

Preliminary Paper for Globalization and Its Discontents

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Law, Class and Imperialism

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This paper seeks to contribute to the workshop by exploring the utility of terms such as “class” and “imperialism” in understanding the globalization of law and its implications. Despite the use of these terms, and examination of issues related to them, the paper will not provide much normative guidance. Normative implications can be discussed, but the point of this paper is to try to understand the processes that are behind the production, export, and import of law and legal approaches. It is a work in progress, and therefore there is probably more description than necessary to make the general points. I have left the description in part to provide more of a picture of “globalization in action” as seen through impacts on and through individuals in different social contexts. Our research is based on extensive interviews, and we are further advanced in our research in Indonesia and India than we are in the Philippines – the three countries discussed in this paper. The research will be combined in a book length manuscript that we hope to complete this academic year (and which will also include other South and East Asian countries).

The use of terms such as empire, imperialism, or colonialism in relation to law is generally meant to denounce a particular approach or program – usually in the name of a more enlightened approach. A recent seminar at the London School of Economics on “legal imperialism,” for example, highlighted the dangers associated with the role of U.S. Non-Governmental Organizations or NGOs in shaping a “human rights” agenda that could be regressive and anti-democratic (cite). Recent works by U.S. legal scholars criticizing “legal imperialism” or more generally the new round of “law and development” that commenced in the 1980s follow the same pattern. They attack U.S. policies abroad as imperial – biased

toward U.S. practices, not suitable for the recipient country --in the name of more enlightened ones (e.g., Chua) that will supposedly be more suitable as well. This scholarship is consistent with earlier attacks on law and development and legal imperialism (Gardner). Since U.S. foreign policy was conceived partly in opposition to European colonialism, these rhetorical positions build on the negative connotation of empire.

One problem with this literature is that the “anti-imperialists” often have more in common with the “imperialists” than not. The debates are relatively narrow. They are mostly about the shape of what is presumed to be a relatively expansive and reformist U.S. foreign policy. Within the U.S. legal academy, those most sensitive to the imperialism issue typically call for more attention to democracy, human rights, and regulation. Gardner’s critique of legal imperialism, for example, called for more activism and emphasis on human rights – precisely consistent with the approach that his previous employer, the Ford Foundation, was then beginning to embrace. These debates pro and con do not provide much analytical content for the term “legal imperialism.” It is about how best to implement an interventionist foreign policy. The other possibility, which is to say that any import or export of a legal approach is to be denounced as imperial, is also not very helpful in the context of a global market in expertise.

A recent advance in this discussion comes from the legal historian Lauren Benton, whose insightful book on *Law and Colonial Cultures* focuses on the role of law in European colonialism (2002). Examining the particular way that law related to colonial patterns in different contexts, she notes that, “The law worked both to tie disparate parts of empires and to lay the basis for exchanges of all sorts between politically and culturally separate imperial or colonial powers” (2002:3). Rather than seeing the law simply as “an imposition” from colonial authorities, she explores a process through which “internally fragmented entities ... tended to insert themselves within local power structures even in places where there was a

sharp imbalance of power” (id. 9). She also focuses on the key role of “cultural intermediaries” who “simultaneously ‘collaborated’ with an imposed legal order and ‘resisted’ its effects” (id. 17).

The intermediaries – as double agents -- sometimes helped to build the law in order to be in a position to use it for their advantage, and sometimes they challenged it, and in each case they drew on individuals and groups from the colonizing side to strengthen their position. The process over time involved many variations but helped generally to build something “state-like” that could then be targeted by movements for independence -- typically led by those who had played the role of intermediary.

This historical work has the advantage of seeing law in relation to imperial or colonial *processes* contested and legitimated on both sides. The anti-imperialist rhetoric from the north from this perspective can be seen as part of the process – and a tool to be used for both contestation and legitimation. Benton also highlights the fact that the colonial process involves interactions with local power structures that may be transformed through the process.

Consistent with this orientation, this paper examines recent developments that reveal the very same imperial processes that Benton finds. In addition to the observations already made, we highlight several related points in this paper. First, to repeat, the anti-imperialism of the U.S. fits quite well in the very same framework of import and export seen in the groups that favor policies that can be categorized as imperial.

Second, while Benton emphasizes the contributions of both sides toward the construction of the role of law and even specific legal doctrines, we highlight an obvious point about those contributions – the “law” comes from the colonial power, and the definition of what is legitimate depends on what can gain credibility in the colonial centers. Put another way, the negotiation between the two sides is by definition skewed toward the centers for the production of law and legal credibility. Contributions are not equal. Benton’s use of the term

“legal pluralism” underscores the hierarchy, since the tool of analysis places the competing kinds of local authority – religion, tribe, party, family – within a context defined in the empire – legal -- even if contested and changing there as well.

Third, the central importance of the intermediaries, which has already been mentioned, relates to the fact that the colonizers “inserted” themselves in local power structures. The “exchange” within the space of law thus drew on local elites on both sides and contributed, with detours and complexities depending on local conditions – to the reproduction and legitimation of the power of those elites. The study of law as part of imperial processes therefore necessarily involves some examination of social class and hierarchy.

Finally, since the role of law in imperial processes depends on the place of law in the state at home, it is not surprising to see that the role looms larger in the U.S. story than it does in most other local settings. Indeed, consistent with what Benton found for the European colonists, the position of the law within the United States – structured around the idea of lawyer statespersons increasingly reflected in a division of labor between NGOs and corporate lawyers -- grows stronger because of the possibilities and contests that take place abroad over U.S. policies.

