

Preface

This book is short but ambitious. It aims at suggesting a new interpretation of the fundamental institutions of private law capable of making them part of the solution to current global predicaments. It advocates a broad diffusion of these interpretations and legal ideas not only among a new generation of lawyers but also among the lay population. Its ambition is to deploy private law where it belongs: in the collective intelligence of the common(s), as a counter-hegemonic tool to institutionalize a *new common sense*. Collective understanding of the law (basic legal alphabetization) is a pre-requisite for a desirable transformation of the status quo.

The book's title, *The Turning Point in Private Law*, alludes to a number of quite dramatic transformations that society is experiencing or should experience. The ecological crisis, first and foremost, challenges the very foundational ideology of capitalism and modernity, the possibility of infinite growth on a finite planet.¹ Second, incredibly fast technological transformations, especially but not limited to the domain of communication, have opened a new frontier, on which capitalism (and every individual experiencing internet connection) has become completely dependent. Just as the discoveries of the late fifteenth century determined to a very large extent the development of modernity by enlarging its physical frontiers, the technological construction of a virtual space has produced a new frontier where capitalism can experiment, unimpaired by previous restraints, with new strategies of extraction and accumulation. The third dramatic transformation is determined by the unprecedented change in the balance of power between public sovereignty and private property. Private property today is so much concentrated in private hands (mostly, but not only, through corporate control) that public sovereigns organized as an electoral "democracy" simply cannot limit the power of rent. The material conditions in which the

¹ See F Capra and U Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Berrett-Koehler 2015). *The Turning Point: Science, Society and the Rising Culture* (Wildwood House 1982) is the title of a book by Fritjof Capra, on whose ecological approach this book builds.

political process unfolds make it impossible for elected officials to stand against further accumulation in the hands of the very rich. A handful of wealthy capitalists, whose names are well known, work as a barrier, insurmountable by the constituted political process, against any amount of economic redistribution in favor of the billions of people who live today in deep misery. As a consequence of this shift in power between the private and the public, whose conditions of existence have been determined by the end of the Cold War, “reforms” have “typically come to mean the introduction not of milder but harsher forms of capitalism, not less but more ruthless styles of exploitation and neglect.”² The tremendous economic, political, and technological power of the very rich makes the status quo look unchangeable, producing frustration and appeasement. Indeed, the tremendous might of *coercion* through the military industrial complex has changed its own relationship with the ideological apparatuses of hegemony, including the relationship between legality and democratic legitimacy. No longer, as in the classic Gramscian vision, is hegemony (*i.e.* ideological persuasion) armored through coercion, but brute coercion is slightly softened through hegemony.³ Globalization brought us permanent conditions of “passive revolution” that have all but discarded the ideals of liberal democracy, transformed citizens into commodities, and produced hopelessness. This is a grim state of affairs for any vision that, following Rosa Luxemburg, believes in the antinomy between capitalism and civilization. Today, anybody who sustains a total critique⁴ of capitalism and its apparatuses is considered a utopian thinker, as if utopia were not the very belief that in the current conditions of generalized crisis, disorder, and war it is possible to continue with “business as usual”. Humankind is indeed at a *turning point* (it has been here for a while, but “points” in history can be quite extended in time) in which we must choose between continuing the current barbarism or developing an alternative to capitalism (in the iconic statement of Luxemburg: Socialism or Barbarism!), a *new ecological order* sustained by a radically immanent, historicist, and humanist philosophy of praxis. Because the traditional tools of legal reform are impotent (the political process is under the stranglehold of the *status*

² See Perry Anderson, *The Antinomies of Antonio Gramsci* (Verso 2017), 27; a similar idea is developed in U Mattei, *Contro riforme* (Einaudi 2013).

³ See Peter D Thomas, *The Gramscian Moment: Philosophy, Hegemony, and Marxism* (Brill 2009). See also for an especially accessible and relevant analysis, V Gerratana, *Gramsci: problemi di metodo* (Editori riuniti 1997).

⁴ We use “total critique” in the sense made clear by Roberto Manguaibera Unger, *Knowledge and Politics* (Collier Macmillan 1975).

quo), the conditions of change must be pursued through a different strategy: a global (and local) *war of position* in which legal *interpretation through praxis* (i.e. resistance and disobedience) is systematically carried on by legally and ecologically literate people supported by legal scholars serving the function of “democratic philosophers” in a relentlessly producing new subjectivity.

