Gramsci on Law, Morality, and Power

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Introduction

The specific concern of this paper is Gramsci's theory of hegemony and state insofar as it helps to understand the role and nature of law in advanced Western democracies. At first sight the exercise may seem artificial in that Gramsci never directed himself towards law as a primary area of study. However, it is known that he attended law seminars at Turin University for a brief period in 1912 (Lettere, p. 491, quoted Davidson, 1977, p. 58); and there is little doubt that "the law" occupied a prominent position in his system of thought.

"If every State tends to create and maintain a certain type of civilization and of citizen... and to eliminate certain customs and attitudes and to disseminate others, then the law will be its instrument for this purpose..." (S.P.N., p. 246).

Sumner observes that law "... seems to be closely involved in the hegemony of the ruling class" (1979, p. 7) while Cain repeatedly alludes to the importance of law in Gramsci's work (1983; 1977, pp. 20,40).

The problems to be considered include the role of law in maintaining class rule in capitalism; the relationship between hegemony, morality and law; the creation of different kinds of hegemony and their correlative forms of law; the form and extent of the modern state and state power; the "general activity of law" and the concept of power; the role of law in creating class unity; and finally some key material aspects of modern capitalist law.

The Place of Law in the Construction of Hegemony

The main effect of Gramsci's studies of the state and law is to elucidate the nature of bourgeois rule. The condition for challenging the existing order is to
understand its strengths as well as its weaknesses, and Gramsci's development of the concept of hegemony was instrumental in making this possible. For Sassoon, his analyses "... apply to any form of class rule, be it bourgeois or proletarian, whatever the precise configuration of State power" (1980, p. 110). If law is to be effective in its main task, that is "... to create and maintain a certain type of civilization and of citizen", it is essential that it "... be developed so that it is suitable for such a purpose—so that it is maximally effective and productive of positive results" (S.P.N., p. 246). Cain argues that this passage refers to the "new conception of law" which will be necessary for "... the new directive class led by the industrial workers" if it is to be successful in establishing a new, proletarian hegemony (1983). But the main point, I think, is that this new conception of law is theoretically necessary for the understanding of capitalist rule and the strategy for challenging it. In fact I am inclined to treat such passages as referring primarily to a theory of law in Western representative democracies: Hoare and Nowell Smith seem implicitly to recognize this in their introduction to the relevant section of the Prison Notebooks (S.P.N., p. 206). Similarly, Buci-Glucksmann states unequivocally that, at least in the Notebooks, "... hegemony... involves first and foremost the practice of the dominant class" (1980, p. 47). Thus I take the notes on law mainly as part of an investigation into the nature and functioning of the "normal" bourgeois democratic state.

Gramsci approaches the question of law via what he calls the "juridical" and "ethical" problems. The juridical problem is

"... the problem of assimilating the entire grouping to its most advanced fraction; it is a problem of education of the masses, of their 'adaptation' in accordance with the requirements of the goal to be achieved" (S.P.N., p. 195)

The criticism that this indicates an analysis of class domination in terms of simple behaviourism is met by posing the "ethical problem of ensuring "... the correspondence 'spontaneously and freely accepted' between... the conduct of each individual and the ends which society sets itself as necessary" (S.P.N., pp. 195-196). For Gramsci,

"This is precisely the function of law... through 'law' the State renders the ruling group 'homogeneous' and tends to create a social conformism which is useful to the ruling group's line of development" (S.P.N., p. 195).

In Cain's reading "... all Gramsci's relatively extended discussions of law are in the context of his analyses of revolutionary developments" (1983). However, this assertion is not in my opinion supported by the texts; Sumner would apparently agree:

"In modern capitalism, this (the juridical problem—MB) means the problem of assimilating the intermediate classes, the proletariat, the
industrial reserve army and even fractious sectors of the bourgeoisie to the
hegemonic domination of the multi-national bourgeoisie and their
national political and cultural representatives" (1979, p. 257).

