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SUBALTERNS AND International Law :

A Political Critique

Translated by Sarah Gouin

SUBALTERNS

A. PEDONE & HART

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Editions PEDONE / HART Publishing

The first version has been published is in French
Les Subalternes en droit international, Editions Pedone 2018

This work is co-published by
Editions PEDONE in Paris, France
and
HART Publishing Ltd in Oxford, United Kingdom

EDITIONS PEDONE
13 rue Soufflot – 75005 – Paris – France
Telephone: +33 (0) 1 43 54 05 97 Fax: +33 (0)46 34 07 60
E-mail: editions-pedone@orange.fr Website: http://www.pedone.info

HART PUBLISHING
Bloomsbury Publishing Plc
Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK
1385 Broadway, New York, NY 10018, USA
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British Library Cataloguing in Publication
Data − Data Available

© HART Publishing – OXFORD –2022 – I.S.B.N. 9781509940707

© Editions A. PEDONE – PARIS –2022 – I.S.B.N. 978-2-233-01000-1

The seeds of the ideas in this book were first put down on paper and published in: Rémi Bachand and Thierry Lapointe, "Beyond Presentism: Rethinking the Enduring Co-Constitutive Relationships between International Law and International Relations" (2010) 4 International Political Sociology 271; and in: "Les quatre strates du droit international analysés du point de vue des subordalternes" (2011) 24:1 Revue québécoise de droit international 1, excerpts of which are reproduced throughout this book. Parts of the first chapter have already been published in: Rémi Bachand, "Les apports de la théorie féministe du positionnement dans une théorie (critique) du droit (international)", in Georges Azzaria, dir., Les cadres théoriques et le droit : Actes de la 2e Journée d'études sur la méthode et l'épistémologie juridiques (Cowansville: Yvon Blais, 2013) 137 (reprinted in: Emmanuelle Tourme Jouannet, Laurence Burgorgue-Larsen, Horatia Muir Watt and Hélène Ruis-Fabri, dir., Féminisme(s) et droit international (Paris: Société de législation comparée, 2016) 95. Parts of chapters 2 and 3 were discussed in: Rémi Bachand, "'Le droit applicable en la présente affaire est le droit international coutumier tel qu'il ressort de la jurisprudence': quelques réflexions sur la méthodologie de la Cour internationale de Justice au moment de l'identification des règles de droit international coutumier" (2016) 40 L'observateur des Nations Unies 35; and parts of chapter 3 in: Rémi Bachand, Les contraintes juridiques et extra-juridiques de l'interprétation juridictionnelle des traités de droit international: l'exemple du droit international économique (Doctoral thesis, Université Paris I, 2007) [unpublished].

The author is heavily indebted to Sarah Gouin for her great work in the translation of this book, which was first published in French (Les subalternes et le droit international: une critique politique, Paris, Pedone, 2018)[1]. He would also like to thank Thierry Lapointe for his contribution to the development of these ideas; as well as the members of CÉDIM for their highly relevant comments during the meetings held in the summer of 2017. He extends his warmest thanks to Julie Nollet, whose support has been unwavering, particularly during the final stages of this project.

[1] It should be noted that although some statistics have been updated, the bibliography has not been modified from the original version, which was finalised towards the end of 2017.

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INTRODUCTION

The title of this book, *Subalterns and International Law*, could not be clearer as to its objective: it offers a theorisation of the effects that international law can have on subalterns, a concept that I will define in greater detail in the first chapter. For reasons that will also be explained in the first chapter, I will reflect on the relationship between international law and the intertwining, in the different societies of the world, of the four main systems of social relations of subordination, namely patriarchy, capitalism, racism, and imperialism (an intertwining that, together with the mechanisms by which these systems reproduce, transform and legitimise themselves – religion, the media, educational institutions, law, etc. – constitute what I call the "matrices of subordination" of the different societies of the world). Such a research project leads me towards three clear objectives, which will enable me to identify, on the one hand, my theoretical opponents, and on the other hand, the theoretical approaches that serve as my starting point, but which I seek to complete by filling their gaps. The objectives are as follows:

