

# 'I'd like to learn what hegemony means'

## Teaching International Law from a Critical Angle

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*'It is a fucking TRADE SCHOOL. You are all there to be trained to think and act exactly the same way as everyone else in the profession, so you can then be a drone in the legal system.'*(Tucker Max, excerpt from *'Why You Should Not Go to Law School'*<sup>1</sup>)

### Introduction

International law teaching is largely dedicated to the idea of training students to acquire a language of expertise employed in international legal organisations. Such training is causing the reproduction of a cultural hegemony in the classroom, in the law school, and society at large. In the following, I investigate whether there is a possibility (and an obligation) for teachers of international law to disrupt this reproduction, to be counter-hegemonic in their teaching. The term 'cultural hegemony' was coined by Antonio Gramsci to denote the actions of a ruling class which constructs particular cultural norms, sustaining and endorsing them as natural and inevitable, for the purposes of domination. There is an emphasis on ruling by consent rather than simply through force (Gramsci 1971/2007). Gramsci dedicated his writing, particularly in *The Prison Notebooks*, to exposing the accepted cultural norms as artificial social constructs, put into place and sustained through particular institutions, practices, and beliefs.<sup>2</sup> In Gramsci's view, education is central to understanding hegemony, signalling 'every relationship of "hegemony" is necessarily an educational relationship' (Gramsci 1971/2007, p. 350). Applying this analytical frame to the practices involved in teaching international law, the question is: Is the dominant form of practice-oriented international law teaching producing and reproducing the dominance of a particular class of lawyers who privilege individualism, the 'global North', males, whites, and an ideology of neoliberalism? And, is this cultural hegemony presented and perceived as natural and inevitable?

My own reflection on teaching international law from a critical angle was decidedly inspired by a teaching workshop I organized as part of the Critical Approaches to International Criminal Law conference in December 2012. In the

1 [http://www.huffingtonpost.com/tucker-max/law-school\\_b\\_2713943.html](http://www.huffingtonpost.com/tucker-max/law-school_b_2713943.html), accessed 21 July 2013.

2 Michael A. Peters explains hegemony in Gramsci's sense as 'an essential part of the sociology of capitalist society enabling an understanding of the manufacture of consent by the powerful through the institution of cultural values' (Peters 2010, p. ix).

Christine E.J. Schwöbel-Patel

modest preparation for the workshop and during the course of the day, the question of the extent of the politics of teaching became increasingly prominent. The workshop, on the third day of a three-day conference, was organized for a group of like-minded lecturers in order to consider how to teach international criminal law (ICL) from a critical perspective. Like-minded here refers to a group of colleagues who are concerned with foregrounding issues of hegemony, inequality, power imbalances, biases, and limitations in and of international criminal law in their research. The discussion soon drifted towards the more general question of how to teach (law) in a critical fashion. Emotions ran high. It seemed to me, and troubled me, that a left critical agenda in research was apparently one matter, teaching in this vein to students was another. It surprised me how divisive the topic was. Some colleagues felt obligations and restrictions imposed through their institutions, others felt constrained by the expectations of students. One friend and colleague even provocatively said to me 'good luck with getting a promotion with that agenda'. I am, admittedly, as much implicated in the concern about institutional and academic restraints, and probably just as complicit in the reproduction of the existing unequal structures as the next person – but, I think that this should not spell defeat in terms of a critical, maybe even radical, outlook on teaching.

Apart from my own complicity, I should set out some further disclaimers: Although much of what is mentioned below could be equally valid in the context of school, even nursery school, education, I will largely draw on my experience in higher education. An additional disclaimer regards my inadequate expertise in pedagogy. Perhaps problematically, higher education teachers are not, or only in a very limited way, expected to engage with the science of learning theories and processes. In general, the expectation is that if you have researched in an area (or did well in that area in your own exams), you are also able to teach it. Researching even superficially on pedagogy has unveiled a rich tradition of thought and an enormous literature of which I have merely been able to reference small parts.

It should be noted from the outset that the audience I refer to here is not limited to teachers/lecturers/educators<sup>3</sup> of law. When I speak to a 'we' in the following, so an audience to which I include myself, I mean all teachers *and* students of law, and in particular international law. Much can be said about teaching ICL from a critical perspective (about its focus on individual accountability, the simplified narratives of 'goodie' and 'baddie', the lack of political, religious, and social context, the North/South divide of responsibility, and so on), but, this contribution focuses on more general questions of pedagogy in higher education, teaching law, and particularly teaching international law.

In the following, I begin by setting out the stakes of the current trajectory of education as determined by neoliberal precepts. I then consider Duncan Kennedy's piece on 'Legal Education and the Reproduction of Hierarchy', placing it within today's higher education systems. From this emerges that (the majority of) Ken-

3 I use these terms interchangeably.

'I'd like to learn what hegemony means'

nedy's key concerns are still as salient today as they were 30 years ago. I then turn to international law by drawing on a piece by Anne Orford in which she interrogates the depoliticization of international lawyers, achieved through their *disciplining*. From these two sections I take that legal education in its focus on training is causing the cementing of an existing hegemony, meaning that the interests of the most powerful social groups are constantly reaffirmed (Mayo 2010, p. 22). My modest suggestion, which can only touch upon rudimentaries, is for a consideration of the German word *Bildung* in relation to teaching (international) law from a critical angle. *Bildung*, as opposed to training, encompasses a sense of activity rather than passivity; it includes the idea of reflexiveness and critique. I suggest that this notion of *Bildung* may be a starting point for a counter-hegemonic approach to teaching law, and in particular international law.

