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Symposium: Twelfth Annual LatCrit Conference Critical Localities: Epistemic Communities, Rooted Cosmopolitans, New Hegemonies and Knowledge Processes: The **Growing Role of American Legal Culture**

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This work is a revised version of the original paper because of the useful observations and remarks that were suggested during the Conference.

SUMMARY:

... Civilization and barbarism can reflect a particular point of view concerning the way Latin American countries observe--in first place--Europe, and then, the United States. ... Moreover, as for the frame provided by the philosophy of language, four factors should be cited to describe the biography of this particular relationship between Unites States and Latin America: i) The emergence of a global market--markets not only facilitate the economic transactions, but also the exchange of different culture perspectives; markets also show the relativism of cultures; ii) Wealth as a means to universal peace--the ideals and values of the merchator can be reduced to this conception strongly conceptualized in modern literature; wealth reduces social conflict by a common share of goods as if this could only depend on the interests of the merchator; iii) Wealth as a synonymous of civilization--the result of the association of different ideals in the mind of the intellectual class when they find out they can be supported by the merchator; and iv) The subordination of legal systems to global markets--the real effect of the dynamics of the factors cited before; in this way, full justice can be enjoyed by the rich, and the boundaries between the merchator's interests and those of the rest of the society are fuzzily defined. ... Although being subject to a debate nowadays, privatization was developed by local as well as foreign law firms, and State governments called attention to investments, mergers, and acquisitions done by large foreign corporations. ... The logic of privatization applied the schools of law as an outstanding tool to determine the abilities required by the corporations and the foreign law firms to cause a change in the local, cultural point-of-view in order to shift from viewing capitalism as the "bad boy." ... Thus, the American Model seduced Latin American elites because it not only represents a "land of freedoms" but also because it means the place where legal imagination expands. ... SEE FIGURE IN ORIGINAL Local elites find the finality of the expected reforms, thinking more on the results of the American development than in their causes. ... The promotion made by these organizations on behalf of a dominant content of a global culture cannot stop the emergence of local and regional conflicts produced by the social burden of the cultural imperialism and the economic requirements of the logic of privatization. ... In Argentina, Alberdi stated that English was the language of freedom, of industry, and of order, and that the United States' progress is understood because they had and have European elements. ... Culture and law are integrated in a new form of imperialism although words in use do not reflect--in a real way--how things happen.

TEXT:

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I. Introduction

In the last century scholars have written about cultural imperialism and its consequences from different hypothesis. Our preoccupation takes a diverse perspective the one provided by the philosophy of language. Terms can permeate the debate to explain why American Legal Culture has a significant impact in Latin American countries from 1800. In this

work, it will be demonstrated that there is an increase of the role of American Legal Culture in Latin American Legal Culture, and that this change is not beneficial.

II. On the Elements of Cultural Imperialism

Theorists have written about cultural imperialism from different and interesting perspectives--social, political, economical, and philosophical. They all have demonstrated that this phenomenon requires different approaches in order to explain what is happening within the borders and beyond the State. This paper suggests there can be another perspective: the one that takes account of the philosophy of language. There are many good reasons to make this choice. First, since the Renaissance, language has become a helpful instrument to analyze cultural change; it does not mean that language has to be taken as a sole phenomenon. Rather, language has to be analyzed in interaction with the reality it intends to describe, and in constant dependence with the philosophical background it refers to. Hence, the debate between nominalism and realism during the Middle Ages is important, considering the consequences of this debate in the following centuries. This discussion is related to the names of things that were common between Socrates and the sophists. Language becomes a relevant issue in explaining the way to found different societies or worlds in a Borgeesian style, as he did in his short stories *The Garden of Forking Paths* and *Tlon, Uqbar, Orbis Tertius*. So, words and meanings prove to be essential in the society-making process. This conception seduced the mind of philosophers [*6] and politicians, but it also attracted lawmakers, lawyers, and judges. A certain kind of magic is revealed; playing with terms could uncover many problems as well as cause new ones. Philosophers--such as Hobbes--discover the power to create a new society from narratives, and these can be explained through narratives. In some way, this kind of world-construction relies on a religious belief, as God creates the universe by the power of his logos; philosophers think they are capable to do the same. So, terms are a subject that matter especially when there is a chance to transform the society. This is the performative function.