The first objective seeks to propose theoretical tools to understand the role of international law in the different societies of the world. In concrete terms, the structure of this book is based on the idea that international law influences the various matrices of subordination of international society in four different ways. First, it influences them through its *legal form* (in summary: the identification of the subjects of the legal order, and how rules are created then enforced when disputes arise) which institutionalises the structure of the world as it is and, by extension, its power structures; second, through its *rules and institutions* which, although much less effective than those of most domestic legal orders because of their legal form, often have significant effects on the relationship between and within States, and even between non-State actors; third, through its ability to *influence* what I call the *ideological formations* of the societies that make up the world; and fourth, as a *language* from which political claims can be legitimately articulated and defended. If the only contribution of this book is the acknowledgement of the relevance of this

conceptual framework (and even if the reader disagrees with the rest of the theoretical framework, with the way it is used, with the examples, with the resulting political analysis, etc.), I can consider that the time taken to write it will not have been in vain.

This objective places my propositions almost automatically in opposition with the research programs of two theoretical approaches. In the first instance, it is opposed to the theoretical project of a certain legal formalism. More specifically, I challenge three postulates that are generally shared by adherents of this approach, namely that law is foremost an order of constraints that has as its object the determination of behaviours that are subject to sanction by the holder of the monopoly of legitimate violence; that it is organised around an internal rationality, which can be discovered; that the main, if not the only, effects of the law are those that derive from its institutionalisation (for example, thanks to the existence of institutions, such as courts, or even the mere fact that existing rules are respected by States because they fear that their reputation will be affected by a violation, etc.). If I oppose this type of analysis, it is because I consider that it is through external factors that we can understand how law works (I am thinking here of the intersubjectivity produced by the epistemic community of internationalists, which will influence and even give meaning to legal rules); and because the effects of law are far from being the product only of its institutionalisation, and go far beyond the mere establishment of behavioural guidelines. The second theoretical opponent is a somewhat simplistic variant (which is found less and less frequently among serious political scientists) of the realism of International Relations for which international law does not exist because of the non-existence or near-existence of a formal institution capable of implementing it and empowered to sanction its violations. Contrary to what realists think, I will show that international law not only produces effects on the world, but is even one of its main structuring agents.

The second objective is also theoretical in nature, i.e., it aims once again to propose alternative conceptual tools to those traditionally used in the literature of international law. In contrast to the first objective, this second proposition has a much more important political dimension, since it concerns normative benchmarks against which to assess the concrete effects of international law on society. Indeed, I start from the premise that the choice of concepts in a social analysis is essential because it allows for a particular diagnosis to be made, a diagnosis that presumes one remedy (a “solution”) rather than another,

and the objective of this book, in addition to proposing "a" conceptual framework, is to propose one that has the effect of radicalising the analyses, diagnoses, and solutions that can currently be found in the literature of international law.

Once again, I have, for this objective, two theoretical opponents. The first is the program of the international lawyers that use a liberal vocabulary according to which emancipation must be articulated around legal concepts such as human rights, development, non-discrimination, equality (including equal opportunities), equity, the fight against poverty, etc. I oppose this normative agenda by articulating my propositions around more radical notions of "exploitation" and "domination" (which I will subsume under the concept of "subordination") that I am working to eliminate (and not only reduce). Moreover, since it is these concepts of domination and exploitation that are at the basis of the four systems of social relations of subordination that constitute the matrix of subordination of societies, and since it is appropriate to analyse them jointly because of the way in which they interact, it appears that my research project also challenges the research agendas of several of those – who nevertheless constitute a major inspiration for my writings – who claim to articulate "critical theories", in the sense that the propositions that are made in this book seek to radicalise their analyses. This radicalisation proposition is based on two aspects. Firstly, I already pointed out a few years ago[1] that the "critical approaches to international law" (I was essentially speaking of the critical approaches present in anglophone literature, but the remark can surely also be made with regard to francophone literature) have so far struggled to go beyond criticism of the effects of international law on the relationship of more than one or two types of social positioning categories (class, gender, race, Western/Third World). My proposition seeks to go beyond these analyses and to approach the question from a normative position inspired by the theories of intersectionality[2], which considers all of these categories. Secondly, and for reasons that will be explained in the first chapter, it seems that it is not from these categories of analysis of social standpoint, nor even from social systems of subordination (capitalism, patriarchy, racism, imperialism), but from the concepts of exploitation and domination (subsumed under that of