I. Law in the Early Construction of the U.S. Empire – Elihu Root and the Philippines

Developments that took place at the end of the nineteenth century made the United States into a colonial power. The Spanish-American War brought Cuba, Puerto Rico, and the Philippines under U.S. control, and the activities of that period set a lasting tone for U.S. foreign policy with respect to what later became the third world. The example of the Philippines is especially instructive in seeing the development of the U.S. approach to colonial ventures and also to the role lawyers have played generally in both serving and opposing colonialism. In order to understand the U.S. picture, therefore, we go to the genesis

of the colonial role in the Philippines, which, as we shall see, relates closely to the legitimization of the U.S. corporate lawyers who emerged at the turn of the twentieth century to serve the great business empires of the time.

The rise of the new industrial class connected to the railroads, the banks, and the emerging oil industry presented a great opportunity for lawyers, especially in New York City. But there were also risks. The robber barons used legal hired guns and unscrupulous tactics to defeat their competitors (Galanter and Palay 1991). The lawyers who served them became identified with the businesses and business tactics they served. There was opposition within the traditional bar to these alliances, which threatened the legitimacy of the emerging profession as a whole. The founding of the Association of the Bar of the City of New York was in fact largely a reaction to Stephen Field's notorious representation of Jay Gould (Gordon 1984: 57).

The rising corporate bar in New York City adopted the strategy of building a relative autonomy from their clients in order to make their expertise more valuable and their own roles more legitimate. They invested in the law, including antitrust, and in the state through politics in the Progressive era and beyond. This investment took place at both the local and the international level, involving municipal justice at one level and foreign policy at another (Powell 1988; Gordon 1984). Both locally and internationally, a part of the state strategy for the law firms and their clients involved the mobilization of social capital to help civilize the robber barons into philanthropic patrons -- led by the Carnegie and Rockefeller foundations (Berman 1983). Another aspect of their strategy was to invest in legal science -- emerging at that time through the case method pioneered at Harvard but seen also in the founding of the American Society of International Law early in the 20th century. Those who excelled at the case method, in addition, were invited to join the leading corporate law firms -- cementing the relationship between the elite schools and the leading corporate firms.

These strategies required an initial accumulation of symbolic capital -- combining social class, elite school ties, meritocratic criteria, political investment, size, and entrepreneurship. The professional firms were able to combine the social capital of the well bred cosmopolitan elite with the ambition and talent of meritocratic newcomers promised a partnership if they could succeed as associates. Sullivan and Cromwell provided a perfect example, with Sullivan bringing ties to an old family and Cromwell the entrepreneurial drive of the outsider (Lisagor and Lipsius 1988).

The Wall Street law firm – often termed the Cravath model – became the institutionalization of this double agent strategy. The law firms served as buffers and crossroads between academia, business, and the state. This double agency can be seen as an institutionalized schizophrenia, according to which the lawyers would alternately seek to find ways for their clients to avoid state regulation and find ways for the state to regulate their clients (Gordon 1984). The practical result was that it allowed the lawyers to construct rules to protect and rationalize the power of their clients, to build the need for their own professional services, and to gain some power in the state and economy.

Elihu Root, who became Secretary of War under McKinley in 1899, was one such corporate lawyer, and his career points to the way that these lawyers moved into the sphere of foreign policy. His clients late in the nineteenth century included the famous Sugar Trust, which he helped to survive the threat embodied in antitrust legislation, and he also invested in good government through the Republican Party. His activities in the sphere of foreign affairs began under President McKinley. Root became the prototype for the so-called U.S. Foreign Policy Establishment¹ (FPE) that played a key role in U.S. foreign policy throughout the 20th century – especially after World War II. As many commentators have noted, the FPE – institutionalized in the Council of Foreign Relations, established in 1921 and initially led by Root – was dominated by corporate lawyers (Grose 1996). One of Root's key tasks as

Secretary of War was to deal with the continued resistance in the Philippines to the U.S. occupation and colonization.

Root at that time was new to foreign affairs. Many notable lawyers were actively hostile to this colonial venture. They questioned the legitimacy of these activities in terms of U.S. legal and moral values. Colonialism was anathema to many who defined the U.S. in opposition to the European colonial powers. Partly because of this attitude, McKinley and Root sought help in solving the Philippines problem from Judge William Howard Taft, a pillar of good breeding and legal professionalism and another who had questioned the Philippine takeover. Taft at the time was the presiding judge of the Sixth Circuit Court of Appeals and dean of the law school of the University of Cincinnati. Taft accepted the position to lead the effort to build a new government in the Philippines because, it was “a national obligation, indeed a ‘sacred duty,’ to create a government adapted to the needs of the Filipinos, one that would help to develop them into a self-governing people” (Minger 1975:2). Following Root’s ideas as well, they led “the effort of the United States to transplant its values and institutions in the Philippines” (Karnow, 170).¹³ According to Taft, “We hold the Philippines for the benefit of the Filipinos” (Karnow 197).

The U.S. – led by an emerging legal elite anxious to legitimate itself -- therefore sought to reinvent colonialism with a moral façade both as a way to make it more legitimate than the more traditional Spanish colonialism that it replaced and to offer legal morality as a sort of civic religion to substitute for the conservative Catholicism that was a key component of the Spanish model of colonization. We cannot detail the history of this effort – and the

¹³According to Karnow, “Inspired by a sense of moral obligation, they [the U.S.] believed it to be their responsibility to bestow the spiritual and material blessings of their exceptional society on the new possession– as though providence had appointed them to be its savior. So, during its half-century in the archipelago, the United States refused to be labeled a colonial power and even expunged the word *colonial* from its official vocabulary” (197).

consequences – here, but we can get some sense from testimony of one of the dominant “civilizers” in the Philippines. George Malcolm was a young law graduate of the University of Michigan who went to the Philippines in order to “see my country initiate a system of ever increasing self-government for the Philippines ... [and] to take a stand in favor of resolute adherence to America’s revolutionary anti-colonial policy” (Malcolm 23). Through entrepreneurial initiative, he helped to establish the University of Philippines College of Law in 1911, and he became the first dean.

