Leiden Journal of International Law, 22 (2009), pp. 437–454
 Printed in the United Kingdom doi:10.1017/S0922156509990033

Gramsci Reconsidered: Hegemony in Global Law

SONJA BUCKEL AND ANDREAS FISCHER-LESCANO*

Abstract

This article focuses on Antonio Gramsci's hegemony theory. Hegemony, for Gramsci, is a particular way of living and thinking, a *Weltanschauung* (world-view), on which the preferences, taste, morality, ethics, and philosophical principles of the majority are based. Social struggles are transformed into legal ones in the course of processes in which juridical intellectuals are organizing hegemony under the special conditions of the legal system. We try to use this concept to contrast it with the prevailing readings of hegemony in international relations and in international law. 'Hegemonic law', we argue, is not the law of any superpower, but an asymmetric consensus which relies on a climate of world-society-wide recognition. The concrete form of hegemonic law under particular social conditions depends on the 'historical bloc', in which it is coupled with other social praxes. In the post-Westphalian system the historical bloc is fragmented into transnational and colliding legal regimes and law-generating processes in civil society.

Key words

fragmentation of world law; global civil society; global social movements; hegemony; ideology

'Between equal rights, force decides', said Karl Marx, describing the antinomy of law in antagonistic situations of capitalist production relations, in which 'law [stands] against law'.[1] He here addresses a question that lies at the centre of all critical legal theories: what violence is blurred in the medium of the concealment mechanism called 'law'?

To answer this question we shall attempt below to make Antonio Gramsci's hegemony theory and his model of a hegemonic law fertile for the theory of law. This task has to cope with the twofold difficulty that, on the one hand, Gramsci was no theoretician of law in the narrower sense, which is why the potential of

* Sonja Buckel, Ph.D., is a research fellow at the Frankfurt Institute of Social Research, funded by the German Research Foundation (DFG); s.buckel@soz.uni-frankfurt.de. Andreas Fischer-Lescano is professor of public law, European and international law and legal theory at University of Bremen and director of the Center for European Law and Politics (ZERP); fischer-lescano@zerp.uni-bremen.de. This text is the revised version of our contribution to Buckel and Fischer-Lescano (eds.), *Hegemonie gepanzert mit Zwang. Zivilgesellschaft und Politik im Staatsverständnis Antonio Gramscis* (2007). We wish to thank I. L. Fraser for translating the text and the two anonymous referees for constructive criticisms.

1 'There is, then, an antinomy here, law against law, both equally marked by the law of commodity exchange. Between equal rights, force decides. Thus in the history of capitalist production the standardization of the working day takes the form of a struggle over the bounds of the working day – a fight between the universal capitalist, i.e. the capitalist class, and the universal worker, or the working class.' K. Marx and F. Engels, *Marx-Engels-Werke* (1958), XXIII, 249; see also C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (2005).

his theory for an analysis of law has only seldom been made use of.[2] On the other hand, his approach can be taken up only through a critique of restrictions associated with his times. This applies particularly to his conception of the economy as the basis and as the concealed essentialist core,[3] as well as to his 'classism' in the form of a one-sided focusing on classes, where there is, instead, more of a 'pluralism of power' and a multiplicity of struggles.[4] Furthermore, and of particular importance, we shall expand Gramsci's hegemony theory by adding a theoretical insight which neo-materialist- and systems-theory approaches share: that is, the impact of the autonomization of social relations. Although Gramsci was mainly concerned with the autonomy of the ideological, his focus on social *practices* let him lose sight of this special autonomy of certain practices. This decisive structural element of capitalist societies was most prominently analysed in Marx's *Capital* and developed further by Niklas Luhmann and neo-materialist thinkers.

In this way a hegemony theory in the Gramscian tradition can offer an innovative contribution to the debate on the presence of the political in law that has accompanied modern law since its emergence, extending into both major social-philosophical theories and theory of legal 'methodology'. While the Kantian tradition sees the political aspect in a peculiar linkage of law with a democratically legitimated apparatus of sanction, and from Kelsen to Habermas unanimity prevails as to the necessary identification of law and state as punishing power, postmodern theoreticians from Michel Foucault to Jacques Derrida and feminist legal scholars such as Catharine MacKinnon have attempted to plumb the mystic depths of this unity of state and law.[5] While the former want to control force by shaping state policy as 'applied legal theory',[6] the latter see at the centre of law the very phenomenon the Kantian legal tradition seeks by all means of law to pacify: the positing of law as a groundless act of force.[7] The phenomena of violence so identified aim deeper than the statist binding of the concept of law to a military and police apparatus of compulsion. They aim at the 'entirety of law' and at a subtle force: the violent form of lawmaking, the contingencies of every legal decision that separates the lawful from the unlawful and prefers one of the two antagonistic legal positions to the other. This focus makes societal contradictions, as the prime mover of social dynamics, the main theme of legal theory, which now looks at the complicated translation processes whereby

2 On the state of legal-theoretical discussion of Gramsci see *inter alia* A. C. Cutler, 'Gramsci, Law, and the Culture of Global Capitalism', (2005) 8 *Critical Review of International Social and Political Philosophy* 527; D. Litowitz, 'Gramsci, Hegemony, and the Law', (2000) 2 *Brigham Young University Law Review* 515; I. Staff, 'Kleine Anmerkung zum "Großen Intellektuellen"', (1989) 22 (2) *Kritische Justiz* 176; M. Cain, 'Gramsci, the State and the Place of Law', in D. Sugarman (ed.), *Legality, Ideology and the State* (1983), 95; M. Benney, 'Gramsci on Law, Morality, and Power', (1983) 11 *International Journal of the Sociology of Law* 191; D. Kennedy, 'Antonio Gramsci and the Legal System', (1982) 6 *ALSA Forum* 32; E. Greer, 'Antonio Gramsci and "Legal Hegemony"', in D. Kairys (ed.), *The Politics of Law* (1982), at 304–9; C. Sumner, *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law* (1979), 257 ff.

3 E. Laclau and C. Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (2001), 69.

4 Litowitz, *supra* note 2, at 536.

5 For a survey of feminist legal theory see R. Hunter, 'Law's (Masculine) Violence: Reshaping Jurisprudence', (2006) 17 *Law and Critique* 27.