This imperative of political (and even physical) survival of critical thought motivates the present book, which we regard as an attempt to show a path of study, interpretation, and struggle that is at the same time a critique from within (a war of position in the Gramscian sense) and a step in the aforementioned philosophy of praxis. In spite of its appearance, a counter-hegemonic reading of private law should never be constructed as a gradualist alternative to a full-fledged war of movement, should the material conditions come to ripeness.⁵

No conception of order, especially of *a new order*, can be seriously outlined (let alone obtained) in the current conditions without interrogating the tremendously thick amount of *humanist knowledge* historically produced by the (immanent) theory and praxis of Western private law. Indeed, in capitalist settings legal knowledge is the byproduct of the activity of a professional group—lawyers—whose role has been central in constructing the bourgeois hegemony throughout modernity. In the perspective of Pashukanis, private law (the subject matter of this book) is necessarily connected with the *capitalist transaction* that connects among themselves *abstract* subjects dealing with *abstract* commodities through *abstract* institutions such as property rights, contracts, legal persons, torts, and ultimately State sovereignty. It is through the *abstraction* of private law that lawyers have contributed to legitimizing plunder and extraction of the magnitude as that carried out during primitive accumulation (enclosure of the commons and colonization), as witnessed for example by the presence of a notary on Christopher Columbus’s *Santa María*.⁶ At the same time, no matter if aware or unaware of their ideological contribution, lawyers, through their humanistic vision and preaching, have provided materials for *counter-hegemony*, as witnessed for example by the debate between Sepulveda and Las Casas on the subjectivity of the savages.⁷ Such legal materials have displayed the potential for creating emancipation through collective or individual

⁵ See Peter D Thomas, *The Gramscian Moment*, cit.

⁶ See U Mattei and L Nader, *Plunder: When the Rule of Law is Illegal* (Blackwell 2008).

⁷ See A Andrea Cassi, *Ultramar: l’invenzione europea del nuovo mondo* (Laterza 2007).

resistance, such as occurred in the African-American Civil Rights Movement (the *illegal* act of Rosa Parks is paramount). The law has even helped in the construction of new hegemonies in the dramatically short periods of time in which revolution has disentangled its institutions from capitalist exploitation.

In this book we foresee a new hegemony emerging through a process that might be long and complex but that has already occurred in history and might occur again.⁸ Perhaps the current dramatic decline of international prestige of the US model and forty years of sustained capital accumulation under the firm leadership of the CPC (Communist Party of China) will determine a reversal of cultural relationship (and even global hegemony) between China and the West, triggered by the possibility and effectiveness of the response to the ecological crisis (which is simply impossible in the institutional setting of captured electoral democracy). Most probably, in the current conditions of fully globalized capitalism, the next wave of hegemony in the law will not be that of a sovereign nation State. The dialectic relationship between “global” and “local” can trigger the emergence of institutions of the common(s) producing a hegemony based on *active and direct consent, on a process of permanent self-governance and education, seeking the truth on the predicaments of human survival: a hegemony without subaltern allies*. This book is a simple toolkit for those contributing to the making of this subversive pattern of legal hegemony: a toolkit we offer to a new generation of comrades, equal allies of critical lawyers in transforming the current murderous capitalism into a shared world.

At the *turning point* we need the opposite of bourgeois hegemony (based on the lies of scientific positivism and legal professionalism). We can obtain this antithesis through a counter-hegemonic interpretation of private law. The most acute capitalist lawyers have recognized, for instance, how Lenin’s legal reforms in the early 1920s immensely contributed to the development of global legal civilization in diverse areas such as international law (ban on secrecy), criminal law (rehabilitation), family law (equality among spouses), labor law (paid leave, sufficient salary, obligatory rest), and many others.⁹

⁸ See Ugo Mattei, ‘A Theory of Imperial Law: A Study on US Hegemony and the Latin Resistance’ (2003) 10(1) *Indiana J. of Global Legal Studies* 383–448. See also Ugo Mattei, ‘The Cold War and Comparative Law: A Study in Intellectual Discipline’ (2017) 65(3) *AJCL* 1–47.

⁹ See John Quigley, *Soviet Legal Innovation and the Law of the Western World* (Cambridge University Press 2007).