The novelty of Gramsci’s approach is striking: the emphasis is on
persuasion and consent, which is "... 'historically' caused by the prestige
(and consequent confidence) which the dominant group enjoys because of its
position and function in the world of production" (S.P.N., p. 12). Nevertheless there is a place for "coercion" in this highly developed system of
regulation: state coercion "... 'legally' enforces discipline on those groups
who do not 'consent' either actively or passively" (S.P.N. p. 12). Of course
these broad formulations are not sufficiently rigorous for our purposes. We
want to know not only why law is so important to the maintenance of class
rule, but also how it achieves its purpose and above all what sort of 'thing' it
is. In other words, where is law located in the social structure and what is its
specific effectivity at each of the levels on which it is active?

As a basis for doing this a brief examination of the fundamental aspects of
Gramsci’s political theory—his analyses of hegemony and the state—is essential.

The concept of hegemony is central to Gramsci’s thought. In its most
developed form, it amounts to a general theory of the practice of ruling classes.
It corresponds to a specific form of class consciousness, that is, consciousness
of specific class interests at both the "economic" and "political" levels. For
Gramsci, only a "fundamental class" can exercise hegemony—either the
proletariat or the bourgeoisie. Its characteristic element is "intellectual and
moral leadership", which Gramsci sees as the basic condition for the
enjoyment of political supremacy. Briefly stated it amounts to a situation in which

"... the vast majority of people are united within a common system of
values, goals and beliefs... it is this consensus en salutis, rather than formal
representation, which provides the cohesion which such complex modern
states require" (Hall, 1978, p. 215).

A much earlier but still helpful indication of its scope is given by Williams
(1960). For him hegemony is,

"... an order in which a certain way of life is dominant, in which one
concept of reality is diffused throughout society in all its institutional
and private manifestations, informing with its spirit all taste, morality,
customs, religious and political principles, and all social relations,
particularly in their intellectual and moral connotations" (p. 387).

Finally, Foucault (1979) emphasizes the way in which this new "... subtle,
calculated technology of subjection" has superseded "... the traditional,
rival, costly, violent forms of power ..." (p. 221).

Hegemony—and its reflex "conformism"—is created through the medium
of ideology. In a characteristic passage Poulantzas (1980) argues that,

"the State cannot enshrine and reproduce political domination exclusively through repression, force or 'naked' violence, but directly calls upon ideology to legitimize violence and contribute to a consensus of those classes and fractions which are dominated from the point of view of political power" (p. 28)

For Gramsci, ideology is not false consciousness, an illusion, or simply any system of ideas. It is in fact the terrain "... on which men move, acquire consciousness of their position, struggle." (S.P.N. p. 377) Ideology is therefore a part of social practice through which all consciousness is acquired. The most important sources of consciousness are the "organic ideologies", fundamental expressions of a particular structure. These "world views" "organize' human masses" (S.P.N. p. 377): a world view is implicit in all action.

As a material force ideology is diffused through the "ideological structure": ideological practice must be seen as material and institutional (Mouffe, 1979, p. 187). Thus for Gramsci the schools, churches, mass media and trade unions are all, as Mouffe expresses it, "hegemonic apparatuses". For Mouffe, Gramsci's account of hegemony and ideology represents a considerable advance over economistic or epiphenomenalist explanations of superstructural phenomena. It recognizes that hegemony is created through intellectual and moral reform, and represents "... the creation of a new world view which will serve as a unifying principle for a new collective will" (Mouffe, 1979, p. 191).

The distinction between the "new collective will" (or "organic ideology") and its "unifying principle" should be made clear. The unifying principle will always be supplied by a fundamental class, and involves "... a system of values the realization of which depends on the central role played by the fundamental class at the level of the relations of production" (Mouffe, 1979, p. 193). The essence of the distinction is that the unifying principle will always be the expression of a particular class. The collective will, on the other hand, will be an ensemble of values and ideologies. The key to the concept of hegemony is that all of these are transformed by their articulation to a particular hegemonic principle. Mouffe sums up the relation of hegemony as follows:

"... a class is hegemonic when it has managed to articulate to its discourse the overwhelming majority of ideological elements characteristic of a given social formation, in particular the national-popular elements which allow it to become the class expressing the national interest" (1979, p. 195).