6 I. Kant, 'Schrift zum ewigen Frieden', in Kant, *Werkausgabe*, ed. W. Weischedel, Vol. 11 (1967), 191.

7 J. Derrida, 'Force of Law: The "Mystical Foundation of Authority"', (1990) 11 *Cardozo Law Review* 924.

social contradictions are transformed into conflicts of law which increasingly lead to clashes of global masses of law in a 'world law without a world State'.[8]

Yet the presence of the political is also tracked down by critical theories at the core of legal self-description, in methodology, as they address the question of how social power relationships are translated into law and how they colour legal decisions: in the method-forming theory of private law, for instance, starting from the historical school around Friedrich Carl von Savigny (1779–1861) up to 'conceptual' and 'interest' jurisprudence, or also in American 'legal formalism', the view still prevalent was that legal decisions follow a formal, rational, or at least law-applying, logic. This was opposed by both the free-law school, 'legal realism', and the 'critical legal studies' (CLS) movement, all insisting on the political character of every legal decision. The very fact that legal practice thinks that it can 'with no explicit legal-theory or social-philosophical basis, confine itself to the status of "neutral" methodologies' makes it into 'political jurisprudence' in a genuine sense,[9] for it could not even see itself how little it had recourse to doctrinaire methods of finding the law, and how far it instead conveys a particular internalized 'preconception'.[10]

Considered more closely, judges do not apply law, but make law, and thus operate 'politically, not juridically'.[11] In this process of 'judicial lawmaking' ideological projects are conveyed,[12] so that law is scarcely anything more than 'simply politics dressed in different garb',[13] and its outcomes are in no way foreseeable but deeply 'indeterminate'. Accordingly, the central topos of CLS became the law's 'indeterminacy'. Ingeborg Maus points out that this indeterminacy has social causes, namely a legislative technique that works, because of politically unresolved conflicts, with general clauses. This leads to the fact that 'all government apparatuses themselves take on the business of substantive law-making under specific conditions for applying the law, while in an age of an increasing flood of norms the bindingness of law withers into a legitimatory semblance'.[14] Systems-theory approaches, by contrast, see this as an inherent feature of the legal system, which has to be understood more fundamentally, as 'undecidability'. One expression of the paradoxicality of the legal system[15] is that in legal communication it cannot be asked whether the

8 G. Teubner, 'Global Bukowina: Legal Pluralism in the World-Society', in G. Teubner (ed.), *Global Law without a State* (1996), 3; D. C. Becker, *Von Namen und Nummern: Kollisionen unverträglicher Rechtsmassen im Internet* (2005); M. Koskenniemi, 'Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought', lecture given at Harvard University, March 2005, available at www.valt.helsinki.fi/blogs/eci/PluralismHarvard.pdf.

9 R. Wiethölter, 'Begriffs- und Interessenjurisprudenz – falsche Fronten im IPR und Wirtschaftsverfassungsrecht. Bemerkungen zur selbstgerechten Kollisionsnorm', in A. Lüderitz and J. Schröder (eds.), *Internationales Privatrecht und Rechtsvergleichung im Ausgang des 20. Jahrhunderts. Bewahrung oder Wende? Festschrift für Gerhard Kegel* (1977), at 235

10 J. Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung. Rationalitätsgrundlagen richterlicher Entscheidungspraxis* (1970), 7–10.

11 R. Wiethölter, *Rechtswissenschaf* (1968), 292.

12 D. Kennedy, *A Critique of Adjudication* (1997), 1.

13 A. C. Hutchinson and P. J. Monahan, 'Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought', (1984) 206 *Stanford Law Review* 36.

14 I. Maus, 'Zur Theorie der Institutionalisierung bei Kant', in Maus, *Zur Aufklärung der Demokratietheorie: rechts- und demokratietheoretische Überlegungen im Anschluss an Kant* (1992), 294.

15 M. Luhmann, *Law as a Social System* (2004), 381.

distinction between right and wrong exists rightly or wrongly. Instead, these paradoxical situations are merely rendered invisible.

However plausible this *critique* of ideology is, it is nonetheless dependent on a *theory* of ideology – that is, on a theory that asks about the constitutive conditions of ideology. For how does the impenetrable legal preconception arise? In what way are legal decisions 'political' or 'ideological'? And, finally, what is the 'added value' of law, if ideology appears in its very *form*? These questions are to be answered first by presenting Antonio Gramsci's hegemony theory and then going on to apply this concept to the law. Finally, we shall present a few considerations on counter-hegemonic techniques that contemplate a democratic transformation of world law.

1. The autonomy of the ideological: Gramsci's hegemony theory

Gramsci, along with Georg (György) Lukács, was one of the first Marxist theorists to devote attention explicitly and systematically in the late 1920s to so-called 'superstructure' phenomena. Against economistic Marxism, he insisted on the materiality of 'ideologies'; they are 'anything but illusion and appearance', but rather 'an objective and operative reality'.[16] On the terrain of ideologies people attain to consciousness of fundamental social conflicts,[17] and accordingly elaborate their relationship to the world in the ideologies.[18] It is with Gramsci that the crucial theoretical transition is effected from ideology as 'systems of ideas', thus as mere mirroring without specific reality, to ideology as 'lived, habitual social practice'.[19] It is embodied in institutions, in praxes, and, we must, with Foucault and Bourdieu, add, in subjectivities – which is 'no small assertion of "reality"'.[20] Even though Gramsci retains the concepts of 'superstructures',[21] nonetheless Laclau and Mouffe take it that his theory excludes an interpretation of the ideological as 'false consciousness':[22] if ideology possesses just as much reality as do economic processes, then a hierarchical distinction between 'structure' and 'superstructure' can scarcely be maintained any longer. We must, however, add that the separation of social sectors with their own intrinsic dynamics is itself already the historical outcome of the capitalist division of labour, here in particular that between intellectual and manual labour,[23] and that *in this sense* 'social reality, in its productive structure [certainly] produces ideologies'.[24]

16 A. Gramsci, *Gefängnishefte. Kritische Gesamtausgabe* (1991), Q4 §15: 475, K. Bochmann and W.F. Haug (eds.) [The Notebooks (Q = Quaderni del Carcere) 1–8 are published in English: J. A. Buttigieg (ed.), *Prison Notebooks*, Volume 1–3. (1991–2007)].

17 Ibid., §38, 502.

18 C. Buci-Glucksmann, *Gramsci and the State* (1980), 60.

19 T. Eagleton, *Ideology: An Introduction* (1991), 115.

20 Gramsci, *supra* note 16, §38, 502.

21 See on the use of the term 'superstructure' as a back-translation of the Italian world ('superstruttura') the editorial note by Wolfgang Fritz Haug (in Gramsci, *supra* note 16, vol. 3, A 213), which we here follow. The central idea is that more fruitful meanings can accrue around the word 'superstructure', helping in particular to avoid reductionist modes of thought that see the 'superstructure' as a mere 'reflex' of the 'basis'.