## 1 The stakes

I would like to use some of the introductory space to set out what I think may be at stake if (international) (law) education continues along the current trajectories. We could imagine the international law classroom as existing within different spheres of influence. The sphere of the law school, the faculty, the university, the domestic state's educational system, the domestic state's larger political and ideological system, the regional (inter-national) education and political system, and then the global sphere. Each sphere influences the other and highlights different stakes. There are numerous issues which could be explored here; I want to highlight just one stake per sphere, conceding that they may overlap and are in part artificially segregated for the purpose of clarification and argument, and forewarning that these thoughts will be fleshed out more in the following sections.

Proceeding from the global to the local: future international lawyers who are taught today will enter international legal organizations, or other legal outfits (law firms, governments) with a certain influence and a particular notion of 'how the world works'. Teachers of international law students are teaching a global elite, a global class, which carries ideas of the law into their work and private lives. While already coming to university as fully-formed individuals with preferences, dislikes, and sympathies, they are unlikely to have formed a definitive idea of the law, and the law in society. Along the current trajectories, international law is taught as a set of norms which have universal currency and are there to reign in power-politics. This liberal notion of international law, while enchanting, is predicated on a number of assumptions which privilege individualism over more social ideas, the 'global North' over the 'global South', male over female, white over non-white, neoliberal over social ideology. In Gramsci's sense, an elite class of international lawyers has manipulated the system of values within international law in order to establish its own *Weltanschauung* as the dominant one. International lawyers of tomorrow sustain and reproduce the *status quo* by viewing this domination as natural and the paradigms as neutral and universal.<sup>4</sup>

4 This is in reference to Marx and Engels in *Die Deutsche Ideologie*.

Christine E.J. Schwöbel-Patel

On the regional level, the reproduction of historical biases is at stake, particularly so in Europe. The spheres of influence in international law, although arguably shifting from the previously *exclusive* eurocentric, is nevertheless unarguably originated and entrenched in eurocentric enlightenment ideas. The centres and clusters of international law teaching (London and other parts of England, the Netherlands, the East Coast of the US, Southern Germany, Melbourne and Sydney) are reproducing these eurocentric enlightenment ideas and presenting them as global.<sup>5</sup>

State politics is an important sphere of influence for students of international law since it is to a great extent state politics which determines the attitude to, or the culture of, education. Commitments to neoliberalism are becoming more evident in higher education – prompting a move away from education's former place in the public sphere. The political economy of education has become central. David Harvey's work on neoliberalism is instructive for pinning down some of its central themes. In particular, Harvey states that a cardinal feature of neoliberal thinking is 'the assumption that individual freedoms are guaranteed by freedom of the market and of trade' (Harvey 2007, p. 7).

Students are largely viewed as consumers; universities are viewed as competing in a global marketplace, with franchised universities becoming more common, particularly in the so-called emerging markets; education is being 'sold' as a financial investment in the future; universities are trying to meet customer demand by changing their syllabi and training foci. In the UK, the commitment to neoliberalism has become sharpened with the Conservative-Liberal Democrat coalition government. All in all, higher education has become commodified and marketized (Canaan & Shumar 2008). It appears that this is not only the case in the free-market centres of Europe and Northern America, but also 'the South' (Naidoo 2008; Amsler 2008; Mamdani 2007).

Neoliberalism has assumed world-wide scope. Harvey places the globalization of neoliberalism in the late 1970s, early 1980s, with Deng Xiaoping's liberalization policies in China, Paul Volcker's taking command of the US Federal Reserve, Margaret Thatcher's mandate to curb trade union power, and Ronald Reagan's political and economic endeavours (Harvey 2007, p. 1, 2). The reach of neoliberalism has sharpened further since the financial crisis and the consequent funding cuts across the public sector. Meanwhile, the limitations of free market capitalism have also become more evident, with Eurozone sovereign debt crises being a case in point. At stake in regard to universities is the understanding of the university as a place outside of a market logic, in which knowledge can be more than simply a means to acquiring particular skills for securing a particular profession.

Universities have political orientations too, some openly, some less openly. In the US, affiliations with certain traditions of thought, and certain attitudes towards

5 The recent so-called 'turn to history' in international law has sought to bring attention to such biases as well as challenge the accepted history of international law.