The idealism of the U.S. colonialism was part of a process to make friends with those already high in the Philippine social order. There was a strategy of winning over the Philippines by befriending the elite – the *ilustrados*, the “rich intelligentsia” created under Spanish colonialism (Karnow 15). Malcolm’s goal with the law school was therefore “the training of leaders for the country. The students were not alone tutored in abstract law dogmas; they were inculcated with the principles of democracy.” (Id.). One of the graduates in 1913, who “established the reputation of the new school by topping all candidates in the Bar examination” (Malcolm 98), was Manuel Roxas, who became the first President of the Philippine Republic. Malcolm, according to his memoirs, “filled the role of father-confessor and adviser to Roxas, constantly keeping before him his ultimate goal – to become the first President of an independent Philippines” (id.) To foreshadow later events, we can note that a protege of Roxas, who also finished first in the Bar examination, was Ferdinand Marcos.

As with respect to the domestic activities of the Wall Street elite, civic virtue in foreign policy served as a substitute for strong state institutions and traditions -- while providing ideal opportunities – on both sides -- for the empowerment of a professional oligarchy boasting of its "inherited noblesse oblige." That is not to say that these lawyers forgot more direct forms of self-interest. William Nelson Cromwell took advantage of the imperial ambitions of Theodore Roosevelt and his connections to lawyers in the Roosevelt

administration to enrich both himself and his clients in relation to the Panama canal. He helped to focus the discussion of the project for a canal joining the Atlantic and Pacific on Panama and then helped create a Panama “state” that could sign away rights to the canal.

The process more generally led to the construction of a quasi political monopoly for "gentlemen lawyers" who came to be seen as "natural" statesmen. This civic morality was a justification for an elitist model of power which can be dressed under different guises. It supported the conversion, for example, of the masonic *ilustrados* into brotherhoods of legal notables centered around the law school fraternities in the Philippines. It also supported considerable idealistic investment in the Philippines and its legal institutions.

This early construction of moral imperialism, more importantly, served as a later model for the moral crusade against communism (which was also the time of the apotheosis of the FPE in U.S. foreign policy circles). Similarly, the strategy of training Philippine proteges became a blueprint for the "making" friends philanthropic strategy – later seen in the funding by the Ford Foundation first of scholars and later of NGO activists (Dezalay and Garth 2002). In both the early and the later versions, this moral imperialism was a perfect breeding ground for double agents thriving on the social hypocrisy that combined their idealism and the material interests of themselves and their clients.

The ironic result of the strategy in the Philippines, moreover, was that the same individuals who made their reputations fighting the “bosses” in the urban centers of the United States succeeded in promoting and legitimating a clientelist State for the benefit of their proteges -- landowners turned into lawyer/politicians. They laid the foundations for what has been termed “Booty capitalism.” In the words of Hedman and Sidel, leading scholars of the Philippines, “bossism and corruption... frequently derided and diagnosed as pathologically “Filipino” are best understood as reflections of enduring American colonial legacies” (p. 8).

The Philippine political system involves strong politics – competition among elites typically with law degrees -- but a very weak state (Hedman and Sidel). In practice, as a consequence, a small group of families gets a de facto monopoly on State politics through the manipulation of the electoral process (characterized as “money, goons and guns”), then uses its control of the Senate for patronage (through the control of appointments) and personal enrichment – including lucrative import licenses, State provided subventions, and preferential access to quasi free loans.

This exercise in bolstering idealism and at the same time seeking to replicate themselves in a different setting succeeded in at least in two other aspects. First, they were able to institutionalize a weak state model, which meant also that the State bureaucracies (including the justice system) were highly dependant on clientelism and patronage from the small oligarchy of notables (again, based often in the Senate). Second, there was success in the exportation of the schizophrenic professional model: a mix of meritocracy, seen in the continuing importance of the actual numerical rankings in the bar exams, and a kind of Philippine guanxi seen in the powerful role of fraternities; and an enduring combination of masonic idealism and rationalism and a strong religiosity. Two of the three leading law schools are religious-based, for example, and they provided much of the impetus for the toppling of the dictatorship of Marcos.

It is also not surprising that the system provides a perfect breeding ground for double agents. One of many examples would be the way that Quezon used nationalist and populist rhetoric to distinguish himself from his U.S. protectors at home while lobbying in Washington against early withdrawal of the U.S. from the Philippines. He and his allies could both lead the movement for independence and control its timing so that it would not disrupt the smooth transition of power to the U.S. protégés. Another is the “constitutional authoritarianism” that Marcos used to legitimate his power at home and abroad.

The pattern laid down by this “moral genesis” in the Philippines gets reinforced with each new crisis, leading to reinvestment in virtue. We see strong investment, for example, in the recruitment of deeply religious Chief Justices to rebuild the credentials of the justice system after Marcos lost power. Even the CIA has played into the process of moral imperialism – for example, by funding, through the Asia Foundation, the National Committee for Free Elections, at the same time launching its protege Magsaysay as an “Asian hero” and social reformer (e.g., agrarian courts). And later the CIA promoted a brilliant man who grew up in poverty – Macagapal -- as “Honest Mac,” the “poor man’s best friend.”