22 Laclau and Mouffe, *supra* note 3, at 67.

23 N. Poulantzas, *State, Power, Socialism* (2001), 54.

24 Gramsci, *supra* note 16, §15, 475.

https://doi.org/10.1017/S0922156509990033 Published online by Cambridge University Press

The effectively powerful reality of ideology in the institutions and usages of the conduct of life[25] is of pre-eminent significance for a legal theory. For the law, like morality, religion, or culture, lies in its entirety within the sphere of the ideological. It is accordingly not merely 'infected' by ideology, as supposed in the critical methodology debate, but is instead, following the Gramsci-inspired Franco-Greek political theorist Nicos Poulantzas,[26] the unity-creating ideological institution in capitalist societies, replacing religion, the dominant ideology of feudalism.

Gramsci placed great value on the autonomy of the ideological, seeing it as an important area of struggle. The struggle of the working class in the factories was not enough, but must rather be extended to the area of the 'superstructures'. That opened up the field of hegemony, for the special feature of Gramscian theory of ideology is the fact that the key category in Gramsci's writings is not 'ideology' but 'hegemony'.[27] Using this category he rejected a mechanistic conception of the emergence of 'class consciousness' – that is, the ideological reflection of one's own place in society. This did not arise spontaneously from the 'objective' position of a social group, which on the contrary could give rise only to a 'trade-unionist' consciousness – that is, a direct, status-based self-perception.[28] Only once a social grouping took up the more complex fight about superstructures,[29] overcoming its own 'corporative' interests and managing to go through a 'catharsis' from which an awareness of the need to take other interests into account and thus universalize the particularistic position emerged, could one speak of the 'politico-ethical' phase within the relationship of political forces. Hegemony is a contradictory *process* of generalization, which must embrace all areas of human activity, enabling societal – that is, not only economic but also political and ideological – leadership.[30] It presupposes both concessions to those over whom the hegemony is exercised, in an asymmetrical balance of compromise,[31] and the capacity to develop a 'world-view' with which the governed can be led.[32] Only in this way could their consensus be secured.[33]

Gramsci opposed a mechanistic theory of power. Like Foucault, he took it that in modern bourgeois societies rule could no longer come about via the 'imperative of obedience', that 'obedience' could not be understood automatically or as the result of some 'small, simple machinery'.[34] Obedience came not of itself, but from a necessarily ideological proof of its 'necessity' or 'rationality'.[35] The decisive thing was for the hegemonic group to represent a theoretical self-perception, a 'philosophy', which must not be just the exclusive possession of a restricted stratum of intellectuals, but

25 A. Demirovic, *Der nonkonformistische Intellektuelle. Die Entwicklung der Kritischen Theorie zur Frankfurter Schule* (1999), 21.
26 Poulantzas, *supra* note 23, at 80.
27 Eagleton, *supra* note 19, at 112.
28 Gramsci, *supra* note 16, Q4 §38, 495.
29 Ibid., at 496.
30 K. Priester, *Studien zur Staatstheorie des italienischen Marxismus: Gramsci und Della Volpe* (1981), 28; A. S. Sassoon, *Gramsci's Politics* (1987), 118.
31 Gramsci, *supra* note 16, Q13 §18, 1567.
32 Ibid., Q6 §10, 719.
33 Ibid., §13, 721.
34 M. Foucault, *The History of Sexuality: An Introduction*, Vol. 1 (1990), 81.
35 Gramsci, *supra* note 16, Q15 §4, 714.

https://doi.org/10.1017/S0922156509990033 Published online by Cambridge University Press

has to become a *Weltanschauung*, manifested implicitly in art, the economy, politics, and, specifically, in law too, in all 'molecular' and collective expressions of life.[36]

Hegemony is thus a particular way of living and thinking, a *Weltanschauung*, on which the preferences, taste, morality, ethics, and philosophical principles of the majority in the society are based.[37] The concept thus means more than Weber's 'legitimacy',[38] namely rule through an asymmetric consensus which spreads throughout the texture of social life and thus becomes 'naturalized' in the form of custom, habit, and spontaneous practice.[39] This is a subtle sort of power that has become the *common sense* of a whole social order.[40] But it must not be misunderstood as 'colonization of the inner world',[41] for hegemony is not some metaphysical subject, but a permanent practice, a world-view fought out in struggles for recognition, through which moral, political, and intellectual leadership is established.

Long before Foucault's concept of 'governmentality', which he used to describe the 'art of leading' in the sense of everyday control of behaviour and regulation of self-technologies,[42] Gramsci was already insisting that 'there really are the governed and the governing, leaders and led'.[43] Politics and the whole of political science were based on this fundamental fact, on the art of 'how one can most effectively lead . . . and on the other side recognize the line of least resistance . . . in order to secure the obedience of the led or governed'.[44] 'Government' is here fundamentally different from the everyday notion of 'government in the technical sense'.[45]

Leaders and led can, however, no longer, as in Gramsci's theory, be identified with a 'ruling' or ruled class. Not because, say, there are no longer any classes, but because the polycentrism of modern societal power relationships is based on specific (to subsystems) situations of rule and exploitation interwoven with a plurality of multiple technologies of power and constituted together with them. Here, with these very concepts of the 'relations of force'[46] and of 'hegemony', Gramsci offers a possibility of overcoming the historical limitations of classism. Thus, as Laclau and Mouffe have pointed out, for Gramsci collective subjects are not, strictly speaking, classes, but complex 'collective wills' that are the result of, are a higher synthesis of, the politico- ideological articulation of dispersed and fragmented historical forces.[47] Taking up the concept of 'intersectionality' from feminist legal theory, we can see Gramsci's 'hegemonic bloc' in a more multidimensional way, as an alliance system of dominant subject positions stable throughout a certain period:

---

36 A. Kramer, 'Gramscis Interpretation des Marxismus', in H.-G. Backhaus (ed.), *Gesellschaft. Beiträge zur Marxschen Theorie 4* (1975), 95; Gramsci, *supra* note 16, Q17 §51, 1890.
37 Kramer, *supra* note 36, at 90.
38 Buci-Glucksmann, *supra* note 18, at 56.
39 Eagleton, *supra* note 19, at 116.
40 Ibid., at 114.
41 See, e.g., Litowitz, *supra* note 2, at 523.
42 M. Foucault, *Geschichte der Gouvernementalität I. Sicherheit, Territorium, Bevölkerung: Vorlesung am Collège de France 1977/1978* (2004), 241.
43 Gramsci, *supra* note 16, Q16 §4, 1713.
44 Ibid.
45 Ibid., Q17 §51, 1890.
46 On which see J. Wissel, 'Kräfteverhältnisse', in W. F. Haug (ed.), *Historisch kritisches Wörterbuch des Marxismus* (2009, forthcoming).
47 Laclau and Mouffe, *supra* note 3, at 68.