'I'd like to learn what hegemony means'

pedagogy, are perhaps most evident. In my experience, it is also possible to distinguish between more conservative and more liberal institutions in Europe. By conservative I mean an affinity with doctrine and sympathies with political (read governmental) actors; while being more liberal-minded denotes an affinity with rights-discourse and sympathies with individual (read non-governmental) actors. And, by this distinguisher, students in the Netherlands are more conservative than those in the UK and students in the South of England are more conservative than in the North. This can then, in a very generalized manner, be mapped onto the respective institutions whereby students at Leiden University are more conservative than students at the University of Liverpool. Within the UK, a distinguishing factor may be the designation of a university as Russell Group, i.e., an institution which foregrounds research,<sup>6</sup> and non-Russell Group institutions, many of them the former polytechnics which often foreground (although not exclusively so) teaching and training (Freedman 2011, p. 1-2). The Russell Group was formed in 1994 as a response to the 1992 government policy to eliminate the binary divide between universities and polytechnics. Joyce E. Canaan argues that by once again distinguishing themselves from the rest, the Russell Group have re-stratified the seemingly levelled playing field (Canaan 2013, p. 25). Russell Group students tend to be the elite privately educated students, while non-Russell Group universities are largely attended by students from working class backgrounds. At the same time, needless to say, student groups are not homogenous. Yet, at stake in the contemporary trajectory of neoliberal universities is that there is no longer a space for universities committed to bridging social inequalities in a meaningful way.

The seemingly most significant influence of the attitude of law schools is in how far they are, or allow themselves to be, steered by the professions. This occurs through influences both on the law syllabus (which subjects are 'core' subjects) and in terms of requirements of employability skills. The more this is so, the more a tradition of training rather than teaching, of technical expertise rather than critical thought, is established. The stakes here will be further explored below, but they crucially include the understanding of law as a discipline which is socially relevant. Students come to law school to be trained, expecting the inculcation of a particular expertise; they largely do not come to law school to understand the underlying social structures of the law.

The final sphere of influence, the international law classroom, is directed primarily by the teacher and his or her pedagogy. Subject to further investigation below, international law lecturers are surrendering to the aforementioned spheres of influence and are furthering a cultural hegemony which is enabled through submission to a neoliberal market logic. Lecturers submit to this due to, first, their own education of international law, and, second, because they are disciplined to teach in this way. The disciplining of international lawyers relates to the combination of subjection to the discipline (Threadgold 1996), as well as a culture of

6 <http://www.russellgroup.ac.uk/our-universities/>, accessed 21 July 2013.

Christine E.J. Schwöbel-Patel

accountability imposed on them (Shore & Wright 2000, p. 57-89). The primary driving force of cultural hegemony is the teaching of (international) law, and its language, as a *technical* discipline. The understanding of international law's own hegemonic tendencies, as well as its possible counter-hegemonic properties, are therefore left underexplored.

In this diagnosis of the spheres of influence, knowledge is a means to a particular end, both from the perspective of the students (securing a job) as well as for the teacher (getting promotions). At the more complicated partly unconscious cultural level, the end is a reproduction of the existing power imbalances.

## 2 Teaching law

In 1982, Duncan Kennedy published 'Legal Education and the Reproduction of Hierarchy'. In this piece, Kennedy interrogates the US law school as a site in which hierarchies are both manifested and reproduced (Kennedy 1982, p. 591).

He begins with a description of a typical first-year law school experience. His examination spans the classroom experience ('the teachers are overwhelmingly white, male, and deadeningly straight and middle class in manner' (p. 593)), the pressures of performance ('performance is on one's mind, adrenalin flows, success has a nightly and daily meaning in terms of the material suggested' (ibid.)), and the intellectual experience. The intellectual experience includes the revelation that there is no purchase for left or even for committed liberal thinking: 'The basic experience is of double surrender: to a passivizing classroom experience and to a passive attitude toward the content of the legal system' (p. 594).

In his analysis, the thesis particularly stands out that much of this approach to law and legal teaching comes about through an artificial distinction between law and policy. Such a distinction lies at the intellectual core of the ideological content of legal education (p. 596). Lecturers teach law in a way which presumes that legal reasoning exists, moreover that it exists as a rational neutral practice, and that it is different from policy analysis. Policy analysis is the only outlet for uncovering indeterminacy and for biased decisions. Public policy is that which highlights the indeterminacy and manipulability of ideas and institutions central to liberalism (ibid.). Contract law, tort law, land law, criminal law, are all taught as though they had an inner logic. Kennedy highlights that these are not random subjects built on the foundation of neutral reasoning, but are 'the ground-rules of late nineteenth-century laissez-faire capitalism' (p. 597). The primacy of property and restrictions on interference with the market are foregrounded as central values. The relevant rights are those reflecting the interests of private property owners, businesses, multinational corporations and financial capital. Through the idea of the 'inner logic', law is bestowed with an almost magical, and certainly mysterious, authority. The authority of the law is mirrored by the authority of the lecturer who imparts knowledge on the basis that his or her authority is preserved. Students mimic such authority, both of the law and of the individual who

'I'd like to learn what hegemony means'

has the knowledge to impart the law. Ultimately, students learn to embody established hierarchies without questioning them.

Kennedy's description of a US law school in the 1980s is an equally accurate description of many law schools in the world today. Certainly, it seems particularly familiar to the law schools in the UK, where the three year law course is heavily influenced by the professions. The subjects required by the legal profession are compulsory subjects on the degree programme so that completion of the degree will also satisfy the requirements of the professional bodies. There is a tacit understanding of the distinction between 'hard' and 'soft' modules. The former include the core modules of contract law, tort law, criminal law, law of trusts, commercial law; the latter include modules such as family law, human rights law, legal theory. Soft subjects are often feminized and infantilized (Orford 1998, p. 18). Syllabi are increasingly skills-focused, emphasizing communication skills, team work and critical analysis.<sup>7</sup> Notwithstanding the importance of such skills, understanding and analysing the role of law in society, even regarding law as a social language, have disappeared and have given way to the training of professionals who will fit in well with a market-focussed legal practice.<sup>8</sup> As the epigraph provocatively states: law schools are in this sense trade schools.