The example of the Philippines therefore is important for two basic points. One is that it illustrates how and when the U.S. itself constructed a kind of “legal imperialism” that encompassed the tension embodied in the corporate lawyers at the turn of the century – serving their clients, building their own power, and gaining legitimacy for their role. The history of the Philippines is full of examples of how that approach shaped the role of the law and the role of the state, including a long flourishing NGO movement and long history of activity by U.S. philanthropic foundations. The second major point is that the legacy within the Philippines is more about the reproduction of a certain elite with a state that can only perpetuate that elite rather than about institutionalizing good governance and social reform.

Law in the Cold War Construction and Reformation of the Predatory State: Indonesia

The example of Indonesia builds on the study of the impact of U.S. colonial policies on the Philippines. It provides an example of the U.S. approach and its impact after the colonial regime of the Dutch. The small but elite group of lawyers trained by the Dutch played a prominent role in the movement for Indonesian independence,¹ but by the 1960s the

¹According to Lev, “it was in the major elites, in the colonial administrative service, in the government courts, and in the law schools of Holland and Batavia that a new group of professional lawyers began to emerge from within the colonial order. As legal studies became an evident route to success in the colony, a full term law faculty was finally opened in Batavia in 1924, though Indonesian students had gone to the Netherlands for advanced training before

legal profession “had basically collapsed.”² According to one observer of the changes over time, lawyers lost respect. They were regarded mainly as “scalpers – go-betweens or middlemen, the worst kind of middlemen.” There was a sense among those with higher ideals that “you don’t go into private practice” even “as late as the 1970s.” Nevertheless, “there continued to be a group of very highly ethical ... litigators to advocates..., who were – and this dates back into the Sukarno period – trying to maintain the notion of an autonomous legal profession.” That became marginalized under Sukarno because, reportedly, “those people were too much Western oriented. And too much Dutch thinking.”

U.S. investment in individuals and expertise began relatively early in Indonesia, in particular by cultivating the aristocratic protégés of the Dutch. Even before 1949, for example, the U.S. challenged the Dutch to grant independence while working with members of the Javanese aristocracy. One of the individuals close to the U.S. at the time was Sumitro Djojohadikusumo, a Dutch-trained economist from the aristocracy and a member of the very elitist Socialist Party (PSI) (which was later supported by the CIA in rebellion against Sukarno).

During the Cold War, as in Latin America (Dezalay and Garth, 2002), this policy of cultivating scholars and professionals from elite backgrounds expanded in numbers and in the range of expertise supported. Much of the focus, again as in Latin America, was on economics. Many were in fact Sumitro’s students, the “Berkeley Mafia” educated at the University of California. There was also significant support for anthropologists or social scientists, seen in the Ford Foundation-funded Cornell project involving George Kahin and

then. Most early Indonesian law students were high born Javanese who, from their knowledge of the Dutch language, were already familiar with the national level of colonial authority “(Lev, in Holt 1972: 256).

²“[I]n the latter days of the Dutch administration law was a small but prestigious profession in Indonesia.... And people from, I guess it would be what we call upper-middle class or even aristocratic families would go to Holland or would study in Indonesia. And there was a small but well-known body of those people who were in positions of prominence both in the government and on the fringes of the government after independence.” (See Lev writings)

Selosoermardjan – a sociologist/politician close to the sultan of Jogjakarta. Naturally, again as elsewhere, there was also training of the military, in this case by the Harvard/CIA Professor Pauker and by SESKOAD, the elite/intellectual army school where the young U.S.-trained aristocrats could teach and build networks with (or marry into) the new upcoming military meritocracy that controlled significant power and resources (including the former Dutch enterprises). To continue the Latin American/Cold War parallels, the training of lawyers through the Ford Foundation in Indonesia was only a small part of a much wider strategy of constructing a whole professional class of proteges who could replace the lawyers ousted by Sukarno.

The legal elite and their descendants actually helped energize the student politics that helped promote the end of the Sukarno regime, and they believed that the new Suharto administration would “restore democracy, the rule of law, and human rights” in the late 1960s. After a few years, however, neither Suharto nor his Berkeley trained economist-technocrats was willing to invest much in law. The opinion of the technocrats was reportedly that law was a “constraint” that hindered the changes needed for economic development (referring to economists Salim and Mujoyo). And Suharto found no need to invest in law to legitimate his anti-Communist regime. The “legal euphoria” came to an end fairly quickly.

The Ford Foundation-sponsored International Legal Center (ILC) became involved significantly in Indonesia in the 1970s. One program sent individuals to Indonesia (and elsewhere) through a fellowship program that “put principally young American lawyers in positions in the developing world – legal positions.” According to one participant, “The way in which the program operated in reality was that in most cases the foreign lawyer was working with somebody who was identified as a significant innovator for reform within the legal system of the country concerned.” Robert Hornick, who went on to head Coudert Brothers and become the major U.S. expert in Indonesian law, was sent to work with

Professor Mochtar Kusumaatmadja. Mochtar (with a legal education including Harvard, Yale, and the University of Chicago) was a prominent voice for legal reform at that time, an ILC trustee, and the convenor in 1973 of an ILC Workshop on The Indonesian Legal System (Linnan 1999). He served both as Minister of Justice and Minister of Foreign Affairs under Suharto. Many ILC fellows were sent generally to try to upgrade legal instruction in Indonesia (Linnan) and help rebuild the place of law and lawyers.