Some lawyers are aware of the different global material conditions in which the law has been historically produced; most are not. This makes the dialogue with the latter particularly challenging and explains our strategy in writing this book (which is the point of arrival of the elaboration of a collective group of scholars) in the form of a *basic introduction* suggesting some avenues of interpretation for an ecology of private law. The idea is to make the book useful to the profession in its practical concerns but at the same time to educate lawyers regarding the current immanent conditions of the legal reality. Constructing hegemony is not a one-shot business and it requires a longer or shorter dialogue with the actors of the system we need to subvert as well as the construction of a new like-minded class of ecologically aware lawyers. As much as the entanglement of private law with capitalism should not be considered as a final ontological condition of law, similarly a revolutionary process aimed at subverting capitalism is essentially a continuum in which the actual transfer of power is only one moment. The question we are facing in our dealing with private law is how to construct a society beyond capital, a society that by producing through praxis and theory an ecological private law is capable of respecting the imperatives of survival. This book does not speak only to lawyers. We try to limit the jargon and explain the fundamental concepts it deals with at a level that is accessible to the lay reader. There are two reasons for this choice. Our critique of positivism is total and we flatly refuse the possibility of keeping separate the *is* from the *ought to be*, law from politics. Consequently, we deny the necessity of a class of professional lawyers trained to tell everybody else what the law is. This idea that the law can be described *ex ante*, outside of the social processes of obedience or disobedience, is transcendent, fetishist, and ultimately a false consciousness of the kind our counter-hegemony wishes to reject. The ultimate interpreters of the law are the individual and collective subjects who respect or refuse it. The second reason to talk law to a lay audience is that lawyers, as many other bourgeois professionals, might become the victims of the very technological transformation that they made possible by facilitating extraction and accumulation. The Western lawyer is a contingent figure even if she has enjoyed tremendous success during modernity. As much as there have been great civilizations without professional lawyers (think about China or India), *albeit not without law*, future civilization might well be without lawyers, for good or bad.

The historical conditions of “cognitive capitalism” and the global political phase of “passive revolution” that characterize the current turning point require some caution and might suggest a strategy of war “of position” rather than “of movement” in front of the bourgeois legal

profession. Technology is quickly eliminating many legal jobs (algorithms already perform research tasks that law firms used to delegate to junior associates), but this does not seem to be the most serious problem from a humanist perspective. Today, the most promising *frontier of capitalist extraction* (and therefore of potential revolution) is the online world where artificial intelligence, big data, and algorithms under capitalist control show all of the tremendous potential of the current technological transformation of the means of production. As much as industrial capitalism has developed in the American frontier institutions in order to apply them in the motherland and conquer it (think about liberal constitutionalism, absolute private property, the corporation as a person, judicial review, and many others), it is likely that transformations of law in the digital frontier will change the world offline and not the other way round.

The reader must realize that it would be a mistake to discount some sort of incommunicability between the online frontier and the offline motherland. In fact, one simply does not exist without the other. Online lawyers are not necessary for capitalist extraction; they only create transaction costs (nobody reads their fine print anyway when hitting *I agree*): they can be cheaply substituted by technologists (at the high end of the profession), coders (at the middle scale), and algorithms. The law can be built into technology so that capitalism can satisfy its de facto logic of power without having to submit itself to the preaching of lawyers with their (hypocritical) ethics and values. This substitution of brutality for hypocrisy might not be desirable as much as it is not desirable to substitute brute military might for international law.

This book is the result of uninterrupted years of an intergenerational dialogue since Alessandra Quarta was a third-year law student of Ugo Mattei at the University of Turin in 2009. The academic work carried on together in Turin at the University and at the International University College has generated quite a number of participants engaged in deploying an ecological approach to private law. Among them, we wish to thank Michele Spanò, Emanuele Ariano, Rocco Albanese, Michalel Monterossi, and Antonio Vercellone. We also wish to thank Giuseppe Mastruzzo and Roxana Vatanparast at the International University College, Ryan Fisher and Laura Scomparin at the University of Turin. The academic work was never separate from the militant effort of the international movement for the commons that originated in the water referendum of 2011 and continued with the occupation of the Teatro Valle, the Costituente per -i Beni Comuni, as much as in dozens of smaller struggles in Italy and elsewhere. There are far too many comrades who have inspired our struggles and contributed materials of praxis to the development of our

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