https://doi.org/10.1017/S0922156509990033 Published online by Cambridge University Press

> Instead, the individuals are something like points of intersection, at which the manifold mutually perpendicular axes of disadvantagement meet. Being as a rule disadvantaged along some axes and at the same time favoured along others, in the modern regime they pursue their struggles for recognition.[48]

The *Weltanschauung* of this alliance system of a multiplicity of actors, the overall effect of which escapes their strategic praxes, is accordingly inscribed in institutions, praxes, and subjects, and thus also in law. And here Gramsci was concerned to emphasize that not all social forces have equal chances of becoming hegemonic. The heritage of past struggles is a structurally inscribed strategic selectivity that favours some struggles over others.[49]

2. Apparatuses of hegemony

If ideological practice is to be understood as material and institutional, then this materiality should be looked at more closely. Gramsci endeavours to grasp it with the concept of the 'hegemony apparatus':[50] as a unification of hegemony into an 'apparatus'[51] – that is, an institutional consolidation, organizationally interested in self-preservation, which displays relational autonomy vis-à-vis the societal power relationships. He considers the decisive hegemony apparatuses to be those of 'civil society' – that is, schools, universities, churches, the mass media, trade unions, and so on. One innovation by Gramsci here is the reallocation of the term 'civil society'. For it no longer denotes an anti- or non-state public, as in Habermasian approaches, but instead the set of all hegemony apparatuses commonly called 'private'. Civil society at the same time forms, together with the state in the narrower sense, the 'integral state' and thus the two great superstructural 'levels' that combine hegemony and direct rule: 'dictatorship plus hegemony' and 'hegemony armoured with coercion'.[52] They organize consensus and also, in the event of a leadership crisis in the government apparatus of coercion, hold ready the disciplining of those who neither actively nor passively assent.[53]

Even if the apparently strict separation of the two superstructural areas into a hegemonic and a repressive one is above all a methodological one,[54] or more one of emphasis than of essence[55] – and Louis Althusser is right that the expanded state consists of several apparatuses, of which some have a *predominantly* repressive role, others a *predominantly* hegemonic one[56] – there is still a state-theory deficit in Gramsci's analyses, which is responsible for the fact that Gramscian hegemony theory has hitherto only rarely been taken up in connection with law: he devoted his whole

48 N. Fraser, 'Soziale Gerechtigkeit im Zeitalter der Identitätspolitik', in N. Fraser and A. Honneth, *Umverteilung oder Anerkennung?* (2003), 80.
49 B. Jessop, State Theory: Putting the Capitalist State in Its Place (1990), 309.
50 Gramsci, *supra* note 16, Q6 §87, 782.
51 Buci-Glucksmann, *supra* note 18, at 48.
52 Gramsci, *supra* note 16, Q6 §155, 824; §88, 783.
53 Ibid., Q12 §1, 1502.
54 Priester, *supra* note 30, at 60.
55 Sassoon, *supra* note 30, at 113.
56 L. Althusser, 'Ideology and Ideological State Apparatuses: Notes toward an Investigation', in Althusser, *Lenin and Philosophy and Other Essays* (1971), 145.

https://doi.org/10.1017/S0922156509990033 Published online by Cambridge University Press

attention to the cultural institutions that organize mass consensus, but very little to the political institutions of bourgeois democracy.[57] From one of his few statements on the latter, though, it becomes clear *how* one could use Gramsci to analyse the hegemony apparatus of law: in the governing bureaucracy the 'leadership personnel' crystallize out. In the political and legal apparatuses the leadership personnel act not only repressively but also hegemonically: 'naturally, all three powers are also organs of political hegemony', but to differing extents: parliament is the most closely tied to civil society, judicial power represents the continuity of the written law (even against the government), while government in the technical sense is the most repressive form of state power.[58]

Before going on to apply Gramsci's analyses to the legal hegemony apparatus, we must first take a closer look at the 'leadership personnel', because Gramsci analyses this concept under the heading of 'intellectuals', bringing alongside the concepts of hegemony and civil society the third conceptual extension. For the figure of the intellectual in Gramsci is 'less a contemplative thinker, in the style of the old idealist style of the intelligentsia, than an organizer'[59] of hegemony. Intellectuals guide the cathartic process of developing particularist interests into a coherent *Weltanschauung*.[60] Hegemony must be organized because ideology is not just a reflex, arising automatically out of the societal structures. And this organization is incumbent on those who in the given society have the function of intellectuals within the social division of labour.[61] In feudalism the 'churchmen' still had the 'monopoly over the superstructures': 'the religious ideology, i.e. the philosophy and science of the epoch, including schools, education, morality, justice, charity, welfare etc.'[62] With the differentiation of the various sectors in capitalist societies, these positions are dispersed among various hegemony apparatuses. In the hierarchy of mental and physical labour, they all stand on the side of mental labour: 'the State embodies in the totality of its apparatuses . . . intellectual labour in its separation from manual labour'.[63]

The intellectuals continually recalibrate the balance of social forces and become spokesmen for a complicated system of alliances,[64] become functionaries of the superstructures.[65] This concept of intellectuals distances itself from the idealistic view of intellectuals as apparently outside the societal power relationships, and thereby demystifies intellectual labour as such.[66] As against the 'great intellectuals', the literati and the philosophers, Gramsci is concerned more with the petty intellectuals, the specialists and technicians of hegemony, who can manage to provide adequate language for a particular stage of historical development. If through

57 P. Anderson, 'The Antinomies of Gramsci ', (1976–7) 100 *New Left Review* 72; see also Priester, *supra* note 30, at 59.
58 Gramsci, *supra* note 16, §81, 773.
59 Eagleton, *supra* note 19, at 119.
60 Staff, *supra* note 2, at 179.
61 Gramsci, *supra* note 16, Q12 §1, 1500.
62 Ibid., at 1498.
63 Poulantzas, *supra* note 23, at 56.
64 Demirovic, *supra* note 25, at 23, 26.
65 Sassoon, *supra* note 30, at 138.
66 Ibid., at 135.

https://doi.org/10.1017/S0922156509990033 Published online by Cambridge University Press

this they succeed in bringing into being a *Weltanschauung*, then they are 'organic intellectuals'. Their ideas are no arbitrary subjective speculations, but must be capable of articulating broad societal coalitions of interests.[67]