Second, besides the interest for narratives as world-creators, language manifests a remarkable effect: the pragmatic use. The pragmatic use reveals that there is not a definitive or an objective meaning, change depends on subjectivity. In this way, names are labels; they do not refer to real objects. This reveals the relationship with relativism as it will happen in the modernity. The pragmatic use of language manifests the power to transform the reference frame of a determined culture by changing the meanings or creating neologisms. So, by modifying the reference frame, it is possible to legitimize a perspective and justify new conducts or--from a large point of view--set the foundations of a future social order, as it can be observed in the Enlightenment.

Third, it has to be considered that certain words are an easy path to reduce the world's complexity; as Gellner writes, "there is a tendency for the major intellectual conflicts in human history to be binary."¹¹ Binaries reduce the necessity to explain or to comprehend. They reward individuals with the knowledge of a reality that seems to be without complexity, but they are masks determined cultures use to protect themselves from internal or external enemies. Intellectual binaries are functional to social and political order. Civilization and barbarism can reflect a particular point of view concerning the way Latin American countries observe--in first place--Europe, and then, the United States. The choice between these two words can decide a Latin American State's destiny like local elites try to show.¹² Though arbitrary, a whole social transformation may be that it relies on a political binary. Bentham, Le Bon, and then Freud explained their worth and utility in different and valuable studies.¹³ [*7]

Then, because of the place philosophy of language has taken in modern times, narratives are helpful to explain and to comprehend why American Legal Culture acquired and has an eminent role in Latin American countries. Language anticipates the social change and that is why it is a key determinant in the analysis of that change. Moreover, as for the frame provided by the philosophy of language, four factors should be cited to describe the biography of this particular relationship between Unites States and Latin America:

- i) The emergence of a global market--markets not only facilitate the economic transactions, but also the exchange of different culture perspectives; markets also show the relativism of cultures;
- ii) Wealth as a means to universal peace--the ideals and values of the merchator can be reduced to this conception strongly conceptualized in modern literature; wealth reduces social conflict by a common share of goods as if this could only depend on the interests of the merchator;
- iii) Wealth as a synonymous of civilization--the result of the association of different ideals in the mind of the intellectual class when they find out they can be supported by the merchator; and

iv) The subordination of legal systems to global markets--the real effect of the dynamics of the factors cited before; in this way, full justice can be enjoyed by the rich, and the boundaries between the merchant's interests and those of the rest of the society are fuzzily defined.

III. The Emergence of the Economic Mind

It exists as a general conception that global markets are the result of a long-term process that began in the Early Renaissance, a process that starts firstly with the rise of local markets and the commercial leagues, then expands to regional markets, and--in our times--results in a global one with a strong presence of transnational corporations. Markets are not only the places where commercial affairs are settled down, they are also the sites whose effects manifest in everyday life, because wealth finds that the cities are the proper scene where richness can be exposed to all the citizens.

It has been expounded several times--by authors like Weber, Sombart, Troeltsch, and Pernoud--that this situation emerges from the position the merchant got by promoting commerce as an outstanding factor of progress [*8] and economics as a general criteria of judging human activities. In the following centuries, as a consequence of the change of meaning of the word *virtus*, its meaning moved from the classical reference to justice, prudence, and temperance to a new one that signifies commercial prudence and ability to negotiate: a relevant modification that brings the modern placement to material welfare in the social order and, simultaneously, breaks the barriers of the ancient norms against commerce and banking--mainly those derived from Plato. Thus, the prejudice against richness that was common in the Middle Ages disappears from the mind of men and women as determined religious beliefs and ethics look for a casuistry to help the merchant get peace with himself when reading the well known phrases of the New Testament that condemn the rich and praise the poor. The Reformation and the Renaissance culture help to jump over the obstacles towards a peaceful enjoyment of wealth for the bourgeoisie. Wealth means success in life, and success in life is obtained through the activity of human virtues. But this enjoyment of wealth has to be protected with legal norms, so lawyers, judges, and lawmakers tend to find out the road to assure proprietors that they will not have legal constraints from non-proprietors or social revolutionaries. It must be stated that "in neither city were the wage-earners or craftsmen of the eighteenth century considered a part of the political community."⁴