The most important point to bring out of this is that hegemony must be thought of as a process; and ideology is above all the site where opposing hegemonic principles confront each other (see S.P.N., p. 162). Thus:
"the objective of ideological struggle is not to reject the system and all of its elements but to rearticulate it, to break it down to its basic elements and then to sift through past conceptions to see which ones, with some changes of content, can serve to express the new situation. Once this is done the chosen elements are finally rearticulated into another system" (Mouffe, 1979, p. 192).

This "new situation" is therefore the result of specific struggles in a particular historical context.

Gramsci distinguishes between two kinds of hegemony. The first he calls "transformism", and this involves,

"... the gradual but continuous absorption... of the active elements produced by allied groups—and even of those which come from antagonistic groups and seemed irreconcilably hostile. In this political leadership became merely an aspect of the function of domination..." (S.P.N. p. 59).

This is therefore a kind of 'bastard hegemony': it means the neutralization of opposing interests to prevent them from seriously threatening those of the ruling group. Gramsci illustrates it by reference to the Italy of the 19th century:

"an examination of Italian history from 1815 on reveals how a small ruling group has succeeded in systematically absorbing the political leaders of all mass movements of subversive origin... This was called 'transformism'... it was an organic process in the formation of a ruling class..." (L.F.P., p. 243)

Femia (1981) links the concept specifically to post-Risorgimento Italy, and labels that period's laissez-faire elitist Liberalism as "minimal hegemony" (p. 47).

The second is "expansive hegemony", and Gramsci characterizes it in this way:

"this phenomenon manifests itself 'spontaneously' in the historical periods in which the given social group is really progressive, i.e. really causes the whole society to move forward, not merely satisfying its own existential requirements, but continuously augmenting its cadres for the conquest of ever new spheres of economic and productive activity" (S.P.N., p. 60).

It must consist "... in the creation of an active, direct consensus resulting from the genuine adoption of the interests of the popular classes by the hegemonic class, which would give rise to the creation of a genuine 'national-popular will'" (Mouffe, 1979, pp. 182-183). This is why the hegemony of the capitalist class can only take the form of "transformism":

"Undoubtedly the fact of hegemony presupposes that account be taken of the interests and the tendencies of the groups over which hegemony is to
be exercised, and that a certain compromise equilibrium should be formed—in other words, that the leading group should make sacrifices of an economic-corporate kind. But there is no doubt that such sacrifices and such a compromise cannot touch the essential...” (S.P.N., p. 161).

For capital the essential is the extraction of surplus value. Since the objective interests of the working classes are in direct opposition to this process, they can never genuinely be taken on board by the hegemonic bourgeoisie.

At a certain stage, then,

“the bourgeois class is ‘saturated’: it not only does not expand—it starts to disintegrate; it not only does not assimilate new elements, it loses part of itself...” (S.P.N., p. 260)

For Gramsci it is the role of the proletariat, as the “... class claiming to be capable of assimilating the whole of society...” (S.P.N., p. 260) to

“... perfect this conception of the State and law, so as to conceive the end of the State and of law—rendered useless since they will have exhausted their function and will have been absorbed by civil society” (ibid.).

It is therefore the sole prerogative of the proletariat to achieve genuine “expansive” hegemony.

I must confess to having some reservations about some of these passages from the Notebooks. The texts have an “epochal” ring which is inconsistent with what I take to be the basic anti-economist, anti-determinist thrust of Gramsci’s theses on hegemony, politics, and the State. (See Buci-Glucksman, 1980, pp. 95-96.) Instead I would emphasize the implications of Gramsci’s hegemony classification for a theory of crisis in advanced democracies.

Support for such an approach can be found in the Notebooks themselves: crisis

“... occurs either because the ruling class has failed in some major political undertaking for which it has requested, or forcibly extracted, the consent of the broad masses (war, for example), or because huge masses... have passed suddenly from a state of political passivity to a certain activity.... A ‘crisis of authority’ is spoken of: this is precisely the crisis of hegemony, or general crisis of the State” (S.P.N., p. 210).