3. Hegemonic law

Gramsci insisted on the intrinsic dynamics of the superstructures. The phenomenon of law, largely ignored by him and also by his followers, displays a highly specific logic of its own, an autonomization of social relations that makes it very much the paradigmatic example of a substantive infrastructure in the organization of hegemony. This inherent meaning is what gives the law its added value in hegemonic struggles, by rendering impossible the direct, reflexive depiction of societal power relationships in law. At this point Gramsci's approach must be expanded to the insights of materialist legal theory[68] and the systems theory of law. For the latter, legal relationships clump together into an operationally closed system, which reproduces itself exclusively through its own operations.[69] This is – in materialist terms – an expression of the fact that in capitalistically organized societies the social relations become autonomized vis-à-vis the immediate actors into social forms, created behind their backs. They are

> the reified and fetishized forms, decipherable only through theoretical critiques, which the mutual relations of individuals in society take on, autonomized vis-à-vis their conscious will and actions, and which characterize their immediate perceptions and behavioural orientations: commodity,[70] value, capital, law, State.[71]

The differentiation and autonomization of societal sub-areas make them self-referential. Legal communications, oriented to the code of legal/illegal, connect exclusively with legal communications,[72] so that it is ultimately the law itself that determines what law is.[73]

Hegemonic conflicts take place in the legal system, or in the legal form, under the conditions of this self-referential autonomization: in legal proceedings. These are sets of praxes and institutions: courts, rules of procedure, substantive legal norms, legal commentaries, learned opinions and academic self-descriptions, legal argumentation and subjects suitably accustomed to it, legal knowledge, timing rules, and architectonic specificities: 'Legal subjects are thus locked in the house of law.'[74] The law is thus equally an opaque, congealed social relationship and a

67 Eagleton, *supra* note 19, at 119.
68 S. Buckel, *Subjektivierung & Kohäsion. Zur Rekonstruktion einer materialistischen Theorie des Rechts* (2007); S. Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (2008).
69 Luhmann, *supra* note 15, at 76.
70 See on the 'commodity form of law' Miéville, *supra* note 1.
71 J. Hirsch, 'Politische Form, politische Institutionen und Staat', in J. Esser, C. Görg, and J. Hirsch (eds.), *Politik, Institutionen und Staat* (1994), 161.
72 Luhmann, *supra* note 15, at 67.
73 A. Fischer-Lescano, 'Global Constitutional Struggles: Human Rights between *Colère Publique* and *Colère Politique*', in W. Kaleck, M. Ratner, T. Singelnstein, and P. Weiss (eds.), *International Prosecution of Human Rights Crimes* (2006), 13.
74 Hunter, *supra* note 5, at 40.

https://doi.org/10.1017/S0922156509990033 Published online by Cambridge University Press

postponement, delaying, and hampering of the direct assertion of claims to power by the political or economic systems.

The legal intellectuals organize hegemonic consensus under the special substantive prerequisites of legal technology. They master, in legal argumentation, a specific knowledge technology, and organize legal proceedings. But here, in law, it is not so much the great intellectuals, the legal philosophers, who count, but the businesslike, everyday practice of the petty intellectuals who, while they hold more strictly to permitted criteria,[75] are responsible, through their immanent knowledge of the legal system, for the organization of hegemony in legal argumentation (doctrines). The latter is the substantive reference framework of various norms and decisions that fixes in time solutions once found and thus makes them reproducible, establishes legal figures, enables systematization and differentiation, and stores manifold model solutions and bygone conflicts.

Doctrine, as the language of the legal intellectuals, produces a special effect here: sealing itself off from endless (legal policy) enquiry, it acts as a stopping rule for justification-seeking argument.[76] For by appearing as a purely technical, immanent procedure, as a legal necessity,[77] it renders the production of hegemony 'invisible', or, in systems-theory terms, the 'paradoxy' of the legal system is deployed through the establishment of stops to reflection. What is decided as law under particular historical conditions is not determined by the legal system itself, but is the outcome of a '*Weltanschauung*' inscribed in the law, elaborated by legal intellectuals. The castles of world law are built on quicksand. The basic paradoxy cannot be addressed in the law's everyday operations, because any such attempt would cripple the law's functionality and bring the castles crashing down. Instead, the law's operations are concerned to render invisible the unstable foundations – a technique elaborated by legal dogmatics and legal theory, since these act as if there were some ultimate legitimate basis for the various decisions.[78]

Hegemony accordingly becomes significant precisely at the weakest point of the legal system, the fragile claim to legitimacy of its legal entities. Here is the point at which the legal intellectuals have to manage to develop a hegemonic argumentation – that is, one that formulates a 'politico-ethical', albeit asymmetrical, consensus, a complex 'collective will' on the basis of the current relations of force. For this, doctrines offer a sort of infrastructure for universalization and standardization – that is, for making incompatible hegemonic projects compatible. Both the abstractness and the formalized justificatory procedures offer, through the already established legal entities – and the fixation, systematization, and reproducibility thereof – a reservoir for the argumentation, which is thereby relieved of their arbitrariness in favour of a particularistic interest through a kind of formal constraint. Legal entities are sedimented, strategically selective products of past disputes. Argumentation that simply ignored these or distanced itself from them

75 Demirovic, *supra* note 25, at 26.
76 Luhmann, *supra* note 15, at 423.
77 Kennedy, *supra* note 12, at 1f.
78 A. Fischer-Lescano, *Globalverfassung. Die Geltungsbegründung der Menschenrechte* (2005), 21 ff.

without any effort at justification would reveal itself as arbitrary. It must instead take them up and thus simultaneously reproduce them and get them out of the way.

Hegemonic struggles are, on the one hand, normalized through this formal constraint, but, on the other, it nonetheless offers them a link to universalization and compatibilization.[79] 'Dominant' and 'minority' opinions reflect the current state of the hegemonic consensus in law in unsurpassed openness. General clauses like 'public policy' or the 'objective value system' are barely disguised stand-ins for it. Judicial decision is accordingly a process whereby objective societal relations are articulated in legal – and therefore alienated, specially encoded – semantics. This is far removed from the obscure suspicion that the quality of a decision depends on what the judges had for breakfast.

The *Weltanschauung* thus expressed in law finds its way, too, into leadership technologies through the specific form of the law. Great importance here attaches to legal hegemony. For as against the view that laws merely sanction existing relations, Gramsci takes it that the law is 'in reality a struggle for the creation of a new usage'.[80] The state in the integral sense strives to create and maintain a particular mode of coexistence and of individual relations, to make certain usages and modes of behaviour disappear and to disseminate others. It is the law (along with, *inter alia*, the schools) that is the means for this.[81] If political leadership has to create a social conformism, then it is actually the 'legal problem' to 'educate' the 'masses',[82] or 'a question for the "law"', through which 'the educative pressure on the individuals is exercised, so as to attain their consensus and collaboration'.[83] This does not mean a traditional political 'control concept', but the 'educative, creative, formative character of the law'[84] as a productive form of power, defining through legal practices types of subjectivity, forms of knowledge, and thus also producing relations between human beings and truth:[85] subjectivities and forms of life.