A new, legal culture begins to emerge in accordance with the needs of the bourgeois class. As many scholars have pointed out, the merchant demands to be recognized by the old nobility and, at last, to replace her in the social hierarchy. So, the values of the bourgeois class are learned as the ones that bring peace to the cities and the world, and therefore free commerce extends and freedoms increase--especially those related with the values of the bourgeois class. In this way, corporations begin to behave as political agents as the new class looks for the King's support against her enemies. Along with this support comes the help of the *noblesse de robe*, the sons of the bourgeois class who dedicate themselves to the practice of law. The words of the law and their interpretation prove to be strange to lay people and this kind of information is restricted as law becomes a complex subject to understand and apply. The establishment of the property law as the axis of the modern legal system--with the help of the Roman Law--creates a new social hierarchy, putting the merchant and the corporations in a privileged place. This situation enlarges the position of the bourgeois class, mainly her power and prestige. [*9]

IV. Wealth as a Means to Universal Peace

The bourgeois class needs appointments in the royal administration, particularly in the financial and the judicial areas. They demand legal support on behalf of their corporations. They know they can get influence because of the power that wealth brings. The change of the social order originates--in the rest of the society--a dual process of admiration and hatred. There is admiration for the rich's attitude towards life and hatred against them because of the way they live. Not every one can share the benefits of the new social order. Step-by-step wealth starts to mean--in daily life--progress, culture, and freedom. This is what European countries convey with the colonization of America and the conceptions that will be learned by Latin American elites. Europe and then the United States will be seen as models of civilization, ideal societies that show what wealth gets in liberal societies; it is the result of free commerce as the bourgeoisie expounds in books and in facts.

Cultural imperialism increases his presence as Latin America's elites learn the binary--that will be classical--civilization or barbarism as early as in the 1800s. The reductionism implicit in this conception facilitates the cultural imperialism's expansion. What those terms mean seduced the mind of framers of the American constitutions as it can be seen in the constitutional clauses of modern legal texts that follow--what it is called in this essay--the American Model. Equal clauses along the Americas facilitate the activities of corporations.

V. The Confusion between Political and Economic Ends

The confusion between political and economic ends starts with the confusion of the interests of the bourgeoisie and those of the King's or the States'. Popular sovereignty, parliament, charts of freedoms were words that masked the real situation of the non-proprietors. Thus, the legal system can establish a set of norms that--"in the lab"--are going to protect every citizen but--"in action"--only the wealthy citizens can enjoy full protection. On admitting this dual process, people learn that there is a law for the rich and a law for the poor. Capitalism could not resolve the problem because it was in its origins. The dream for a new world was found out with the colonization of America. But the dream--in the long run--could not change the conditions that it was to resolve. In spite of some benefits of the cultural transplant, America did not recreate better conditions of life because the merchant's values were transplanted.

In search of independence, America got better conditions only for a part of her people. The binary civilization-barbarism caused the coming of other binaries such as american-non american, modern-antique, and [*10] progress-retrogress, binaries that were spread by the literary Latin American people, particularly through the universities. Again the local noblesse de robe took advantage of the power to enact norms and interpret them as they did in Europe. The binary american-non american gives the United States a justification for its eminent role in Latin America's politics as it happened from the beginning of the Monroe Doctrine. The binary modern-antique distinguishes what the civilization represents and what the native culture means.⁵ And the binary progress-decadence represents--as mentioned before--the fight between the ideal manifested with the Enlightenment and the one symbolized by the Old Regime. In this way, the transformation of the reference frame set the foundations for capitalism for Europe and then for America; words proved to be powerful enough to break the ties with the Old World.