In contrast to Latin America, the Ford Foundation law project emphasized training lawyers committed to social justice. It was clear that Sumitro's students could find a niche in the National Planning Bureau as economists, but, as noted before, there was no similar place for lawyers in Sukarno's "guided democracy." The aristocratic heritage of the lawyers also suited them well for positions imbued with noblesse oblige. The context also explains why these "cause lawyers" moonlighted almost immediately as corporate lawyers through their friends and cousins from the same social milieu, who had managed to retrain as a new technocratic elite — acceptable to Sukarno and later able to form alliances with the military (and the Chinese) to form the core of the State oligarchy of Suharto's New Order.

We can see the dynamic in the early history of legal aid and corporate law firms. One of those who supported the overthrow of Sukarno, Adnun Buyung Nasution, soon clashed with Suharto and left the position in the Attorney General's office that he had just regained with the change of government. Pursuing an idea inspired from his earlier stay in Australia, he decided to implement a plan to promote legal aid and human rights in Indonesia. He gained support from inside and outside the government for the plan, and in 1970 he created the Legal Aid Institute (known as the LBH) with the sponsorship of the Indonesian Advocates Association (PERADIN). The LBH became the key point of reference for legal and political reform among U.S. academics and later became the designated manifestation of the human rights movement in Indonesia (Lev Hrts NGOs). Nasution recruited idealistic young lawyers,

developed the office, and began to experience more friction with the government. As the government became more repressive, Nasution decided to try to expand to other areas in Indonesia and for that purpose invited foreign notables, including Daniel Lev (trained in the Cornell program) and Paul Modito (who had moved to the Netherlands), to “give lectures about the rule of law and democracy.”

The government, nevertheless, decided to forbid that expansion and in January of 1974, after a student rally against Suharto, Nasution was one of a number of individuals arrested. He was detained for two years without trial. When he came out, he managed to rebuild the Legal Aid Institute and, with the active support of local bar associations, expanded the program ultimately to have 18 offices all over Indonesia. During the 1980s, in fact, the Institute was able to gain substantial foreign funding, including from USAID. When Nasution moved to the Netherlands in 1985 after the government took away his license to practice law for defending an opposition leader, Todung Mulya Lubis, another well-known activist with LBH, took over. Mulya Lubis was well-known internationally as well and had studied at Berkeley with a scholarship from the Ford Foundation. For the next four years the Legal Aid Institute was administered by Mulya Lubis. Nasution then came back in 1993 to run the Institute and solve various problems associated with the successor to Mulya Lubis.

While certainly a strong favorite of U.S. legal idealists, the key initial source of funding for the LBH was not a foundation or government. Instead it was a private law firm established by Nasution in order to serve foreign clients. The firm itself grew out of an interdisciplinary business labeled Indo Consultant, which involved Mulya Lubis and an economist, the well-known Professor Sumitro. After running the LBH, in fact, Mulya Lubis also went into corporate law while continuing to work with and create NGOs, including several directed against corruption. These individuals in the late 1960s met with Professor Mochtar – soon thereafter Minister of Justice -- to try to set up what would have been one of

the first corporate law firms since the Dutch had left. Indo Consultant was to provide the initial financing, but Sumitro very quickly became a Minister in the government. This original group then split and Nasution then created Adnan Buyung Associates, which used resources from the representation of foreign clients to help support the LBH.

Around the same time, Frank Morgan, a graduate of Stanford Law School, came to Jakarta (in 1970) with the belief that the liberalization under the 1967 Foreign Investment Law would open up places for corporate lawyers. He visited the Minister of Justice seeking to start an expatriate law practice, but the Minister said that he could practice law in Indonesia only if he could “find some Indonesians.” He then contacted Mochtar, still the Dean of Padjaran University in Bandung, and Mochtar supported the idea as consistent with his general interest in law and development. They joined forces with Kirkland, Kaplan and Associates, a U.S. firm based in Thailand, but that arrangement did not work and they soon thereafter split. The new firm became MKK, and it remains prominent with Morgan and Mochtar still very visible at the law firm.

Another important Indonesian law firm started in 1967, when Ali Budiardjo, a prominent member of the Socialist Party (PSI) with an equally prominent father, asked Mardjono Reksidiputro, just back from education in the United States, to form a law office. Their first client was Freeport Indonesia, a controversial multinational in Indonesia. As with respect to the other lawyers we have mentioned, these individuals were direct descendants of the rather small Dutch-educated legal elite. With another law firm led by Professor Gautama, these firms were the only ones in the early 1970s to cater to foreign investors. They all also avoided litigation to maintain a respectable ethical posture with the rapid decline of the courts. Not surprisingly, these law firms prospered with the rise of foreign investment, self-consciously imitating U.S. law firms and keeping a distance from the corruption associated with the government.

As Robison shows (p. 60-66) the coalition of social groups that profited from and supported the Suharto regime (and survived it) is broad and diversified. Its legitimating core is constituted by the technocrats who built an alliance with the army (and the Chinese) to build highly prosperous enterprises that relied on government contracts, licenses and low rate loans. This coalition was consolidated by a whole system of clientelism and patronage cemented by matrimonial alliances and joint ventures (for instance one Sumitro son married into the Suharto family, while another became a very successful businessman through joint ventures with Suharto's family (p. 62)). And clearly the cosmopolitan legal intelligentsia is very much part of that world even if they occupy a marginal position – still a profitable niche – as brokers for the foreign investors and international financial institutions.