This effect can only be produced by the law if it is similarly understood in an expanded sense: as an aspect of the state in the narrower sense as well as of civil society. The law's activity is more extensive than the purely state practice, acting with the backing of the monopoly of violence. From the viewpoint of codification and implementation it belongs to the state tasks in the strict sense, and is to that extent also repressive. Legal practice nonetheless generates among subjects a particular conception of the right way to live, of what is the law,[86] thus authorizing a particular form of life;[87] 'The "double face of law", consensual and coercive, forms a dialectic specific to the bourgeois conception of law, which Gramsci posited to

79 See G. Teubner, 'Alienating Justice: On the Social Surplus Value of the Twelfth Camel', in D. Nelken and J. Pribán (eds.), *Law's New Boundaries: Consequences of Legal Autopoiesis* (2001), 21.
80 Gramsci, *supra* note 16, Q6 §98, 791.
81 Ibid., Q13 §11, 1548.
82 Ibid., Q6 §84, 777.
83 Ibid., Q13 §7, 1544.
84 Ibid., Q6 §98, 792.
85 M. Foucault, 'Truth and Judicial Forms' (1974), in Foucault, *Essential Works of Foucault 1954–1984, Vol. III (Power)*, trans. R. Hurley (2001), 1.
86 Kramer, *supra* note 36, at 94.
87 Litowitz, *supra* note 2, at 530.

https://doi.org/10.1017/S0922156509990033 Published online by Cambridge University Press

be an ethical conception.'[88] The 'ethical conception' here means the stimulation of self-technologies, the elaboration of a form of the relation to oneself that enables the individual to constitute itself as subject of a particular way of living.

Legal disputes are accordingly always about the implementation of a particular *Weltanschauung* in the form of lived practice, of 'lived law',[89] which again points to the materiality of the ideological. Legal norms are, then, complex forms of 'time-binding': in order for social practices to be able to be repeated, to link up with each other, normative expectations must be stabilized, even and especially in a case where someone acts in a way that is other than expected.[90]

4. A NEW 'HISTORICAL BLOC': FRAGMENTED WORLD LAW

Hegemonic law is for Gramsci, in the light of all this, the opposite of law dependent on arbitrary enforcement, lacking even the most minimal prerequisites for legitimacy. By contrast with the debate carried on in international law about so-called 'hegemonic law'[91] – which might well benefit from some illumination from hegemony theory – it constitutes for Gramsci the part of the 'integral law' that can dispense with the weapons of the government apparatus of the nation-state, because it relies on a climate of society-wide recognition.

What form hegemonic law takes under particular social conditions depends on the 'historical bloc' in which it is coupled with other social praxes. Gramsci denoted thereby a special set of relations of social forces in which the various legal, economic, political, and ideological relations are embedded and organically linked with each other, as the compact unity, including thinking and feeling, of a collective way of life spanning all the various forces.[92] The 'historical bloc' is, then, the whole set of material forces (content) and ideologies (form), in which 'the ideologies would be individual whims without the material forces'.[93]

---

88 Cutler, *supra* note 2, at 529.

89 In the free-law tradition: E. Ehrlich, *Grundlegung der Soziologie des Rechts* (1913), 390.

90 Luhmann, *supra* note 15, at 142.

91 B. Hess, 'Aktuelle Brennpunkte des transatlantischen Justizkonflikts', in Hess, *Die Aktiengesellschaft* (2005), 897; N. Krisch, 'Amerikanische Hegemonie und liberale Revolution im Völkerrecht', (2004) 43 *Der Staat. Zeitschrift für Staatslehre und Verfassungsgeschichte, deutsches und europäisches öffentliches Recht* 267; M. Byers and G. Nolte (eds.), *United States Hegemony and the Foundations of International Law* (2003); D. F. Vagts, 'Hegemonic International Law', (2001) 95 AJIL 843.

92 A. Demirovic, 'Hegemoniale Projekte und die Rolle der Intellektuellen', (2001) 61 (239) *Das Argument, Zeitschrift für Philosophie und Sozialwissenschaften* 59.

93 Gramsci, *supra* note 16, Q7§21, 877. In relation to the ideological system of law, Hans Kelsen puts it very similarly when he writes:

> [I]n fact only those legal norms can be supposed valid whose concepts are effective . . . The contents of the two systems [law and nature (Kelsen) – law and power relations (Gramsci)] neither coincide entirely, nor diverge entirely. The tension must not exceed a maximum limit – for then the assumption of an intrinsically legal system of 'law' would lose all meaning – nor fall below a minimum one – for then any chance of using the system of law as a serviceable interpretive or evaluative schema for man's actual behaviour . . . would be taken away. (H. Kelsen, *Allgemeine Staatslehre* (1925), 18) That the law in the objective sense, i.e. the legal order, is the will of the State does not mean that the State 'produces' the law, but that the State is the bearer of this order, the content of which is 'produced' by a social process. (H. Kelsen, *Hauptprobleme der Staatsrechtslehre* (1932), 98)

4.1. Transnationalization

'Fordism' was the example analysed by Gramsci as an ideal type of this sort of historical bloc.[94] It began to take shape from the 1930s onwards in the north-western metropolises, and was based essentially on a Taylorist reorganization of the labour process and the combination of mass production and mass consumption, economic growth, full employment, the asymmetrical consensus between capital, the unions, and the state, along with a male-breadwinner model, and was additionally accompanied by a Keynesian bureaucratic welfare state and a disciplined subjectivity. When this formation came into crisis in the mid-1970s, aspects of a new historical bloc began slowly to take shape, such as a knowledge-based economy; flexible, transnational production; and a transformation of the welfare state in which social security is subordinated to the imperatives of competition. These are outcomes of a search process in which particular social forces were able to prevail.

Within the emerging new historical bloc (whether called post-Fordism, postmodernity or neoliberalism) legal processes are also transnationalized, along with the power relations.[95] Particularly in the 1990s, global legal hegemony apparatuses were formed (like the criminal courts for Yugoslavia and Rwanda – the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) – or the International Criminal Court (ICC) and the Final Appeals Court of Mercosur) or given a new quality (the European Court of Justice (ECJ), the European, Inter-American and African Courts of Human Rights, the World Trade Organization Dispute Settlement Panel). A total of 125 international decision-making bodies are now listed by the Project on International Courts and Tribunals (PICT).[96] Similarly, national courts are used more frequently in this heterarchical system of 'global remedies',[97] in which transnational legal matters, from international criminal law to restitution claims arising from worldwide human-rights breaches, are dealt with. These varied hegemony apparatuses are part of a legally pluralistic network in which 'multiple legal orders operate subnationally, nationally, regionally and transnationally, cross-secting and overlapping'.[98] This has been the decisive change from the Fordist legal system.