[1] Rémi Bachand, "Les Third World Approaches to International Law : Perspectives pour une approche subalterniste du droit international" in Mark Toufayan, Emmanuelle Jouannet & Hélène Ruiz Fabri, dir., *Droit international et nouvelles approches sur le tiers-monde: entre répétition et renouveau* (Paris: Société de législation comparée, 2013) 395.

[2] For a summary: Sirma Bilge, "Théorisations féministes de l'intersectionnalité" (2009) 225:1 Diogène 70.

subordination) that my analysis should start, contrary to what those usually associated with critical theories of international law have often done. In this respect, it seems that seeking to find out how international law influences the contradictions that exist as a result of these systems of subordination is, once again, an attempt to radicalise the critical analyses that already exist.

The third objective is even more political. The point is to defend the proposition that international law is, for those in a position of domination in the matrices of subordination, an important tool for stabilising the systems of social relations of subordination that form these matrices. This stabilisation is achieved by the introduction (and dissemination in various national legal orders) of legal instruments that give the impression that the global system is beneficial to all, but which are in reality tools of resistance and emancipation propositions with a low level of radicality, i.e., that fail to structurally and radically challenge the domination and exploitation structures. This objective is in opposition to liberal positions (a large majority of the profession) for which international law (and in particular international human rights law) is an extremely useful and powerful tool for fighting (in their own words) injustice.

SUBALTERNS
AND
International Law

What is the role of international law in the different societies of the world? What are its effects on the various relations of domination and exploitation that permeate and structure these societies? Should it be seen as being more favourable to dominant groups or to subalterns? Should the latter use international law as the main weapon in their fight against different forms of subordination, or should it be used only in certain strategic circumstances? This book proposes hypotheses to answer these and other questions.

Seeking in particular to radicalise the vocabulary used by critical international lawyers, the author of this book aims to theorise the effects of international law on relations between dominant and subaltern groups in different societies around the world. More specifically, he seeks to understand its role in the reproduction, legitimation, contestation, and transformation of systems of social relations of subordination such as capitalism, patriarchy, racism, and imperialism, which constitute the matrices of subordination in these societies. Essentially, this book considers that these effects occur at four distinct moments, namely when law structures international society, for example by organising it territorially into sovereign and formally equal States; when its rules and institutions are formally used by the various actors who are in a position to do so; when it is a factor influencing the different ideological formations in the world; and, finally, when it is used as a language for legitimately defending political claims.

The ambition of this book is to show that because of its structure, international law is an extremely powerful tool for promoting the reproduction and legitimation of social relations of subordination. Of course, it also contains rules, institutions, and regimes that are perceived as tools of resistance and as propositions for emancipation projects for subalterns, and it is regularly used as such. In the latter cases, however, it must be said that what international law proposes in terms of resistance and emancipation never goes beyond what is tolerable for the dominants.

9781509940707. T

ISBN 978223301000-1

HART PUBLISHING
Bloomsbury Publishing Plc
Kemp House , Chawley Park, Cumnor Hill,
Oxford , OX2 9PH , UK

EDITIONS A. PEDONE
13, Rue Soufflot
75005, Paris
FRANCE