It is worth noting the German law school as a possible counter-example. In Germany, the *Rechtswissenschaften*, legal science, is historically and at present less focused on professionalization, although it appears to be moving in the professionalization and training direction. The education sector at large is relevant: in Germany, students only pay a nominal administration fee per semester rather than the, to some extent, crippling fees in the UK and the US.<sup>9</sup> While the first year of legal education will include contract law, it commonly also includes legal philosophy and Roman law. Rather than being viewed as the 'soft' subjects, these are incorporated into syllabi in the same rigorous way as, say, contract law or criminal law. As a result, the exams in those subjects are not set up to be easier as a mark of the lecturers' gratitude that students have picked their subject.

However, not all is rosy at German universities. An estimated 90 per cent of German law students complement their university studies with a private 'Repetitorium',<sup>10</sup> a hand-full of companies in Germany who charge high fees for preparation for the notoriously difficult exams. They market themselves on the basis that

7 Critical analysis does not refer to an understanding of the underlying assumptions of the law or its place within society at large, rather it refers to the ability of students to make *pro* and *contra* arguments. Critical analysis encompasses the skill of identifying the conflicting principles – usually two or three (one conservative, one liberal, one in the middle). At the end, these conflicting principles are simply 'balanced away' (Kennedy 1970-1971, p. 84).

8 Campaign for the Public University at <http://publicuniversity.org.uk/>, accessed 21 July 2013.

9 Fees of around €1,000 per semester were introduced in most *Bundesländer* after 2005 (when the Federal Constitutional Court rescinded the ban on tuition fees). However, eight years later, these have largely been abandoned ([www.timeshighereducation.co.uk/news/unbridled-success-germanys-fee-foes-claim-victory/2003928.article](http://www.timeshighereducation.co.uk/news/unbridled-success-germanys-fee-foes-claim-victory/2003928.article), accessed 21 July 2013).

10 [www.juraindividuell.de/blog/notwendigkeit-juristischer-repetitorien/](http://www.juraindividuell.de/blog/notwendigkeit-juristischer-repetitorien/), accessed 21 July 2013.

Christine E.J. Schwöbel-Patel

university lectures emphasize academic research while the exams require skills for solving cases. To bridge this disjuncture, students pay around €2000 per year to learn how to solve cases in the exams.<sup>11</sup> And the exam results determine the job, and income.<sup>12</sup>

What the UK, the US and Germany certainly have in common is a largely decrepit left programme in the law schools. In 1982, Duncan Kennedy stated: 'Most liberal students believe that the left program can be reduced to guaranteeing people their rights, and to bringing about the triumph of human rights over mere property rights' (1982, p. 598). Kennedy observed this as worrying given that the rights discourse presupposes, or takes for granted, that the world is and should be divided between the public and the private. The state sector, the public, enforces rights; and the private world of 'civil society' is one in which atomized individuals pursue their diverse goals. The site of the political then exists exclusively in the public sphere. Individuals are distanced, even alienated, from this sphere. Relying purely on the language of rights possibly subjects the left to complicity in the construction of a distinction between law and politics; and with this, the seeming neutrality of the law. Kennedy's conclusion is that 'rights discourse is a trap' (*ibid*). Regardless of whether one agrees with his conclusions, the left programme as a meaningful alternative certainly is a neglected site.

### 3 Teaching international law

As with the distinction between law and policy in foundational law courses, a general public international law course teaches students that there is a distinction between law and politics. For example, the 2003 Iraq war is generally taught as the political manipulation which then led to the war being 'illegal'. The Bush Doctrine, which according to US reasoning extended the exception of self-defence to pre-emptive self-defence, is regarded as political manipulation of the law. Against this, international law is introduced as the voice of reason and neutrality which (more or less successfully) reigns in excesses of politics.

In such rhetoric, both the law and the student are depoliticized. Law is portrayed as the rational, neutral, voice. The complicity of law in its commitment to a particular liberal ideology is obscured. This in itself is a politically motivated move: the depoliticization of law is political.

Orford refers to this process as 'disciplining', drawing both on Michel Foucault's work of 'technologies of the self' and feminist theorist Terry Threadgold. Fou-

11 [www.faz.net/aktuell/rhein-main/wirtschaft/repetitorien-fuer-jurastudenten-recht-verschlossen-1642387.html](http://www.faz.net/aktuell/rhein-main/wirtschaft/repetitorien-fuer-jurastudenten-recht-verschlossen-1642387.html), accessed 21 July 2013.

12 Hemmer, the most popular *Repetitor* in Germany, markets its services with the promise of higher points in the exams. It claims that each point from seven onwards (18 are attainable, the average is around 6) means an extra €1,000 in salary per month ([www.faz.net/aktuell/rhein-main/wirtschaft/repetitorien-fuer-jurastudenten-recht-verschlossen-1642387.html](http://www.faz.net/aktuell/rhein-main/wirtschaft/repetitorien-fuer-jurastudenten-recht-verschlossen-1642387.html), accessed 21 July 2013).