While Gramsci's description of the 'historical bloc' and the power relations materialized in it remained strictly dualistic because of his focusing on Fordism, and he analytically separated interstate from intra-state power relations and perceived the link between the two dimensions as incorporation of interstate power relations into the inner-state bloc and vice versa,[99] political-science analyses in a neo-Gramscian perspective have in the course of the debates about the constitutionalization of a

94 Gramsci, *supra* note 16, Q9 §72, 1128 ff.

95 We use a broad concept of transnational law, which includes moments of supranational, international, and private jurisprudence, but transcends the classic *jus inter gentes* and its limited set of subjects, fora, and fonts; see F. Hanschmann, 'Theorie transnationaler Rechtsprozesse', in S. Buckel, R. Christensen, and A. Fischer-Lescano (eds.), *Neue Theorien des Rechts* (2009), 375.

96 www.pict-pcti.org.

97 Fischer-Lescano, *supra* note 78, at 175.

98 Cutler, *supra* note 2, at 535.

99 'It should further be borne in mind that international relations become interwoven with these internal relations of a nation State, thereby generating new original and historically specific combinations' (Gramsci, *supra* note 16, Q13 §17, 1561).

https://doi.org/10.1017/S0922156509990033 Published online by Cambridge University Press

neoliberal world order and transnationalization of regulatory complexes extended Gramsci's dualism to a global dimension.

Hegemonic disputes need no longer, accordingly, be oriented purely nationally and internationally, but can also be global. These global forms of the political are generated in network-linked movements, non-governmental organizations (NGOs), professional associations, the media, unions, and other interest groups, which in the Internet age make use of world-spanning means of communication. Even if global competitiveness and economic efficiency have since become discursively hegemonic and apparently act as 'grundnorms of an increasingly transnational historical bloc',[100] nonetheless anti-hegemonic projects are also present, *inter alia* as environmentalist, feminist, health-activist, technology-risk-related, education-policy, human-rights, and so on struggles for recognition. In advocatory form, these are also taking on a global problematic that Luhmann called 'total exclusion', which in relation to class-specific exploitation situations contains the radicalization that in the exclusion zones of the global *favelas* all that matters is one's own survival, and that there even exploitation with minimum material provision seems an unreachable luxury condition.[101] The 'examples of the emergence of a subaltern cosmopolitanism that bear directly on the field of human rights', picked out by Boaventura de Sousa Santos,[102] devoted to a project for inclusion through human rights, demonstrate that global 'counter-hegemonic politics of human rights'[103] are attracting global attention to these radical exclusion situations.

4.2. Counter-hegemonic techniques

While a Gramscian perspective focuses on the hegemonic relations in global law, the international-law hegemony debate starts from Carl Schmitt's analysis that 'those with true power can also define concepts and words by themselves. Caesar dominus et supra grammaticam: Caesar is lord even over grammar'.[104] In a Gramscian 'hegemony as Everyman's and Everywoman's legislature', however, the idea of being able to control world societal signification processes is nothing other than the fantasy of Machiavelli's Prince[105] – that is, a superseded, premodern technology of power, a 'sovereignism' that was 'the oldest dream of the oldest sovereign': 'none of my subjects escapes me, and no gesture of any of my subjects remains unknown to me'.[106] Both the Machiavellian and the Clausewitzian devices in international-law theory, where, following Schmitt, law is regarded as the continuation of politics by other means, underestimate the intractability of the specific procedures of the legal technology and the complexity of hegemony formation.

---

100 Cutler, *supra* note 2, at 535.
101 N. Luhmann, *Die Gesellschaft der Gesellschaft* (1997), 631.
102 B. de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (2002), 285.
103 Ibid., at 281.
104 C. Schmitt, *Der Begriff des Politischen* (2002), at 202.
105 'The modern Prince, the myth of the Prince, cannot be a real person, an actual individual; he can only be an organism, a complex social element in which a collective will already begins to become concrete, which is recognized and has in part asserted itself in action' (Gramsci, *supra* note 16, Q13 §1, 1537).
106 Foucault, *supra* note 42, at 103.

https://doi.org/10.1017/S0922156509990033 Published online by Cambridge University Press

For once it has been recognized that legal disputes are concerned not solely with the individual case but with the enforcement of a hegemonic *Weltanschauung* in the form of lived practice, that the legal hegemony apparatuses elaborate a *common sense* that undertakes to regulate the subjectivities and forms of life, it emerges that the very point is to take up the struggle for (world) law as part of a struggle for the emancipatory transformation of world society, and prevent the law of world society from being administrated exclusively in the backyards and back rooms of non-transparent global governance procedures. The globalized labour movement, environmental activists, feminists, the new global movement from Seattle to Genoa, then, in this sense constitute

> a movement and a process that has a multiple and capillary form that combines Foucauldian and Gramscian understandings of power and hegemony. As an ethical and political movement they form a 'postmodern Prince', that is, a new global form of collective political agency.[107]

This attempts to develop a collective will – that is, to 'become a state', in the extended sense of developing a new world-view, inscribed, not least, in law. Law as a material infrastructure to the organization of hegemony here follows its own strategically selective communication infrastructure, accessible not directly but only as mediated through the functionaries of the superstructures, but for that very reason also blocking the direct action of powerful interests.

The legally creative introduction of an alternative lifestyle by the new global movement can, if it engages with the need for universalization through compulsory legal form, be interpreted as the social dimension of lawmaking: through scandalization, sloganizing, and incessant demands – a reminiscence of Emile Durkheim's concept of *colère publique*.[108] This demanding of an, in this sense, 'nascent world law' by highlighting wrongs as scandalous, by networked activity with NGOs and victim advocates, by intervening in legal proceedings (as *amici curiae*) and negotiation of governmental agreements (the latest example being the ICC statutes), is not a project that is hopeless from the outset. Instead, the struggle for hegemony in world law shows links in many arenas of world law where legally creative social movements in the Gramscian sense can act, 'including those directed at corporate accountability for environmental and human-rights abuses and single issue movements such as those for banning anti-personnel landmines, have attempted to manufacture the consent of the population for alternative paths of sustainable development, peace, or democracy'.[109] Although these movements lack a government's cover through the monopoly of force, they are extremely effective, since from a Gramscian viewpoint it is 'plausible to argue that in international law and relations, the

---

107 S. Gill, 'Constitutionalizing Inequality and the Clash of Globalizations', (2002) 51 (4) *International Studies Review* 47.