Poulantzas (1980) characterized the present political situation in Western Europe as one of crisis signalled by steady progress towards what he called “authoritarian statism”. Hall et al. (1978) refer to “the birth of a law-and-order society” (p. 321) in which

“... each step towards a more authoritarian posture is accompanied by a powerful groundswell of popular legitimacy, and where the civil power and all the forms of the post-liberal state remain solidly intact and in command ...” (ibid.).
Hall’s analysis is less “optimistic” than that of Gramsci: in a period of crisis the masses may “. . . put forward demands which . . . add up to revolution” (S.P.N., p. 210) but for Hall the hegemonic class may also be equal to the test, at least in the short term. Nonetheless Gramsci’s prescription for the ultimate goal—the creation of genuine expansive hegemony, or what Femina (1981, p. 46) calls “integral hegemony”, remains valid. Furthermore the identification of analytical differences between varieties of hegemony is of some significance.

Before moving on to the problem of the state, to complete the picture of hegemony, reference should be made to Cain’s development of the concept (1977, pp. 26–29) and her warning against falling into “. . . homogenous or bi-polar accounts of the generation and distribution of common sense in social formations” (p. 26). In particular, the distinction between “hegemonic” and “political” struggle this leads to (pp. 32–34, 37–38) is especially notable. For reasons of space I don’t want to dwell too much on these questions; but I would point out that Cain’s discussion can usefully be read together with Gramsci’s own development of the distinction between “organic” and “conjunctural” movements, in the context of the working out of an “historical methodology” (S.P.N., pp. 177–179).

Law, Power and the State

Gramsci failed to arrive at a settled conception of the state in his prison writings. This is unfortunate from our point of view because it leaves certain ambiguities in his conception of law which can only be settled by preferring one interpretation to another.

Anderson (1976) identifies three basic positions on the state in the Prison Notebooks: the state is separate from civil society; the state encompasses civil society; and the state is identical to civil society (pp. 12–13). None of these is acceptable to Anderson, who maintains that Gramsci never properly theorized the “key asymmetry” between state and civil society. This entails recognizing that hegemony is a combination of coercion and consent, that coercion is located solely in the state, and that consent is located both in the state and in civil society (1976, pp. 32–33, 41). His conclusion is that “. . . the normal structure of capitalist power in bourgeois-democratic states is in effect simultaneously and indivisibly dominated by culture and determined by coercion” (1976, p. 42).

Sassoon reduces the possible variants to two (1980, p. 112): either “. . . State = political society + civil society, in other words hegemony protected by the armour of coercion” (S.P.N., p. 263), or the State is characterized by coercion while hegemony (“consent”) operates in civil society alone (S.P.N., p. 12). This is to say that Sassoon collapses Anderson’s “third version” into Gramsci’s first (Sassoon, 1980, p. 233, note 9).

The diversity of Gramsci’s attempts to define the relationship between state and civil society is only hinted at by Cain in the earlier (1977) article, and she
adopts the state equals coercion, civil society equals hegemony version as the
cbasis for her discussion. In her latest essay, however, the problem is explicitly
posed and considerable progress is made towards a resolution. She now makes
a firm distinction between an "expanded" and a "narrow" conception of the
state, both of which are used by Gramsci in different contexts. The expanded
(or integral) conception entails seeing the state as a unified superstructure:
"... in the expanded conception state is identified with the two main forms of
teach and control by a dominant class..." (Cain, 1983). One important consequence of
this is the identification of "... a function of control/consent which can be
performed by non-governmental institutions..." (ibid.). This in turn has the
effect of bringing into play current debates on the relationship between
"state" and "power". In particular some reference must be made to recent
work by Foucault and Poulantzas.

Foucault's main thesis is that,

"we must escape from the limited field of juridical sovereignty and State
institutions, and instead base our analysis of power on the study of the
techniques and tactics of domination" (1980, p. 102).