'I'd like to learn what hegemony means'

cault's idea of technologies of the self is that the self exists as an effect of power relations, making individuals to 'subjects' (Foucault 1988). Threadgold's work highlights how the process of being trained in a discipline involves the belief, reproduction, guarding and passing on of the narratives at the heart of the discipline (Threadgold 1996, p. 281). Orford begins her analysis of 'disciplining' with legal education – as the primary site in which the self-image of international lawyers is produced (Orford 1998, p. 15). She is particularly interested in the writing, reading and performing of narratives of intervention by international lawyers. She singles out four aspects of intervention narratives which 'in particular shape the sense of self of international lawyers' (p. 5). First, *New world order professionals*, a role attributed to international lawyers which portrays them as managerialists, 'pragmatic, problem-solving professionals, striding the corridors of power and being involved in history-making events' (ibid). Second, *Agents of humanitarianism*, those international lawyers who are 'humanitarians, saving victims of oppression and human rights abuses' (p. 8). Third, *Gentle civilisers*, an image of 'international lawyers as humane, professional, elite advisers to real decision-makers' (p. 11). And fourth, *Men of action*, professionals who 'do something' in a difficult and torn world which requires decision-making, not dithering. In sum, 'international lawyers come to understand themselves as the embodiment of heroic internationalism, and of the values and myths that underlie international law' (p. 16). And who is this disciplined 'subject' of law according to Orford? 'The "subject" of law is an aggressive, capitalist, heterosexual, white man' (p. 17). In this disciplining and in this technology of the self, legal education is political; it is an exercise of reproduction of power relations, at the same time as being declared non-political. Such training, or disciplining, of both teacher and student reproduces the cultural hegemony in all above-mentioned spheres of influence.

Not all students buy into this depoliticization – the student 'body' is by no means homogenous and students are not to be understood as simply passive recipients. There are some who are suspicious of the role of the law. Yet, often, what they learn to do with this suspicion is to package it away into their private lives – it is seen as having no place in the professional, legal, sphere (Kennedy 1982, p. 608).<sup>13</sup> So even those students who could have a potential political agenda, save this for a space outside of law.

Is it therefore the role of the educator to expose these politics and shift the (self-)understanding of the role of lawyers? The spheres of influence show that the problem is both systemic as well as lying at an individual level. We are working in a neoliberal world, which the education system is largely committed to; legal education will therefore privilege the cardinal features of neoliberalism: individualism, competition, growth, and an idea of the guaranteeing of freedom through free markets and trade. But there are also ways in which education

13 Kennedy already mentioned this in a piece he wrote as a student at Yale Law School: '[T]he division of life into hermetically sealed "private" (emotional) and "public" (effectiveness) compartments must lead to deformations in both areas.' (Kennedy 1970-1971, p. 77, 78).

Christine E.J. Schwöbel-Patel

should be able to extricate itself from such market logic and this is where, potentially, individual educators come into play.

#### 4 *Bildung*

From the above, it emerges that the problem at the teaching level is one of focusing excessively on training students. Education is instrumentalized for the individual. Training is part of the reproduction of cultural hegemony since it does not encourage reflection. In subscribing to training our students, we are ultimately subscribing to a particular exercise of power: one that emanates from viewing students as consumers, in a university of political economy. We are furthering an individualized, rather than a social, idea of teaching, treating knowledge as a means to a particular individual end.

Let us begin where Kennedy begins: if the distinction between law and policy and between law and politics is at the heart of the ideology of teaching which reproduces such cultural hegemony, the first step to teaching from a critical angle would be to introduce ideas of indeterminacy, bias, and manipulability to the law.

This is not about indoctrination of radical thought. Crucially, one type of hegemony must not be substituted with another. There must be a process in which both educator and student participate, with flexibility as to their roles. 'Education', or even 'teaching' and 'training' are terms with limited potential in this regard since they imply a one-way relationship. That between The Educator, The Teacher, The Trainer and the object The Educated, The Taught, The Trained.

The German word, and notion of, *Bildung* is perhaps useful since it captures a wider notion of education. It is a word which implies activity rather than passivity. Dörpinghaus et al. (2012) note two interconnected attributes which are central to the understanding of *Bildung*: first, *Bildung* relates to a complex relationship of self, the other, and the world; second, it relates to critical reflexivity. By this they mean that the relationships of self, the other, and the world are no neutral formulae, that they are thought and language processes (reflexive) which are differentiated and questioned (critique). Their understanding of *Bildung* is a discourse, mediated through differentiation, thought, and language, of the individual with oneself, with others, and the world (Dörpinghaus et al. 2012, p. 10). Such an idea of *Bildung* can be attributed to Hegel who believed in an organic understanding of education (Hegel 1807/1977). Education according to Hegel is the developmental formation of an individuals' unique potential through participation in society. Norms, beliefs, and values, constantly growing, are reflected back through immanent critique and active reconstruction of such cultural norms, beliefs, and values, affecting others and their *Bildung* (Good 2006, p. xix). *Bildung*, then, is to be understood as a social activity.<sup>14</sup>

14 See also Gramsci 'On Education' in *Selections from the Prison Notebooks*, who claims that the aim should be to 'insert young men and women into social activity' (Gramsci 1971/2007, p. 29).

