, the mediation industry has been fueled by the creations of university chairs and masters programs in vocational training and has led to numerous published volumes and organized conferences dedicated to this approach. The mediation

industry offers to reasonable (“harmonious”) persons a model of dispute resolution promoted for its capacity to reduce stress and save money. This rhetoric is powerful. The benefits of such a model are obvious and evident to everyone: why create congestion in the courts, expend money and resources, and wait for years for adjudication on rights issues when there is a perfectly reasonable solution that is immediately at hand?

But the dangers of the mediation model in an individualistic culture such as that of the West are frightening.¹⁹ Mediation is obligatory in many instances in the United States. If the parties do not accept mediation to settle their dispute, they may not have access to the courts. In family law cases, for example, the parties must try court-ordered professional mediation before they are given access to resolution within the court. This is true in a number of different other fields. The biggest risks of ADR as a model of decision making which structurally favors the strongest party or entity are harbored by the disparity in power between the husband and the wife, the boss and the worker, the corporation and the consumer, the weaker state and the more powerful state (as in international mediations on water disputes that grant jurisdiction to the International Court of Justice). If mediation fails to reach a settlement, the blame is placed on the party that caused the failed attempt by refusing an offer or discontinuing the mediation, demonstrating this party’s irrationality, rather than on the party who originally violated the other party’s rights. This is how blame gets attributed to the abused wife who does not succumb to mediation to settle a child-support or spousal-support case because she never wants to see the abusive husband again, the consumer who does not accept a settlement offered by a corporation, the worker who insists that his or her right that was violated be restored and respected, instead of accepting a “reasonable” compromise that

quite possibly the boss and the trade union have agreed upon, and the weaker state that does not accept a border compromise.

Until the end of the 1970s, the ideal that everybody should have his or her day in court was pursued in Western cultures by means of expensive welfare programs. For example, free public defenders were provided to low-income defendants, and the state provided other forms of subsidies to increase access to justice. In Germany and Sweden, these services reached the maximum levels of civilization, but more or less effectively were pursued as an ideal everywhere.²⁰ The demise of the welfare state has produced a decline in the ideal of access to justice for all—the same fate that has happened to access to education, health care, and other services. The irresistible development of ADR thus must be understood in connection with the demise of the welfare state. Ideological hostility to the welfare state, first in the United States and then all over the world, coincides with a new, postmodern phenomenon. As a response to the access to justice problem, the ADR industry promised a huge saving in welfare funds. The access problem was to be solved by denying it exists, with the extra advantage that the nonconformist man or woman loses the right to have a court rule on their case and perhaps can be cured of their unreasonableness and dissent.

Development

Among the flexible terms, empty of a precise meaning but fuelled by uncritical positive connotations, “development” also deserves some comments. Like the notions of the rule of law and alternative dispute resolution, this concept occupies an important place in the ideological tool kit that supports predatory global capitalism. The variations

that make the term “development” vague are historical and geographical and can best be traced by glancing at the transformations of the international financial institution that carries development in its social charter: the World Bank Group.

In 1944, in the famous context of the Bretton Woods agreements, the allied powers appeared to follow the enlightened (and later betrayed) advice of Lord Keynes in attempting to create a formula of international financial governance capable of stabilizing the world that they would inherit from imminent victory in World War II. In this framework, the International Bank of Reconstruction and Development (IBRD) was established. The IBRD was the first institution of the World Bank Group, and the term “development” is inscribed in its name and charter. As it is well known, in addition to the World Bank, the Bretton Woods agreements also gave life to the International Monetary Fund (IMF), an institution that sponsors development even for states that are already developed. The international political climate was already showing the beginnings of an extremely tense competition with the still-allied Soviet bloc, which explains, much more than the official historical account, even the U.S. bombing of Hiroshima as crucial for the capitalist bloc to obtain strategic positioning in the confrontation with the Soviet Union.²¹

“Development” remains in the chartered name of the second institution of the World Bank Group, the International Development Association (IDA), which in 1980, at the beginning of the decade that would “end” the Cold War, engaged in the practice of loaning money to the “poorest countries”—the poorest of the poor. The IDA attempts to produce a consensus, something that Antonio Gramsci teaches us is essential to any project of hegemony. At the same time, it institutionalized the Reagan-Thatcherian logic in which solidarity within the society must be circumscribed as much as possible.