So, the step the Latin American States will take in the 20th century is not strange. There is no doubt that economic ends have the primacy in politics as long as political crises emerge in Latin America; so, in order to seek a remedy, it comes with the spread of a magical term: privatization. Politics of privatization take place in the legal mind as a necessary instrument towards State modernization so as to end up with market regulation⁶ associated with leftist local governments. Local elites begin to teach that privatization brings peace and welfare for all and is a deterrent for dictatorship and corruption; market dynamics make people free.⁷

From a stated situation of economic emergence, local Latin American governments start with a privatization wave. Although being subject to a debate nowadays, privatization was developed by local as well as foreign law firms, and State governments called attention to investments, mergers, and acquisitions done by large foreign corporations. The economic change opened the doors of legal and social transformations. It was an outstanding event that led to diverse kinds of debate, but the road to liberalization was not changed. The logic of this transformation was enforced by jurists and professors through their classes, writings, and speeches. For example, legal subjects such as corporate law, mergers and acquisitions, and governance were and still are taught--sometimes in English--as central to the new economics. It also brought a special interest in getting a MBA. A cultural [*11] revolution was born as capitalism expanded in Latin America. The logic of privatization applied the schools of law as an outstanding tool to determine the abilities required by the corporations and the foreign law firms to cause a change in the local, cultural point-of-view in order to shift from viewing capitalism as the "bad boy." The American Universities' framing of Latin American lawmakers demonstrates how functional they can be to modify the reference frame in the benefit of capitalism. The ideals and the values of the early bourgeoisie show a significant change of contents. Now those ideals and values are impersonal and accepted as good ones by a large portion of society, and the American Model--despite her real life with important contradictions--attracts Latin American peoples, mainly the local elites. The "American dream" and the "land of freedoms" still seduce, nowadays, with the strong support of the masscom. In summary, privatization spread but did not resolve the social inequalities. It showed a hard struggle for dominance, and although the terms of the conflict were re-conceptualized in order to construe a social consensus--for example, introducing the term "stakeholders" so as to warn corporations they would be controlled by the State--local elites did not find out another way to resolve the social and economic gaps born with this process.

VI. America as a Model: Legal and Judicial Reforms in Latin America

The binary civilization-barbarism is the cultural context where legal transplant is done. The process is supported by different sources. So, it is hard to modify the chance to break the binary if it is taken as real, and this point of view is assured by the formal education--especially legal education as the social instrument to legitimize it. Thus, the American Model seduced Latin American elites because it not only represents a "land of freedoms" but also because it means the place where legal imagination expands. As a consequence, the more you accept the information from the model, the more you get closer to it. Hence, although there exists critical points of view regarding the so-called goodness of the American Model, even these critical studies have the same source of information as the adherents: the American Legal

Culture. It is a strange paradox that should be noticed. In the next figure, it can be shown what happens to local systems of law. [*12]

[SEE FIGURE IN ORIGINAL]

Local elites find the finality of the expected reforms, thinking more on the results of the American development than in their causes. The time for the legal transplant grows as economic reforms are recommended by the international financial organizations. There are grounds for thinking that the reforms done and the ones to come depend on a broad set of improvements justified on philosophical foundations that international financial organizations take over. The promotion made by these organizations on behalf of a dominant content of a global culture cannot stop the emergence of local and regional conflicts produced by the social burden of the cultural imperialism and the economic requirements of the logic of privatization. These facts can demonstrate the borders of the cultural models imposed by capitalism, and it should be counted in the conclusions of this essay. In accordance with this, the World Bank⁸⁸ began to use the American model when State reforms required its assistance, especially in the judiciary. These are some of the financial assistance projects in Latin America:

1. Justice Services Modernization Project (Peru);
2. Judicial Modernization Project (El Salvador);
3. Reform of Justice System Project (Argentina);
4. Judicial Reform Project (Guatemala);
5. Judicial Conflict Resolution Improvement Project (Colombia);
6. Model Court Development Project (Argentina).

The importance of the judicial reform relates with the requirements of transnational corporations. The problem with local judicial systems rests on different causes: the extension of legal process, the high costs of litigation, the interest of the State in determined cases, and the presence of corruption in governmental areas.⁸⁹ Hence, there is a confluence of the interests of international financial organizations and the Latin American States in order to enhance legal and judicial reforms. The final outcome is the growth of free markets, and the United States is the model proposed to Latin American States and what local elites should teach as a beneficial tendency.