His concern is to avoid grasping "phenomena of power" as "essentially
repressive":

"... I don't want to say that the State isn't important; what I want to say
is that relations of power, and hence the analysis that must be made of
them, necessarily extend beyond the State" (1980, p. 122).

His approach therefore centres on the "disciplines" which give expression to
"the power of the Norm" (1979, p. 184):

"Discipline" may be identified neither with an institution nor with an
apparatus; it is a type of power, a modality for its exercise, comprising a
whole set of instruments, techniques, procedures, levels of application,
targets; it is a 'physics' or an 'anatomy' of power, a technology" (1979,
p. 215).

Poulantzas challenges Foucault's 'narrow' conception of the state and his
dispersed concept of 'power' with some vehemence:

"What is truly remarkable is the fact that such discourse, which tends to
bust out power by dispersing it among tiny molecular vessels, is enjoying
great success at a time when the expansion and weight of the State are
assumed proportions never seen before" (1980, p. 44)

Thus for Poulantzas "All the apparatuses of hegemony, including those that
are legally private... form part of the State..." (1980, p. 36) and political
power "... is pre-eminently concentrated and materialized by the State,
which is thus the central site of the exercise of power" (1980, p. 44). However
he can also confidently assert that "... power goes far beyond the State, even
broadly understood" because "... the State's discourse does not exhaust all
political discourse..." (1980, p. 37). Perhaps the main point to note is that Poulantzas’ analysis is part of a programme for the achievement of "democratic socialism" within an explicitly Marxist framework, whereas Foucault is working within an historical and social-psychological framework rather than an openly political one. As such both can help to illuminate Gramsci’s remarks on law, state, and power.

Clearly Gramsci’s expanded conception of state demands an integral notion of hegemony as coercion and consent, political and cultural domination: "... it is a way of saying that a class is in super-structural dominance" (Cain, 1983). Similarly, the narrow conception of the state entails a narrow view of hegemony as "control within civil society" (ibid.). Broadly speaking, the former may be regarded as a Poulantzián, the latter as a Foucauldian approach. Caution is necessary, however, in using such a classification. For example, Poulantzas takes care to emphasize that "... the space of the State may be divided between repressive and ideological apparatuses only at a purely descriptive level..." (1980, p. 34). He regards Gramsci’s theory of State as "restrictive" and accuses both Gramsci and Althusser of being influenced by the "old legalist image" (1980, p. 30) of the State.

For Cain the expanded conception of the state has clear advantages (1983): it puts "politics" back into civil society; gives a progressive long term direction to class struggle; and "... is consistent with Gramsci’s view of hegemony as being both political and ideological, and therefore expresses the necessary temporal unity of these two moments of control by a directive class" (1983). Nevertheless, Cain is rightly anxious that the narrow conception should not be ditched altogether, because it "... facilitates the task of analysing the growing penetration of civil society by the state, and consequent unification of apparently dispersed centres of power" (1983). She points out that de Sousa Santos (1980) has demonstrated the utility of such an enquiry, and provided some of the necessary conceptual tools for getting it underway.

It can be argued that the parallel alternative notions of hegemony are both theoretically useful in the same way as the different notions of state. Cain opts firmly for the integral conception of hegemony as involving "... political as well as ideological domination... the two are welded in the concept of hegemony" (1983). She continues: "While either is possible without the other, their unity in hegemony is an object of class struggle, since it is a stabilizing factor" (ibid.). Anderson would concur in this, taking care to separate the idea of "cultural" leadership from the problem of "... the alliances of the working class with other exploited and oppressed groups..." (1976 p. 43). The latter does not constitute hegemony in its fully developed form (although Gramsci continued to use it in this sense—in which it had been familiar to Lenin: see MacLellan, 1979, p. 185); and the former is a red herring: "... the working class under capitalism is inherently incapable of being the culturally dominant class, because it is structurally expropriated by its class position from some of the essential means of cultural production..."
(1976, p. 46). Therefore the earlier, "class alliance" notion of hegemony should not be lost sight of; neither should a unitary conception of hegemony be allowed to prevail. In particular, the existence of numerous "hegemonic sectors" within the class structure should be noted (see Cain, 1977, pp. 27–28), not least because of the new perspective on politics offered by Gramsci's political epistemology. I am thinking specifically of the notion of "prefigurative politics", discussed in detail by Cook & Davis (1981), referred to in passing by Cain (1983) and, incidentally, implicit in her analysis as a whole.