'I'd like to learn what hegemony means'

However, some caution is also necessary. The etymology of the word, according to Schilling, reveals that *Bildung* derives from *Bildnis* which can best be translated as 'image' or 'effigy'. *Bildung* has, so Schilling, theological roots in that it was first conceived of as 'living in the image of God', *zum Ebenbilde Gottes* (Schilling 1961). With this in mind, *Bildung* concerns not only the relationship of an individual towards knowledge and society, but a relationship towards God, an entity embodying universal knowledge – a strict and unbreachable hierarchy is implied. Since secular displacements of God nearly always mean re-entrenchments of hierarchies elsewhere, *Bildung* must, if it is to serve as a useful interpretative tool, be dislodged from a sense of hierarchy, certainly from an idea of a locus of universal knowledge. Yet, how to address the inherent hierarchy of teacher to student?

John Dewey's work may provide some rudimentary points of departure. Dewey, often referred to as a scholar of the philosophy of education (Garrison, Neubert & Reich 2012), was particularly critical of the idea of vocational education as job training (Dewey 1915, 411f). He was wary of the instrumentalism of knowledge, suggesting that this fostered an alienation from larger societal issues. According to Dewey, learning was an intensely social process, and it was paramount for him to put that into practice.<sup>15</sup> In 1896, Dewey and his wife set up a school, the University Elementary School, in Chicago which foregrounded learning through experience. The aim was to discover 'how a school could become a cooperative community'. Children learn through experimenting in a learning environment composed of materials, workshops, library and school gardens; they learn about themselves cooperating in and with their environment. The teacher was not viewed in the role of the domineering instructor, but rather as a co-worker. This is not to say law schools should follow the Dewey model, but it highlights that the displacement of the hierarchy can and has been achieved in other stages of education. It is also an instructive example of the relationship between practice and theory in critique, in that critique is not merely to be implemented through theory.

A further concern about *Bildung* is that it can be used as a class differentiator rather than an equalizer. Particularly in Germany, this is (historically) the case. Writing in 1885, Friedrich Paulsen stated:

'Formerly, one distinguished between aristocratic and middle-class bourgeois (*bürgerlich*), between believers and non-believers, between Catholics and Protestants, Christians and Jews. There are still memories present of these, but the practically important, the significant distinction is between *Gebildeten* and *Ungebildeten*' (Paulsen 1885, p. 658; my translation).

The passage is a reference to the new class of European professionals (professors, teachers, doctors, lawyers, merchants, musicians) which first appeared in the eighteenth century. In Germany, this class was, and often still is, referred to as

15 [www.ucls.uchicago.edu/data/files/gallery/HistoryBookDownloadsGallery/chapter1\\_3.pdf](http://www.ucls.uchicago.edu/data/files/gallery/HistoryBookDownloadsGallery/chapter1_3.pdf), accessed 21 July 2013.

Christine E.J. Schwöbel-Patel

the *Bildungsbürgertum*, the *Bildungs*-(middle-bourgeois) class. At the time of the beginning of the industrial revolution, the *Bildungsbürgertum* was distinguished from the *Wirtschaftsbürgertum*, the economic middle-bourgeois class. Although the idea of social mobility through education is at the heart of this class, again, caution must be taken that *Bildung* does not simply become a new site of reproducing hierarchies. In this context it is noteworthy that Paulsen's ultimate aim was arguably to foster an ideal which was to serve the nation state, the German state as the superior state.<sup>16</sup>

How can a counter-hegemonic approach through *Bildung* be translated into higher education? Kennedy's strategy, provoking thoughts of a *Bildungsbürgertum*, is for 'building a left bourgeois intelligentsia that might one day join together with a mass movement for the radical transformation of American society' (Kennedy 1982, p. 610). Canaan has highlighted the importance of critical pedagogy, outlining the understandings of the Critical Pedagogy Collective (Canaan 2013, p. 34-44). Drawing on Freire (and reminiscent of Dewey), Canaan notes that the assumption of critical pedagogy is that of the students as 'knowers guiding teaching' (p. 36). Students and teachers are 'co-investigators in dialogue' (Freire 1970/2005, p. 62).

There is something distinctly appealing about such an idea of *Bildung* – it is a social as well as political idea of *Bildung*. Harmut von Hentig wrote a notable essay in 1996 in which he places *Bildung* in the context of politics from antiquity (von Hentig 2009, p. 205-210). Von Hentig explains that a privileged education brought with it a responsibility to engage in the Greek polis as well as in the Roman *res publica*. As Dörpinghaus et al. comment, such an approach to *Bildung* may appear alien to us: in today's world, we have replaced social engagement and common responsibility with our individual needs and our 'self' (Dörpinghaus et al. 2012, p. 39). For such an idea of *Bildung* to take hold, we must aim to rethink the deeply entrenched (liberal) notions of individualism.