The group remains small and relatively close-knit. According to one of the new generation of NGO leaders, for example, almost all “power lawyers” in Indonesia are graduates of the LBH. The LBH, he stated, “creates a prestige credential” and provides “excellent training for litigation.” The credential also provides a way to “say no” to corruption and to develop “good relations with the press.” The leaders of many other NGOs also can be traced to LBH (including Indonesia Corruption Watch, Judicial Watch, ILPPS).³ And one of the leaders of a corporate law firm today noted that “many young lawyers” in the firm were or had been active in the NGO sector.⁴

This relatively small group of lawyers leads the charge for corporate law responsive to the U.S. Corrupt Practices Act and more generally to the ways of doing business in the United States. They have been important contacts for the long-established USAID program of law

³Another alumnus of LBH noted that “you can find LGH” in human rights and environmental NGOs as well.

⁴The connection between the sectors is evident also from a lawyer at the Asia Foundation promoting Indonesian reforms. The lawyer started working at the Makarim firm, could still return, but decided to go into foundation work after having “been there and done that” with corporate law. Similarly, one current corporate lawyer observed that when she graduated from law school, prior to the fall of Suharto, graduates of the top law schools sought to work with the corporate law firms, but, “with the crisis in Indonesia,...people [came] to the NGOs more.”

and development (from the 1990s until the present) termed ELIPS (Economic Law and Improved Procurement Systems Project). It focuses on the reform of economic law. These lawyers are also the key players in the NGOs and foundations investing in the reform of Indonesian governance. They, for example, were major actors in the effort to create a new bankruptcy court that would restructure businesses in the wake of the Asian financial crisis.

They lawyers are therefore quite visible with their insistence on the Rule of Law and transparency. That position carries little weight in the running of the predatory state, but it fits perfectly with the agenda of their foreign clients and reinforces their own image, carefully cultivated through the media, of a liberal intelligentsia (e.g., Lubis in *Tempo* or Makarim in *AKSARA*). The reputation for virtue also provides a useful antidote when the greed of some of these predators becomes excessive (like the Suharto family in the late 1980s) and threatens their colleagues and competitors within the oligarchy. The access to the media and the legitimate weapon of anti-corruption rhetoric can even become particularly valuable in times of financial crisis that exacerbates the competition for State resources.

In other words, instead of looking at the double role of these wealthy legal entrepreneurs re-investing in civic virtue as a strange paradox, one can analyze it as another example of a division of labor between two poles of a state oligarchy held together by positions in or around the State, their common financial interests, and personal connections--from family and matrimony to quasi-family in the sense of clientelism and patronage.

Last, but not least, the double role helps to create a whole new market of governance which might form the basis for the re-actualization of hegemonic processes – at least in the long term. By serving as brokers between international institutions (essentially the IMF and the World Bank, which represent the core of the international consortium entitled “Partnership for Governance”), the local media, and NGOs, they contribute to the importation of international expertise directed toward new form of legitimacy – where personally-based

relations and exchanges of services are redefined as clientelism and crony capitalism. The promotion is fueled by creation of a market for a new virtuous professional elite characterized by personal mobility between and among NGOs and donor agencies that facilitates the circulation and pooling of ideas and the elaboration of consensual diagnoses of “problems” and acceptable remedies.

The new network of NGOs serves also as training ground -- substituting for obsolete and impoverished law schools -- as well as an alternative early career path (particularly when administrative and professional jobs are disqualified and so poorly paid that it justifies complementary source of financing -- note the huge shadow budgeting in Indonesia generally). These alternative careers are very sought after because they offer many opportunities for contacts to media, to professional elites, and to networks that lead to foreign scholarships and training. They are also prestigious because they have a noticeable academic component. Research-oriented NGOs serve as think tank for the media, politicians, and international agencies. Yet the linguistic and cultural competence required by this market reserves access to small elite already introduced in these circles through family relations – akin to the older generation of the elite bar which continues to serve indirectly as gate-keepers.

The campaigns against corruption and in favor of good governance are fueled by a competition between projects organized by the donors’ consortium. This action research around specific experiments used as test cases to be amended or expanded if successful builds a practical knowledge – building a social and institutional laboratory producing its own rationalization and promotion of “best” practices, especially through the media. In this way, the campaign against corruption contributes to reproduce at the periphery -- in the shadow of dominated states – the structures of governance created and perfected around Washington D.C. It therefore contributes to hegemonic processes by facilitating the import and export of

U.S. expertise with its corollary – a professional and moral brain drain from periphery towards the core of the global marketplace.

The Comeback of Law in India

According to one of the leaders of the U.S. development program in India in the 1960s, the feeling was that law was a “second rate profession” in India (JL) – far less important than the civil service in determining the fate of the economy. The profession was fed by fees from property disputes, and it was divided into two groups. At the top was an elite descended from those trained in Britain to serve British colonialism. They used their position also to lead the movement for independence, which did not change the legal system. The luster that was attached to their names and careers did not translate to high prestige for lawyers as the country focused on development issues. The prestige of the profession also suffered from the status of the rank and file of the profession, which included a mass of lawyers choosing a law career mainly because it was easy to get into and graduate from the faculties of law. Law was not a highly sought after profession in the 1950s and 1960s.

The Ford Foundation, as we have seen in the other countries where the Cold War helped to gain U.S. resources, worked to build a variety of disciplines. But if the over \$275 million the Ford Foundation invested in India during the period 1952-1992 (Ford Foundation 1992) , only a few of the touched law. Law was not a major part of developmental assistance. There were a few exceptions. In 1958, the Foundation supported the library and research facilities of the Indian Law Institute, and the general emphasis of the Foundation on educational reform translated to grants a few years later to the law faculties of Delhi and Benares to develop case methods to teach law.

