

# ANTONIO GRAMSCI AND THE LEGAL SYSTEM

*by Duncan Kennedy\**

Antonio Gramsci is associated with the word hegemony—that is what makes him a crucial figure in 20th century Marxist theory. Hegemony is very close to our concept of ideology. It is the notion of the exercise of domination through political legitimacy, rather than through force. Hegemony is the notion of the acquisition of the consent of the governed. It is the notion that, in order to understand the modern industrial state, one has to understand its ideological power to generate consent from the masses through the creation of institutions, and organizations, and social patterns that appear legitimate to the masses of the people.

There was virtually no concentrated attention given in the Marxist theory of politics, of the state, or of economics, after the death of Marx, to the role which ideology, consent, the generation of legitimacy, or in short, hegemony, plays in the exercise of power by the bourgeoisie. So Gramsci stands for the reawakening of the notion that Marxists could think seriously about, work hard on, be deeply interested in and try to figure out the mechanisms by which people are persuaded, rather than brutally coerced, into accepting a capitalistic regime. His name is a battle cry for people who are repelled or antagonized by the variants of Marxism which place no importance whatever on what people think. If you don't like the variants of Marxism where all the emphasis is on economic structure, or on the instrumental use of violence to achieve the goals of particular groups, then you tend to wave Gramsci as a flag.

One of the things that makes him good for this purpose is that he was about as central, as important a figure in Western European Marxism, Marxism outside the Soviet Union after the Russian Revolution, as you can find. No one can accuse you of being a simple anti-Marxist, utopian, deviationist, if you are cloaking your interest in ideology in the name of Antonio Gramsci.

There are other people within 20th century Marxism who have the same function, who allow a modern Marxist, a Marxist of the 1970's or 1980's to feel self-respect while talking about ideology. They are people like George Lukacs and Karl Korsch.

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But their status within the communist movement was so much more problematic that they are not as good on defense against charges of renegadism as Gramsci is. That's an implicit aspect of all discussions of Gramsci.

Gramsci is also a wonderful writer. He is a beautiful stylist, not at all in the sort of pompous tradition of European Marxist and non-Marxist social theorizing. His work is very moving and gripping; it appeals to one's aesthetic self, which doesn't find much expression within contemporary Marxist orthodoxy or neo-orthodoxy or whatever. Because most of it's so ugly, it's a particular delight to find something so beautiful within that tradition.

Gramsci also suggests types of analysis. That is, his emphasis on hegemony suggests a way to proceed if you want to understand the system, if you want to understand why the bourgeois capitalist welfare bureaucratic state subsists year after year, why it is not overthrown. Gramsci is arguing that there is more to it than the national guard. He even suggests what the more to it is, with this notion of ideology, consent, hegemony. His writings are full of fragmentary ideas about how this works.

And it is how it all works that is the great mystery. It's all very well to say, "It's not just the national guard that prevents a revolution. It's not just the FBI, or the CIA, there's more to it than that." Everyone agrees that there's more to it than that. But if you want to figure out what the more to it than that is, within contemporary Marxist and non-Marxist thought, left, right and center, radical and non-radical thought, there is extraordinarily little sustained, serious discussion of what might be meant by an idea like ideological hegemony. We all feel it. It's an aspect of all of our lives that we ourselves are trapped within systems of ideas that we feel are false, but can't break out of. We deal constantly, all of us, with others who seem to be turned against themselves by things they believe, things that we think are in some sense wrong-constrictingly distorted.

One reason why it's hard, and why people don't want to talk about it, is that it sounds incredibly elitist to engage in a discussion in which the premise is that someone you want to help is misguided, or wrong, or has had their mind confused by a complicated ideological system. Within liberalism, that's the norm: that you must never talk about false consciousness, there are no absolutes, no one knows the truth, and therefore you can't use, as a complicated explanatory hypothesis, and you shouldn't think about, the idea that one of the things that may be going on is a gigantic brain-wash.

Within Marxism the substitute for the liberal premise is the notion of scientific class analysis. You don't need to refer to the question of what people are thinking, or the complexities of their ideologies, because you've got a systematic body of quasi-or, I would say, pseudo-scientific economic knowledge, for class analysis, which is supposed to tell you what will happen, and how to bring it about. That disposes of the problem of dealing with the subjective dimension of consciousness in a state which is dominated by a capitalist class.

So Gramsci is an invitation. He is an invitation to think about that dimension of your own experience. For me, that leads very directly to what one might call Gramscian experiments. What I am about to suggest is not found in Gramsci. But I think Gramsci's work is very suggestive about our situation as radicals involved in the legal profession, and suggestive in ways which you will never hear anything at all about from the strand of Marxism which insists on base/super-structure distinctions which are mechanical or absolute.

There is a variant of base/super-structure theory in which one says, "Of course the super-structure is not the same thing as the base. It's only in the last analysis that it boils down to the base." Well, Gramsci very explicitly rejects that concept. He is a totalizer of base and super-structure. He uses a concept which he calls the "historic bloc" which suggests that the meaning of a particular economic formation, and of a particular set of relations of economic forces, is embedded in a set of economic, social, political, cultural and other ideological ideas and vice versa. It is not possible to understand or even imagine the concrete economic constellation of forces except within an ideological context. They form a single, indivisible whole, and the attempt to split them sharply apart into a base part and a super-structure part, according to Gramsci, is something that's destined to fail and also to pervert strategic thinking. He thought it would pervert strategic thinking because people can't grasp the implications of the idea of hegemony, if they believe that hegemony is just a function of technology, or economic structure, or whatever.