Although it would be subscribing to a myth to claim that intellectuals (students and educators) are independent of class (Gramsci 1971/2007, p. 1-23), a notion of *Bildung* at least enables flexibility within this class, makes it more sensitized to the inequalities it creates and reproduces. A further myth is that there is no element of training in *Bildung*. It would be erroneous to claim that they are polar opposites; rather, *Bildung* complements training. Gramsci warned against an excessive emphasis on the distinction between 'instruction' and 'education', which can be mapped onto 'training' and '*Bildung*' respectively: 'For instruction to be wholly distinct from education, the pupil would have to be pure passivity, a "mechanical receiver" of abstract notions – which is absurd' (p. 36).

Students come with a certain 'baggage', as Gramsci calls it, of previous education acquired, but also crucially from the sector of civil society in which they participate, within the social relations of their family, neighbourhood. And it is this

16 <http://politische-bildung-sh.de/friedrich-paulsen/>, accessed 21 July 2013.

'I'd like to learn what hegemony means'

'baggage' which needs to be brought to the fore (not repressed) in the engagement with self, the other, and the world.

Translating a political, social, organic notion of *Bildung* to the law classroom involves, above all, the contextualization of norms. In ICL, for example, a deep interrogation of the principle of individual accountability would be required: What are the historical, religious, ideological, and political reasons for foregrounding the responsibility of those individuals? Could the focus on individual accountability be having wider social and societal impacts? Such a study would require the incorporation of anthropology, criminology, sociology, perhaps psychology – disciplines which work with empirical research methods. This would mean a displacement of the law as neutral and objective, demonstrating that law is shaped by considerations other than rationality and logic. Perhaps such contextualization could be central for a counter-hegemonic culture of international law teaching.

## 5 Constraints on educators

The constraints on educators in regard to counter-hegemonic teaching are wide-ranging, although not so wide-ranging to justify complete inability to act/resist. First, the constraints come from the above-mentioned spheres of influence. As Gramsci wrote in his essay 'On Education': 'The problem was not one of model curricula but of men, and not just of the men who are actually teachers themselves but of the entire social complex which they express' (Gramsci 1971/2007, p. 26).

Given the neoliberal commitments of higher education, in how far can an educator make an argument if it is at logger-heads with such a commitment? Will they lose their jobs? Their influence? Their gravitas? In the following, I have singled out institutional restraints (which stand alongside historical, social and societal restraints) as that which may be felt with the most intensity. Student surveys on teaching performance, university league tables, decisions on promotions, are all means by which the notorious 'academic freedom' may at times appear farcical. In 2000, Cris Shore and Susan Wright named the audit culture in higher education 'coercive accountability' (Shore and Wright 2000). They argued that processes of auditing have been transferred from the financial domain to the public sector. This includes the incorporation of terms of the new managerialism, a vocabulary of audit, such as 'performance', 'quality assurance', 'quality control', 'accountability' etc. (p. 60).

The most pressing question in regard to ensuring the 'quality control' of teaching through student surveys and peer-review relates to the teaching of doctrine. Does teaching in a critical manner allow for the teaching of doctrine? Teaching in a critical manner can be approached from one of two ways. One approach is to teach the doctrine and then 'slip in the theory'. Kennedy suggests that politicizing the classroom must begin with black letter law: 'I see myself as having a major

responsibility to teach doctrine' (Kennedy 1994-1995, p. 81). He fears otherwise that he may 'lose the students'. Annelise Riles has written about teaching property law from the perspective of an anthropologist, viewing the relevant case as a cultural text to be interpreted discursively for their cultural meanings (Riles 2004, p. 779). She attempted to teach a case by unpacking wider political and cultural issues, but soon sensed her control over the classroom slipping away (p. 780). On asking a colleague, he advised to 'slip the theory in'; students would not accept a 'theoretical orientation' (ibid). She learns that 'it was doctrine that needed to emerge from the cases, not relations of ownership and their meanings' (p. 782).

This sounds painfully familiar. In relation to international law, such 'slipping in of the theory' can be demonstrated by the teaching of the principle of non-intervention as one of the central tenets in the United Nations Charter (UNC). The doctrine is that there is a prohibition of the use of force, Art. 2 (4) UNC, to which there are two exceptions, provided in Art. 51 UNC (self-defence and UN Security Council resolution). One might then interrogate why the Iraq war from 2003 was regarded as 'illegal' under international law. For this, one would examine self-defence in more detail: Must an attack already have occurred? What has the International Court of Justice stated in this regard? What was previous practice of States prior to 2003? What do international law scholars think? How does the principle of sovereignty come into this? In expounding on sovereignty, one might state that the US has assumed a hegemonic position, allowing it to act despite the action being 'illegal'. There, hegemony was slipped in. Firstly, this presents the complex issue of hegemony in a very simplistic, thin, way. Indeed, hegemony is arguably equated with realism. Often, in teaching principles of international law (and I have certainly been guilty of this), the lecturer will oscillate between legalism and realism. The rule will be presented (legalism) and then the relevant power relations will be opposed to this (realism). International law states that the use of force in Iraq was prohibited; yet, the US acted out of military and economic reasons. Theory is reduced to crude categorizations, and rather than creating a more nuanced idea, one has prompted an even larger distance between the academic observer (student/teacher) and the event. A further problem with this approach is that before slipping in the theory, one has already presented the doctrine (the law) as opposed to politics; law has taken on a neutral voice of reason. In addition, this slipping in of the theory happens, in essence, in every classroom. When presenting this paper at a staff seminar at the University of Liverpool, all lecturers (also the more conservative ones) stated that they work in this way. 'The anarchist intervenes in the most conventional of forms', stated Peter Goodrich, commenting on Duncan Kennedy's choice of publishing his book on *Critique* with Harvard University Press (Goodrich 2001, p. 979).