108 E. Durkheim, *Über soziale Arbeitsteilung. Studie über die Organisation höherer Gesellschaften* (1999), 153. See further N. Luhmann, 'Das Paradox der Menschenrechte und drei Formen seiner Entfaltung', in Luhmann, *Soziologische Aufklärung 6: Die Soziologie und der Mensch* (1995), 229; Teubner, *supra* note 8.

109 B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003), 18.

https://doi.org/10.1017/S0922156509990033 Published online by Cambridge University Press

conditions under which "spontaneous consent" can be manufactured are as important if not more important than the existence of forceful enforcement mechanisms',[110] precisely because the point is the formation of a *Weltanschauung*, which is all that can create consensus on utilization of that monopoly of force in the first place.

Counter-hegemonic techniques can, then – as one aspect of a more comprehensive strategy – take off from such existing tendencies of legal creation. For this it will, however, be necessary to create within world law itself the structural framework conditions for world societal responsiveness – that is, implement mechanisms that link up the organized and effective organizations, professional associations, judges, media, transnational undertakings, and movements with the respective particular publics of their functional context in such a way that decision is linked back to discussion, and thus an unrestrained, undemocratic autonomization of the apparatuses of the economy, technology, science, art, and religion can be opposed.[111] Here, the constitutionalization debate under way in world law contains the potential to inscribe counter-hegemonic logics in the apparatuses: 'The use of the constitutional vocabulary – like Kant's aesthetic judgement – transforms individual suffering into an objective wrong that concerns not just the victim, but everyone.'[112] In particular, the fight to expand procedurally guaranteed rights of action to implement human rights is necessary,[113] in order to convert decorative principles into mandatory rights and render the world courts useful as venues for counter-hegemonic protest.[114]

The Korean women's movement fighting for the rights of the so-called 'comfort women' – that is, the victims of Japan's system of military sexual slavery during the Second World War – is a telling example of such a counter-hegemonic strategy. The crimes committed against 200,000 women and girls between 1932 and 1945 is 'one of the greatest unacknowledged and unremedied injustices of the Second World War'.[115] The former victims, from the weakest position in the social hierarchy, were able to inscribe the norm 'sexual slavery is illegal' in the hegemonic normative order of transnational law, although they had to operate in a global masculinist culture of impunity for acts of violence against women. To develop a counter-hegemonic world view the women first of all had to change their role: from speechless and invisible victims they switched into the subjectivity of legal subjects – that is, the bearer of universal and, in world society, enforceable entitlements. Second,

110 Ibid.

111 On the relation between discussion and decision as structural coupling, see H. Brunkhorst, 'Globalising Democracy without a State: Weak Public, Strong Public, Global Constitutionalism', (2002) 31 *Millennium* 675, at 676, n. 6; and in detail, H. Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (2005).

112 M. Koskenniemi, 'Constitutionalism as a Mindset: Reflections on Kantian Themes about International Law and Globalisation', (2007) 35 (8) *Theoretical Inquiries in Law* 9.

113 On which see K. J. Alter, 'Private Litigants and the New International Courts', (2006) 39 *Comparative Political Studies* 22.

114 J. Lobel, 'Courts as Forums for Protest' (2004) 52 *UCLA Law Review* 477.

115 Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery, *Case No. PT-2000–1-T*, Judgment, 4 December 2001, para. 4.

they chose the global scale: on the one hand global remedies (such as the UN Commission on Human Rights, the Committee on the Elimination of Discrimination against Women (CEDAW), and the US courts), since the local remedies, in the form of the Japanese courts, were unwilling to accept that the Japanese state had violated international law; and on the other hand there were the successful changes to international law brought about by the transnational women's movement during the UN women's rights conferences in the 1990s (such as, for example the Special Rapporteur on Violence against Women). And, finally, they used the political potential of the legal form, that is, the law's own logic and the courts, which they used as political fora. They even created in 2000 their own legal forum, the Women's War Crimes Tribunal, with top-class judges from international tribunals. Although it was a people's tribunal without formal legal authority, they copied the legal form's basic principles and were thus able by this organized scandalization strategy to create a global awareness for the constant injustice of their 'case'. As a result, Japanese history books had to be rewritten and the US and the Canadian Houses of Representatives, as well as the European and the Australian parliaments adopted resolutions in 2008 in order to push the Japanese government into compensating the victims. Furthermore, the provisions in the ICC Statute concerning sexual slavery (Art. 7(1)(g)) as a discrete criminal element can be seen as a result of the global women's movement invoking the arguments of the struggle of the 'comfort women'.[116]

The hegemonic view of 'hegemony' in law has no eyes for these arguments, counter-hegemonic strategies, and emancipatory scandalization processes, but concentrates on the legal effects of attempts by national governmental apparatuses to impose corporate interests not hegemonically but solely through autonomized military force. It is part of the irony of the concept of hegemony thus promoted that in the very act of criticizing imperial legal pretensions as 'hegemonic law' the (international) legal intellectuals subject themselves to that very law, by acknowledging its status as 'law' and giving the phenomena of attempted self-legitimation by globally operating apparatuses the colouring of society-wide validity through use of the adjective 'hegemonic'. With Gramsci, one might here contrafactually insist that whoever disregards the law may well be able to cover the world with bombs, but they place themselves outside the law. The worldwide 'indignation at massive breaches of human rights and manifest infringements of the prohibition on acts of military aggression'[117] shows that direct action for transnational stabilization of legal expectations has been taken away from military apparatuses. The hegemonic power relations will determine whether they are prepared to put up with breaches of rights through war crimes, torture, aggressive wars, and so on without consequences, or else legal ideology will in future 'punish as criminal activity (and in original ways,

116 S. Buckel, 'Feministische Erfolge im transnationalen Recht: Die juridische Aufarbeitung des japanischen Systems sexueller Sklaverei', (2008) 1 *Leviathan* 54.

117 J. Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?', in Habermas, *Der gespaltene Westen. Kleine politische Schriften X* (2004), 142.

https://doi.org/10.1017/S0922156509990033 Published online by Cambridge University Press

by letting "public opinion" act as a sanctioning element)'[118] such deeds even where those responsible are acting in the name of the military and police apparatus of the North.

What world-view will, in the struggle over hegemonic legal globalization as a liberatory fight for a just world order, grow to become the 'prevailing opinion', a general principle of law, or even binding law is not at the disposal of the force of military and police executive apparatuses. Instead, what will, in the norm conflicts on the scale of world society, decide between equal rights, when one world law stands against another, will be force: the force of . . . global hegemony.

118 Gramsci, *supra* note 16, Q13 §11, 1549.

https://doi.org/10.1017/S0922156509990033 Published online by Cambridge University Press