What does this kind of analysis suggest for the legal system? In Gramscian terms, the legal system is a complicated bloc, that is, it involves on the one hand an element of the use of force, of violence, of direct coercion and unmediated oppression by people against other people. One of the functions of the legal system is to organize and render efficient and workable the direct exercise of force and violence by some

people against other people. For example, the protection of property. An absolutely elemental, rock-bottom meaning or function of what we are all involved in, is that the legal system helps organize the deployment of guns to prevent people from socializing the means of production. But that's only part of it. It also has a hegemonic function.

The Gramscian approach suggests that you don't understand it until you've entered into some kind of investigation of its hegemonic function. Gramsci isn't of much direct help, since he doesn't talk a lot about law. There are only two paragraphs in the English translation of the Prison Notebooks about law, and they read like a first year law student grappling with the problem of separation of powers. But Gramsci does talk about other aspects of hegemony; for example, about political theory, and about things like the relationship between the city and the countryside in the development of class consciousness. He also had ideas about the Catholic Church. He was enormously interested in the hegemonic function of Roman Catholicism, in the Church as a body of ideas, and also as a concrete political and social organization of priests and lay clergy supporting the status quo. He took the idea of the opiate of the proletariat in deadly earnest, and tried to figure out how it worked. It's a classic Marxist idea, which, if you are a true materialist, you aren't going to be very interested in.

The legal system as a hegemonic system operates at different levels and for different groups. One way to understand it is as a single body of beliefs, practices, techniques and knowledge that plays different parts in the lives of different social classes. It's part of the life of people who have enormous political power mainly as an instrument. They can use it and they see it as an instrument of the exercise of direct domination. But it's also an important part of the lives of a vast mass of legal workers, who Gramsci would have described as legal intellectuals: both the bar and all the other people who are directly or peripherally involved in administering the system, including judges and court personnel. And it's also a part of the life of the masses.

It doesn't serve the same functions for all those groups. The whole body of people who are involved with the legal system as legal intellectuals, in one way or another (and that really includes the families of wealthy lawyers, who grow up quite mixed in with it) constitutes an important supporting social class for the existing order of things. It's both that the lawyer class as a class is mechanically important to the perpetuation of capitalism, and that its political support of capitalism is an

important element in its survival. Legal behavior and legal thought, with their prestige and claims to universality and rationality, have an important effect, the Gramscian-type argument would go, in maintaining the hegemony of ruling class people over this influential professional, technical, intellectual sector which administers the legal system. The legal system maintains the social structure of the capitalist state. It requires legal workers and has got to have some way of keeping their loyalty.

Then, looking at its ideological function for the masses, the argument would simply be that, like the other elements in the structure of hegemony, the function of legal thought is this: all kinds of people of higher social class are constantly dunning and drilling into the heads of people of lower social class than their own that all kinds of things that people at the bottom want can't be had because they're illegal. Very simple. It's a picture of the universe, of life, if you are a worker, in which you are constantly being told by people who are frightening but also authoritative that you can't have it because it's illegal. That's really it. It's a power element in mass consciousness—the idea of what is legal and what is illegal—as all of you who have done organizing know. The idea of the legal and the illegal is something which, if you can manipulate it skillfully, you can use to exercise great power over people who believe in it.

The Gramscian analysis would end by saying that what one can know as a radical is that that is all pure nonsense. Legal thought does not have the properties that would be necessary to make it a real theory that legitimates the system for the professional workers who use it, and its use is a lie and a mystification for masses of people who are constantly being told that what they want to do is illegal. And that in turn suggests that besides helping the poor who are being exploited, giving them a little space, besides trying to generate organization out of those struggles around goals of the poor, there is a function for radical lawyers which goes beyond just helping the direct victims of the system. There is a vital form of interaction between legal intellectuals—that is, lawyers, judges and other kinds of legal workers—and working class people, which is simply to try to systematically demystify legal reasoning as something that somehow can be used as an argument for or against doing anything.

That has a terrifying overtone, because, of course, we all use legal ideology of the most clearly invalid kind constantly in organizing activity. That is, radicals constantly appeal baldly to ideas of rights which people like Marx thought of as the

quintessence of bourgeois false consciousness. So there's a sense in which our daily activity constantly spouts an ideological line which is deeply anti-radical. It suggests that radicalism is nothing more than getting people their rights.

One has to accept that rights consciousness is a fundamental aspect of mass consciousness in the United States. It's a fundamental aspect of anyone's political activity. What the Gramscian analysis suggests is that one of the ways out of the reform/revolution problem in all these legal activities is to try to develop, at the level of conscious communication with other people, the extent to which they are letting their goals be perverted by the hegemonic false consciousness generated by law. So that's a way in which Gramsci plays directly into tactical or strategic discussions. But, I must admit, it's Gramsci from a fairly partisan point of view. His main function, I think, is to start people into strategic and tactical debates of a kind that aren't likely to occur without the kind of diversity that he represents within Marxist theory.

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