Case studies may provide an alternative approach. Gerry Simpson has previously advocated for teaching with case studies, expounding on the importance of navigating between too broad a 'theory of everything' and the narrow legalistic focus which will 'founder on a lack of explanatory power': 'The solution lies in a severe,

'I'd like to learn what hegemony means'

probably traumatic, narrowing of focus followed by a broadening of perspective' (Simpson 1999, p. 89). An examination of the Iraq war may therefore start with the relevant historical, political, and religious background. The teacher may invite students to understand the narratives around the conflict, with the international legal narrative being one of them.<sup>17</sup> This could prevent assumptions about neutrality of the law from being formed. But theory is not, of course, the only means of critique. In order for a counter-hegemonic *Bildungs*-culture to take hold, one could introduce a form of student-led teaching, changes to the physical setting of the classroom, alternative uses of a normative language, and methods for taking action against oppression. All these suggestions require much more in-depth investigation, for which space (and possibly imagination) are lacking here.

## Conclusion

In 1982, Duncan Kennedy wrote about the reproduction of hierarchy within law schools. In 2013, law schools are still institutions in which the present order, its biases and limitations, are reproduced. They privilege the understanding of norms as neutral over political and indeterminate understandings; the 'global North' over the 'global South'; men over women; heterosexual over homosexual; white over non-white. Yet, despite this grim diagnosis, Kennedy ends on a positive note, a suggestion for restructuring (Kennedy 1982, p. 610f).

My optimistic note relates to the idea of *Bildung* as a form of emancipation; a counter-hegemonic idea with which to resist the current neoliberal trajectory of higher education. Bertold Brecht's poem 'In Praise of Learning' signals the potential for emancipation through learning particularly powerfully.

Learn, man in the asylum!  
 Learn, man in prison!  
 Learn, woman in the kitchen!  
 Learn, sixty-year-old!  
 You must take the lead.  
 Find a school, homeless person!  
 Acquire knowledge, you who are freezing!  
 You who are hungry, grab for a book: It is a weapon.  
 You must take the lead.<sup>18</sup>

The poem is addressed to the weak in society, those who are disadvantaged. Each paragraph ends on 'You must take the lead'. Notably, this poem was regarded as so radical in the post-war United States, that it was the central piece Brecht was

17 I have attempted this in designing a module for undergraduate students at Liverpool Law School titled 'Public International Law in Current Affairs' ([http://www.liv.ac.uk/info/portal/pls/portal30/tulwwwmerge.mergepage?p\\_template=m\\_lw&p\\_tulipproc=moddets&p\\_params=%3Fp\\_module\\_id%3D46928](http://www.liv.ac.uk/info/portal/pls/portal30/tulwwwmerge.mergepage?p_template=m_lw&p_tulipproc=moddets&p_params=%3Fp_module_id%3D46928), accessed 21 July 2013).

18 This is an excerpt from the poem in Brecht 1932/2011. My own translation.

Christine E.J. Schwöbel-Patel

questioned on by the ‘House of Un-American Activities Committee’.<sup>19</sup> In 1947, Brecht’s anti-Nazi activities (which he had previously been celebrated for) looked to the Americans to be communist and revolutionary activities. Such suspicion illustrates particularly well how the neoliberal system is opposed to empowering those who are disempowered. Law schools should sit at the centre of empowerment of the disenfranchised rather than reproduce disempowerment of the weak. And, in the end, this is arguably the message educators want their students to take away with them. Orford has summarized this in regard to international law as educating ‘ethically aware global citizens’ (Orford 1995, p. 251).

Knowledge is not only a tool, or a weapon, for successfully attaining a profession. And *Bildung* is not merely a technique by which to impart knowledge. On the one hand, one may take from this that knowledge is not just about instrumentalism; however, I think the message is that knowledge is not about instrumentalism in a narrow sense, simply concerning the possibilities of the individual. Knowledge can also be instrumental in a wider sense, concerning the possibilities of addressing pressing concerns of society at large.

My final paragraph shall be dedicated to an anecdote from my own teaching – a moment which I found heartening and encouraging. At the beginning of my Critical Approaches to International Criminal Law class, I set out some of the themes we would be investigating in the course of the term. I listed issues of ‘ICL and gender’, ‘ICL and neoliberalism’, ‘ICL and justice’, ‘ICL and utopia’, and ‘ICL and hegemony’. I said a few sentences about each issue. I then asked the students to tell me what it was that they were hoping to get out of the course. One student, a charming 78-year-old, a self-proclaimed conservative, with equally self-proclaimed right-wing tendencies, who was born into a self-identity of the ‘greatness’ of the UK, and had previously worked in law enforcement with the Greater Manchester Police said: ‘I’d like to learn what hegemony means.’

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Christine E.J. Schwöbel-Patel

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