Since the late 1970s, however, law has been important in the programs of development epitomized by the activities of the Ford Foundation. The first emphasis was on the promotion of public interest law and advocacy on behalf of the disadvantaged. When Ford changed

program officers in the late 1970s, the program in India followed the general shift – reflected in the demise of the earlier law and development programs seen in Brazil and elsewhere – away from educational reform aimed at training more creative and development-friendly lawyers through the case method.

The context for the shift in the priorities of the Ford Foundation was a comparable change in the Indian legal situation. The emergency declared by Indira Gandhi in the middle of the 1970s, which threatened basic civil liberties, made the developments elsewhere in human rights – especially in Brazil and Chile – seem particularly relevant to India. The Indian Supreme Court, supported by the Supreme Court Bar, also began to develop “Public Interest Litigation” in order to rebuild the legitimacy of the courts after they had capitulated to the strictures of the emergency. With an expanded standing through an “epistolary jurisdiction” responsive even to post cards, the Supreme Court adopted a modified populist posture that allowed it – at least to some extent – to rehabilitate itself and the position of lawyers in the Indian elite.

At this point a U.S. role in law and development became more prominent. Marc Galanter, from the University of Wisconsin, came to India a number of times in the early 1980s, “at a time when public interest programs were expanding elsewhere.” The Ford Foundation was “looking for groups who gave legal representation to people excluded or outside the system.” The model the Foundation had in mind was California Rural Legal Assistance, an activist organization serving California’s rural poor, but the “top-down” Indian legal aid program did not fit the bill and other potential Indian grantees did not go for the U.S. model. Indeed, many activists still would not accept money from the Ford Foundation because of alleged ties to the CIA.

Nevertheless, one major Ford Foundation initiative in favor of this new emphasis on grass-roots activism was the grant to the Public Interest Legal Support and Research Center,

which was set up in 1987 and led by Rajeev Djava, a prominent Indian legal academic in Britain who returned to India to become a Supreme Court advocate. Rather than a public interest law firm, however, PILSARC was designed to coordinate and support public interest advocacy by regular advocates. As we shall see, the difference was important.

From the perspective of the Ford Foundation, as stated by a former official, it had made a “big bet” on PILSARC, but the “really big hopes” did not pan out. The criticism from the donor perspective was that PILSARC was unable to help build “institutions on the ground” or “take risks.” It did not build a grass-roots legal advocacy group. It also did not provide a place to build a new generation of public interest lawyers outside of the elite – and highly Brahmin – Supreme Court bar (Epp). As a former official of the Ford Foundation stated, there remain very few public interest law firms in India. Instead, there are “individuals with practices who will do public interest law.”

This “failure” was also a success for certain groups. Ultimately, in fact, public interest litigation in India reinforced the position of the sector that also serves the largest business clients – domestic and foreign. It built closer ties between the U.S. legal establishment – with other grants as well (e.g., Lawyers’ Collective) – and the elite of the bar, and it helped in at least a small way to maintain the prominence and position of that elite – which served the U.S. very well, for example, in the Bhopal litigation. In this way, a group of the Indian legal elite was able to secure its own position with the help of a program that ostensibly had been designed to accomplish something else – promote grass roots legal advocacy.

At the same time, however, a number of prominent Indian academics, working with the Supreme Court and its Bar, came up with another idea to increase the number of public interest lawyers and to build the prestige of the legal profession – the creation of a new law school. The issues connected with the Emergency and the subsequent Supreme Court switch to public interest activism brought forth discussion of the need for a “socially relevant legal

education” that could attract bright lawyers to the opportunities to promote law on behalf of the disadvantaged. The Ford Foundation earlier in India had been quite successful in building new business schools with substantial autonomy from the state educational bureaucracy, and that made the new law school idea seem feasible. The Bar Council argued also that a new and self-consciously elitist law school could enhance the prestige of the profession given that some 480 new law schools had been created in the period after 1960.

The Ford Foundation went for the idea of a “moral law school,” and made the grant that allowed the National Law School at Bangalore to be created. The first class graduated in 1992, and now there are imitators in four other places in India (check current status).

According to a former dean, however, only a very small percentage of the graduates have gone on to public interest careers. They have been deterred by the “low salaries” in public interest law and attracted by the much higher salaries in the corporate sector. The law school actually sought to ban on-campus interviewing at the beginning, but the students organized meetings with potential employers at a nearby hotel to make sure that they could find opportunities in corporate law. Many of the graduates also have gone on the further education in the United States.

The largest group in the first class went to Arthur Andersen’s law firm in India, no doubt because of high salaries but also because it was not controlled by the traditional legal-familial elite. The firm was closed down in India, however, by local litigation challenging foreign law firms (well before the Enron events killed Andersen Legal completely). The graduates have therefore tended to go into the solicitors firms, some offices of advocates, and to places in in-house counsel with the new breed of more U.S.-oriented Indian corporations. Again from the perspective of a former Ford Foundation official, the aspiration to “build a human rights and social justice” law school was defeated. It instead produced “brilliant young

technicians for corporate law” – lacking enough “mentoring” or “commitment” to public service to fulfill the original ambition.

As with respect to the business school graduates, as suggested by the move to Andersen in the first class, the law graduates did not have an easy time getting a strong place in a field where opportunity is shaped more by family ties than academic achievements. It is very difficult to become an elite advocate without a father and most often grandfather who was a leader in the bar, and the solicitors’ firms (even though the profession is not formally divided) are limited in the number of partners they can make by an old imported law – which strengthens the importance of family ties. The new law graduates must find their way in that world and in doing so are providing new and meritocratic legitimacy to a family-dominated profession and also providing talented workers who can at least hope to achieve the elite status of those already at the top of the bar.