For the entire phase of formal decolonization (1961, with its emancipation of seventeen African colonies, is known as the “Year of Africa”), which was surely one of the most important civilizing consequences of the Cold War, (the other being the development of the welfare state as a pacifying device within Western capitalism), the promise of development came to be utilized by both imperialist blocs to exercise renewed influence on the newly independent states that entered into the assembly of the sovereign nations. For desperately poor countries, left in dire poverty by the colonizers, (the French literally took the light bulbs from the African public offices with them), it was absolutely unavoidable to knock at the doors of the international financial institutions to obtain the indispensable liquidity to prevent immediate collapse. So the World Bank, with lower interest rates compared with those of private banks, basked in their glory for quite some time. The number of member states progressively grew until it reached its current 185, and the promise of development secured a fundamental role even in the politics of the new postcolonial leaderships—as much in the kleptocratic ones as in the respectable ones. Development truly became a “bipartisan” idea in the deepest sense of the term, even tempting leaders with the prestige of Jawaharlal Nerhu in India, Julius Nyerere in Tanzania, and Fidel Castro and Che Guevara in Cuba.

It did not take a lot of time before the poor countries understood that they had placed themselves in the hands of a usurious international financial system. The double oil crisis of the 1970s filled the vaults of private banks with appalling quantities of petrodollars that were offered at first priority to the most corrupt elites of the Third World at relatively low interest rates, bringing poor countries into ever-increasing indebtedness to finance their luxury-import economies, and the absurd standards of living of the

urbanized ruling elites. For a time, a price increase in raw materials, which were produced in great part in poor countries, contributed to the mirage of development, a dream from which poor countries soon abruptly woke . By the mid-1980s, the project of development had to confront the sudden fall in the international prices of agricultural products and a rapid increase in interest rates due to the risk of default. It then became apparent that the indebtedness of poor countries had become unsustainable.

At that point, the Bretton Woods institutions took the gloves off and revealed the merciless capitalist reality hidden behind international organizations so prestigious as to be structurally connected to the United Nations. In reality, beyond posing as public-minded international organizations, the World Bank and the IMF display the governance model of a private corporation, in which whoever invests the most money is who commands and in which the short-term interests of shareholders dominate. It follows that, despite the presence in these organizations of numerous other member states, the reins of command are solidly in the hands of the United States and of the developed states that control a huge block of the votes. Exactly like a company that, in order to avoid default by its debtors, puts them under controlled administration, the international financial institutions in effect put the indebted states into receivership. In order to service their debt, they are forced to hand over their political sovereignty to the lenders. In Mali, for example, the office of the IMF is located in the same building as the Ministry of Economics. Structural Adjustment Plans (SAPs) are required for obtaining any other financing, whether from the World Bank, the IMF, or even the private sector.²² The SAPs were grounded in the Reagan-era rhetoric according to which, if you see a man who is hungry, do not give him a fish but teach him how to fish—and loan him the rod.

Not surprisingly, all this ends up in the fundamental recipe for the privatization of the entire public sector so that it can be bought “at cost” by the global corporations. The structural adjustment of the economy consisted in fact of the simultaneous introduction of the following points. First, let markets freely determine prices while reducing or eliminating all state controls. Second, transfer all resources held by the state to the private sector. Third, reduce the budget of the state as much as possible. And fourth, reform the courts and the bureaucracy in such a way as to facilitate the development of the private sector. These four fundamental points are spelled out in the financing contracts in a series of detailed prescriptions that the assisted states must implement into law: the abolition of minimum wages, the abolition of food subsidies, the abolition of cost-reduction programs for housing rents, the reduction of work-safety standards and environmental standards, and the obligation to contract out public services such as transportation, education, health care, and pensions to the private sector.

Naturally, such an assault on the political and judicial sovereignty of the member states would not have been possible without the global process of depoliticizing the law that coincided with the end of the Cold War. To be sure, the separation of law from politics long has been a strategy for the legitimization of power in the West, perhaps the most defining element of our highly professionalized legal tradition. Nevertheless, a new level of sophistication in this strategy has been reached with the construction of law as a technology, a remarkable trait of the postmodern condition in the law. In fact, the intimate relationship between law and politics has been exposed by a variety of realist, sociological, and critical schools of thought originating in Germany, France, Italy, and the United States since the beginning of the twentieth century.²³ Consequently, for the