VII. The Role of the American Legal Culture in Argentina

If the Constitution is considered as the supreme law and the primary source of a given legal system, and its text establishes a set of essential rights, guarantees, and freedoms, then its redaction has a relevant value for all those who live in a given State. The admiration for American Founding Fathers led to a similar feeling for the American Constitution and the Federalist Papers--as a guide to constitutional building and interpretation; they became fundamental texts for Latin American lawmakers.

In the case of Argentina, Alberdi took also as essential the Constitution of California of 1849.⁹⁰ Along with this, the structure and labour of the American Supreme Court took the same way in local, legal imagination. Its jurisprudence got a relevant influence in the local Supreme Court. The criteria that Justices followed took account of what was ruled in similar cases in the United States. This is especially reflected in cases that discussed freedom of speech and of the press, religious freedom, and economic directives. In this way, for example, *Marbury v. Madison* is the leading cited case in jurisprudence and in the schools of law. It became the kind of interpretation that judges ought to follow as a model of judicial decision. A particular interest gets the *Miranda* ruling related to the activities of the local police because of the influence and relation it has in non-democratic governments, as *New York Times v. Sullivan* is a leading case for freedom of the press.

Thus, legal education became an important instrument in establishing this role. There is a "fatal attraction" that leads many scholars to put the American law-learning-process as a model to local law schools. Therefore, the case method and the legal clinics are recommended in legal education reform, mostly when those reforms are tied to the assistance of the World Bank. [*14]

It also should be cited:

. The increase of the Justices of the Argentinian Supreme Court from five to nine taken from the U.S. Supreme Court as its model during the Menem administration.

. The writ of certiorari or per saltum (Ley 23.774/90), adopted in *In re Dromi*, Jose Roberto (1990) where it was discussed what kind of legal form Aerolineas Argentinas (Argentinian Airlines) should take in the context of the process of privatization that was decided by the State Government. In their arguments, the Justices took notice of the Evart Act of 1891 and the Judicial Code.¹¹

. The implementation of probation, which caused many problems when it was implemented. In the beginning it was not clear what kind of crimes it had to be applied to.

. The existence of jurors, as it was declared both in the American and the Argentinian Constitutions, was recently implemented in some local tribunals.

. The emergence of ADR, as a legal way to stop the search of litigation that a large portion of the society wants, and whose outcomes actually need to be discussed.

VIII. The Argentine Seduced

In the case of Argentina, the mentioned influence goes through different roads though they have an equal outcome. First, it shows a problem of identity. Being the comparison favorable to the American legal system, local legal literature increases the concern for doing the same as if they were similar countries. Though there is not a single degree of influence, it can be stated that it is greater now than in the nineteenth century, as it grows parallel to the extension of the United States presence in world politics. But it also can be stated that the World Bank has a relevant interest to raise the reputation of that presence. This remarkable influence began in the 1990s along with the State reforms that took place in Latin America and it has not decreased.

In Argentina, Alberdi stated that English was the language of freedom, of industry, and of order, and that the United States' progress is understood because they had and have European elements.¹² Sarmiento worries because [*15] young people did not know the English language.¹³ And Alberdi writes that the liberalism of the colonial system in America attracted many settlers. In one way or another, the United States got a prominent presence, and it is shown as if it was due to their political, economic, and legal organization. The United States did not have to do much in favor of its own manifest destiny, as local elites in Argentina accepted this situation as given and wanted.

In summary, these are good reasons to believe that the present situation has many sources--legal, economic, political, and cultural--that lead to an extension of the American model and diminishes the role of local sources. For example:

. The English language as a lingua franca, the increasing number of bilingual schools demonstrates that it is the second language;

. The requisite of getting a master's degree in a prestigious American university--it means in local eyes: Harvard, Yale, SMU or Chicago--to get a labor appointment in large Argentinian law firms;

. The broad use of the case method when teaching law; and

. The interest in debates amongst American jurists--for example, Rawls, Nozick, Dworkin, and Posner--¹⁴ as if all the problems they expose could be extended to local reality.

It can be said that a kind of imperial legal order has been established. Jurists speak of local legal problems and they think as if they were American. That is cultural imperialism "in action."