The U.S. agenda was molded into the agenda of the Brahmin legal elite, which wanted to enhance its own position, legitimate its role, and encourage some meritocratic entrants to enhance the prestige of the profession. They succeeded and the new law schools further enhance that success. From a perspective not shared by the Ford Foundation but quite welcome to U.S. businesses, the meritocratic new practitioners went into the service of corporate legal practice fortified with technocratic knowledge and predisposed to look favorably toward the United States – the source of the idealism and funding for the new law school – for guidance.

Conclusion: Hypotheses for a Structural Interpretation

In each country, there is a battle that can be characterized as between the civic cosmopolitan intelligentsia on one side (i.e. the international corporate and NGO communities in Jakarta , the religious/judicial hierarchy in the Philippines (Narvasa), and the progressive lawyers in India), and the state oligarchy on the other (i.e. the alliance of technocratic and

military hierarchies with Chinese and Pribuni entrepreneurs in Indonesia, and the State/notable/entrepreneurs of Manila).

The reformist side of this battle, as we have seen, has a strong element in each case of legal idealism supported internationally. Most of the literature on globalization and law, not surprisingly, takes the side of the legal reformers, whether through criticism of the failures to make change or praise for the courage they are showing in the name of progress. More is explained, however, if we examine the two sides as two opposite yet complementary poles within national fields of power. The dominated group uses its foreign resources to contribute to the management of crisis by publicly challenging the positions of the dominant and by offering an acceptable but temporary alternative that feeds off (and help diffuse) the movement of protest (both domestic and international). Then as soon as the worse part of the crisis is over, business as usual returns on the basis of a slightly rearranged compromise between the ruling fractions of the oligarchy.

This temporary rearrangement is made easier by the social (or even familial) proximity between the two poles. Indeed, this process takes place both at the center and the periphery. For example, the anti-Marcos and similar anti-Suharto strategies provided opportunities to mobilize the resources and valorize the positions of the reformist liberal intelligentsia in Washington. The Indian experience helped give new life to public interest law and those supporting it elsewhere (including within the U.S. and even in the anti-globalism campaigns).

Our discussion focuses on international connections, the role of law, and imperial processes as they relate to local hierarchies of power. Scholars who proceed from the national side of the story, however, reach conclusions that are theoretically quite close. For example, Heidman and Sidel, in their recent book on the Philippines, draw on the concept of “trasformismo” from Gramsci, which they define as a counter-offensive mobilizing one fraction of power elites and facilitating a re-actualization of hegemony through the

reappropriation of the rhetoric of contestation. More succinctly, “Transformism involves a political process whereby radical pressures are gradually absorbed and inverted by conservative forces, until they serve the opposite of their original ends” (H&S, p. 13). They use this concept to analyze the recuperation of the anti-Marcos movement by the religious hierarchy in alliance with the more virtuous fraction of establishment. In their words, “Viewed in this light, the People Power Revolution appears less as an example of the spontaneous resurgence of civil society in the process of transition from authoritarian rule and more as the climax in a cycle of recurring crisis and temporary “resolutions” stemming from deep rooted tensions” (“between political citizenship and social class”) p 29, 14.

Without using same theoretical framework, Robison & Hadiz provide a similar interpretation for the demise of Suharto and the impact of the “reformasi” movement. The financial crisis provoked by the fall of oil prices in the early and mid-1980s, they argue, contributed to a rearrangement of the positions of State oligarchy. The more domestic and nationalist groups lost ground to new entrepreneurs better equipped to take advantage of deregulation to build alliances with foreign investors, leading to huge consortiums in newly privatized markets. The result was a concentration of capital and power in the hands of a few individuals well-introduced at the apex of the State (i.e. involving the Suharto clan). This move boosted the position of the cosmopolitan elite, yet paid only lip service to the ideals defended by these professionals (and their counterparts within the World Bank and the IMF). As for their international clients, they tended to think that, even if costly, the personal guarantee offered by direct access to Suharto was more efficient than any imaginable legal forms.

Drawing from Hedman and Sidel, therefore, one could argue that trasformismo contributes to the management of political crisis by providing a substitute for (and control of the excesses of) the bonapartiste or “strong ruler” model. That model has provided the classic

solution to the contradictions of oligarchic democracy – in particular, maintaining control of the state by an elite while preserving the democratic façade of majority rule. This problem has been quite evident not only for Latin America but also for the new Asian states -- Indira Gandhi's emergency, Sukarno's "guided democracy," Suharto's "Pancasila," or Marcos' "constitutional authoritarianism" to mention just those mentioned in this paper.

In this reformist strategy, a fraction of the oligarchy, essentially the intelligentsia, becomes temporarily the voice of legitimate opposition, challenging the authoritarian ruler on behalf of popular protest constructed (yet at the same time channeled) as the legitimate voice of civil society. In other words, by becoming the champions and spokespersons of a unified protest movement, the enlightened fraction of the professionals plays a similar role to the one assumed by the "nabobs of the law" in India. They become the advocates of constitutional transition to independence in order to guide the transfer of power and limit the risks of violent infighting and popular (even revolutionary) takeover.

This reformist strategy fits perfectly within the model of moral imperialism: it relies on a professional elite periodically reinvesting in State institutions from their own power base, thus preventing important institutions (either the state bureaucracies or the justice system, for example, to build their autonomy). Thus it contributes to U.S. hegemony by replicating its own historical model of a state with a "hollow core" (Heinz et al) -- open to the interplay of private interests mediated by lawyers playing the role of statespersons.