entire period between Yalta and the fall of the Berlin Wall, intervention in Third World legal systems was taboo on the part of the World Bank and the IMF so as not to affect the delicate political equilibrium between the blocs. (It is still expressly forbidden by Article IV, section 10 of the constitutive agreement of the IBRD: “Political Activity Prohibited”). Only at the end of the 1980s, then increasing aggressively until today, in the name of development and of law as a technology of governance capable of fostering it, did the World Bank and the IMF become legal-judicial (and therefore political) actors in the processes of globalization. The World Bank not only contractually bound the states to structural adjustments, but sponsored studies, conferences, projects, and research centers devoted to the law, development, and its legal-economic analysis, thus playing a pivotal role in the production of the thick ideology of technological progress that today dominates global discourse about the law. The abdication of political sovereignty on the part of the indebted state thus becomes a natural consequence of any “efficient” system of global governance that ostensibly serves the purpose of reconstructing the economy of a state, but that in fact allows its plunder by the global corporations that indirectly own the “owners” of the World Bank.²⁴ As anyone who does not wish to bury his or her head in the sand knows, the neoliberal prescriptions implemented in the name of development, in particular privatization, have produced and are producing terrible social disasters everywhere, not only on the periphery, but also in the center. These prescriptions mercilessly strike at the weakest and increase repression, often contracted out, in order to suffocate every last hope of revolt and every attempt at emancipation.²⁵

Confronted since the Seattle protests of 1999 with widespread, rampant opposition to structural adjustment, the World Bank has revamped the old, never-

suppressed, and well-tested development ideology, enriching the term “development” with the expression “sustainable” or “equitable.” This is how SAPs became Comprehensive Development Frameworks (CDFs). Nevertheless, this has not changed in the least the simplistic vision of an evolutionary, unilinear, and necessary social progress based on technocratic legality whose “impact” is measurable in terms of the growth of the gross national product.²⁶ However, in subaltern contexts, the development ideology that seems very much to contaminate the discourses of all of our acclaimed technocrats, of our presentable politicians, and of our careerist and elitist academics begins to be frontally challenged by the first symptoms of a renewed awakening of the global conscience. In the words of Vincent Tucker, an African scholar:

Development is the process whereby other peoples are dominated and their destinies are shaped according to an essentially Western way of conceiving and perceiving the world. The development discourse is part of an imperial process whereby other peoples are appropriated and turned into objects. It is an essential part of the process whereby the “developed” countries manage, control and even create the Third World economically, politically, sociologically and culturally. It is a process whereby the lives of some peoples, their plans, their hopes, their imaginations, are shaped by others who frequently share neither their lifestyles, nor their hopes, nor their values. The real nature of this process is disguised by a discourse that portrays development as a necessary and desirable process, as human destiny itself.²⁷

The rhetoric of development today, like Frankenstein’s creation, escapes the control of its creator. It does not alienate only the “underdeveloped” states but also “us.” Transformed into a faithful ideology of the predatory logic of privatization and therefore intellectually sponsored, as in the rule of law or ADR, by the strong powers and by the corporate media, today, development is mere deeply bipartisan propaganda in the hands

of the winners in the processes of global transformation. In its name, what triumphs is the hubris of the Tower of Babel, the delirium of omnipotence, a triumph of quantity over quality, a psychosis for which the saving of half an hour on a train trip justifies any and all environmental destruction. The rhetoric of development blindly drags us through the logic of the very short period, determined by corporate three-month reports to the shareholders, in which triumphs in the plunder and squandering of natural resources are not seen as destruction and waste, but as constant, desirable, necessary, and infinite growth and progress.²⁸

Conclusion

Civilization today does not need bipartisan institutional ideologies uncritically accepted as the only way to exit from an undesirable emergency, be it the lack of democracy and of the rule of law, the litigation explosion and alternative dispute resolution, or poverty and the deficit of development. Such emergencies are most often invented, and such bipartisan ideas hide projects of hegemony, subjugation, and the domination of weaker social actors within the attempt to lure them into these traps. They are functions of predatory capitalism. What civilization needs, on the contrary, is a return of critique and dissent, exactly the opposite of bipartisan agreement. What it needs is a cosmopolitan, highly revolutionary political program capable of recuperating the public sector, political sovereignty, the communal gathering of hope and resources, the quality of life as opposed to the quantity of material wealth, a more equitable size of the slices of the cake—maybe smaller, but tastier for everyone—and care for future generations, as opposed to the brutal selfishness of current individual materialism. If we are not able to

succeed together to create this different world, our destiny will be to continue to work as consumers in shopping malls (for how long?), reassured by the trite formulas repeated by the corrupted, if not outright racist pundits²⁹, constantly blaming on the victims their Western-produced underdevelopment. Very soon, but perhaps too late, we will wake up understanding the tragic consequences of our own moral underdevelopment. Perhaps it will then be too late to exit the only real emergency: the predatory assault on our planet.