IX. Conclusions

There is an implicit belief that the current tendency leads to a new kind of *lex mercatoria*. The internalization of the American Legal Culture suggests its extension in time and space. Though local academics debate about the bad influence of the model and challenge its presence, in real life they are eager to endorse the model. Fiction wins over reality. America is still the "land of freedoms." National identity gets closer to America, and the construction built on the basis of what has been taught and learned in local universities as well as in American universities leads to a one-way thought, assuming the implicit belief that there is no other real tendency. The result is a transnational law created from a new *lex mercatoria* adequate to the [*16] needs of the late capitalism. Culture and law are integrated in a new form of imperialism although words in use do not reflect--in a real way--how things happen. While the struggle for a better economic situation leads the different tendencies of most intellectuals, masscom shows to the rest of the society the interconnectivity between the American way of life and human progress.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate Law Foreign Businesses General Overview

FOOTNOTES:

n1 ERNEST GELLNER, *POSTMODERNISM, REASON, AND RELIGION 1* (Routledge, 1992).

n2 In the case of Argentina, Juan Bautista Alberdi (1810-1884) and Domingo Faustino Sarmiento (1811-1888) as it is demonstrated in this paper.

n3 JEREMY BENTHAM, *TRATADO DE LOS SOFISMAS POLITICOS* (Book of Political Fallacies) (Editorial Leviatan, 1986); GUSTAVE LE BON, *LA REVOLUCION FRANCAISE ET LA PSYCHOLOGIE DES REVOLUTIONS* (The French Revolution and Revolution Psychology) (Ernest Flammarion Editeur, 1918); SIGMUND FREUD, *PSICOLOGIA DE LAS MASAS. MAS ALLA DEL PRINCIPIO DEL PLACER. EL PORVENIR DE UNA ILUSION.* (Mass Psychology. Beyond the Pleasure Principle. The Future of an Illusion.) (Alianza Editorial 2d ed., 1970).

n4 GEORGE RUDE, *PARIS AND LONDON IN THE 18TH CENTURY: STUDIES IN POPULAR PROTESTS 54* (Fontana/Collins 1974).

n5 DOMINGO FAUSTINO SARMIENTO, *FACUNDO*. 113 (Losada ed., Buenos Aires 1945) (opposing the way to wealth from what the caudillos improve with their conduct: barbarism, ". . . to destroy every law and do his own").

n6 TOMAS HUTCHINSON, JORGE A. BARRAGUIRRE, & CARLOS M. GRECCO, *REFORMA DEL ESTADO: LEY 23.696* (State Reform Act 23.696) (Rubinzal-Culzoni eds., Buenos Aires 1990).

n7 PLINIO APULEYO MENDOZA, CARLOS ALBERTO MONTANER, & ALVARO VARGAS LLOSA, *FABRICANTES DE MISERIA* (Makers of misery) (Plaza & Janes S.A. 1998).

n8 Edgardo Buscaglia & Maria Dakolias, World Bank--Technical Papers no. 350, *Judicial Reforms in Latin American Courts* (The Experience in Argentina and Ecuador, <http://www-wds.worldbank.org/servlet/WDSContentServer/WDS/IB/1996/10/01/0000092653970128132105/Rendered/PDF/multipage.pdf>).

n9 See FUNDACION DE INVESTIGACIONES ECONOMICAS LATINOMAERICANAS, *LA REFORMA DEL PODER JUDICIAL EN LA ARGENTINA* (The Reform of the Judicial Power in Argentina) 1996.

n10 JUAN BAUTISTA ALBERDI, *BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACION POLITICA DE LA REPUBLICA ARGENTINA* (Basis and Points of Departure for the Political Organization of the Argentinian Republic) 65 (2001).

n11 HORACIO D. CREO BAY, *RECURSO EXTRAORDINARIO POR SALTO DE INSTANCIA: ANTECEDENTES, EL NACIMIENTO DEL PER SALTUM, ANALISIS DEL CASO DROMI, REQUISITOS, CRITERIO DE ADMISIBILIDAD, TRAMITE* (Editorial Astrea de Alfredo y Ricardo Depalma) (1990).

n12 Alberdi, *supra* note 10, at 77.

n13 SARMIENTO, *supra* note 5, at 78.

n14 It should also be said that the same happens among the German Penal Jurists and Argentinian Penal Law Professors.