1. On the spectacular aspects of legal capitalism, see Ugo Mattei, "A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance," *Indiana Journal of Global Legal Studies* 10, no. 1 (2003), also published in *Global Jurist Frontiers* 3, no. 2 (2003), available on-line at <http://www.bepress.com/gj/frontiers/vol3/iss2/art1/> (subscription required).

2. See Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law is Illegal* (Malden, MA: Blackwell, 2008).

3. Niall Ferguson, *Empire: The Rise and Demise of the British World and the Lessons for Global Power* (New York: Basic Books, 2003).

4. Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA: Harvard University Press, 2001).

5. Commission for Africa, *Our Common Interest: Report of the Commission for Africa* (New York: Penguin Books, 2005).

6. See "International Rule of Law Symposium," *Berkeley Journal of International Law* 25, no. 1 (2007).

7. See Ugo Mattei, "Foreign-Inspired Courts as Agencies of Peace in Troubled Societies," *Global Jurist Topics* 2, no. 1 (2002), available on-line at <http://www.bepress.com/gj/topics/vol2/iss1/art1> (requires subscription).

8. A similar point is made in Nicolas Guilhot, *The Democracy Makers: Human Rights and International Order* (New York: Columbia University Press, 2005).

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9. Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (New York: Metropolitan Books, 2007).
10. The term is borrowed from the classic Eric Wolf, *Europe and the People without History* (Berkeley: University of California Press, 1984).
11. In general on such accounts, see Teemu Ruskola, “Legal Orientalism,” *Michigan Law Review* 101, no. 1 (October 2002): p. 179
12. See, in general, Laura Nader, *The Life of the Law: Anthropological Projects* (Berkeley: University of California Press, 2002).
13. See Marc Galanter, “The Day After the Litigation Explosion,” *Maryland Law Review* 46, no. 3 (1986).
14. See Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: University of Chicago Press, 1996).
15. See Per Henrik Lindblom, “La risoluzione alternativa delle controversie: L’ oppio del sistema giuridico?” in Vincenzo Varano (ed.), *L’Altra giustizia* (Milan: Giuffrè, 2007), p. 219
16. Laura Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (Stanford, CA: Stanford University Press, 1990).
17. See Eric Feldman, *The Ritual of Rights in Japan* (Cambridge: Cambridge University Press, 2003).
18. See Mattei and Nader, *Plunder*.
19. See Elisabetta Grande, “Alternative Dispute Resolution, Africa and the Structure of Law and Power: The Horn in Context,” *Journal of African Law* 43, no. 1 (1999): pp. 63–70.
20. See Ugo Mattei, “Access to Justice. A Renewed Global Issue?” in Katharina Boele Woelki and Sjeff Van Erp (eds.), *General Reports of the XVII Congress of the International Academy of Comparative Law* (Brussels: Bruylant, 2007), 383–408.
21. See Jacques R. Pauwels, *The Myth of the Good War* (Toronto: James Lorimer and Co., 2002).
22. See Giles Mohan, Ed Brown, Bob Milward, and Alfred B. Zack-Williams, *Structural Adjustment: Theory, Practice and Impacts* (London: Routledge, 2000).

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23. See Duncan Kennedy, "Two Globalizations of Law and Legal Thought: 1850–1968," *Suffolk University Law Review* 36 (2003),.
24. See Mattei and Nader, *Plunder*.
25. See Klein, *The Shock Doctrine*. For data on the growth of privatized repression, see Elisabetta Grande, *Il terzo strike: La prigione in America* (Palermo: Sellerio, 2007).
26. See Luca Pes, "Disciplinary Boundaries in Approaching African Development," *Global Jurist Advances* 7, no. 3, available on-line at <http://www.bepress.com/gj/vol7/iss3/art6> (subscription required).
27. Vincent Tucker, "The Myth of Development : A Critique of Eurocentric Discourse," in Ronaldo Munck and Denis O’Hearne (eds.), *Critical Development Theory: Contributions to a New Paradigm* (London : Zed Books, 1999), p. 1. See also Serge Latouche, *Survivre au développement* (Paris: Mille et Une Nuits, 2004).
28. See Thomas Friedman, *The World is Flat: A Brief History of the Twenty-First Century* (New York: Farrar, Straus, and Giroux, 2005).
29. See Gui Debord, *Commentari alla società dello spettacolo [Comments on the Society of the Spectacle* (Malcolm Imrie trans., Verso Books 1998)] (1997).