The "General Activity of Law"

It should now be possible to move to a more informed analysis of Gramsci's specific statements about law. Central to his characterization of law is his elucidation of the "general activity of law" in relation to the juridical and ethical problems. A notable point about the texts in question is that they utilize a distinctly "narrow" conception of the state and civil society: this supports Cain's contention that this approach has considerable advantages from an analytic point of view over the "expanded" version (1983). The distinction between "common sense" and "good sense" understandings of the term "law" is also central. Broadly speaking the former would be used in an uncritical way, while the latter is produced by Gramsci out of the "philosophy of praxis", or Marxism. Common sense is "... the traditional popular conception of the world—what is unimaginatively called 'instinct', although it too is in fact a primitive and elementary historical acquisition" (S.P.N., p. 199). Conversely, "Philosophy is criticism and the superseding of religion and 'common sense'. In this sense it coincides with 'good' as opposed to 'common sense'" (S.P.N., p. 326).

The "general activity of law", then, "... is wider than purely State and governmental activity and also includes the activity involved in directing civil society, in those zones which the technicians of law call legally neutral, i.e. in morality and custom generally..." (S.P.N., p. 195). This basic proposition can be contrasted with Hegel's assertion that,

"morality and moral commands concern the will on its most private, subjective, and particular side, and so cannot be a matter for positive legislation" (1967, p. 137, para. 213).

As "organic intellectuals" of the bourgeoisie (Cain, 1979) lawyers are involved in propagating this traditional notion of law, or what may be termed a narrow conception of law: this is one of the concrete ways in which law is made to appear in society as a relatively autonomous instance. Gramsci is attempting to work out in opposition to this a concept of law which is of use to the subaltern classes, one which clarifies the extent and nature of capitalist rule. It is a form of domination that extends beyond the courts and the
workplace into the homes and personal lives of ordinary individuals. The law in this sense

"... operates without 'sanctions' or compulsory 'obligations', but it
nevertheless exerts a collective pressure and obtains objective results in the
form of an evolution of customs, ways of thinking and acting, morality,
etc." (S.P.N., p. 242).

As Cain emphasizes (1983) this has repercussions for the struggle of the subordinate classes for control of law: she points out that the revolutionary party must stand in a relation of "active" consent with the masses in order to be able ultimately to create a new, active "tradition". Not only is law made to appear relatively autonomous by conventional jurisprudence, it actually is so when seen from this perspective. An important point to add to Cain's discussion is that it is the sole prerogative, in Gramsci's view, of the working classes to create such a new tradition: the persistent conflict between the real interests of the dominated classes and bourgeois "common sense" means that the legal tradition built up by the capitalist class can never be based on "active" but only on "passive" consent. This argument is implicit in most of Gramsci's notes on law, and constitutes their main unifying theme.

If the concept of law can be extended in this way, then it is logical to argue that the "law-makers" are found not only in organs of the State as narrowly understood, but at every level of civil society as well:

"Every man, in as much as he is active, i.e. living, contributes to
modifying the social environment in which he develops... in other words,
he tends to establish 'norms', rules of living and behaviour" (S.P.N.,
p. 265).

Thus every man is a "legislator" for his companions, the only significant
difference between the head of a family and state personnel as such is that the latter "... have at their disposal the legal coercive powers of the State" (S.P.N., p. 266). (Gramsci points out that even "... the leaders of 'private'
organisms... have coercive sanctions at their disposal too, ranging even up to
the death penalty" (S.P.N., p. 266) but his meaning is at best obscure. The
main distinction in this context appears to be that between the official and the
unofficial exercise of coercive power. But the subsidiary point, that private
individuals in positions of authority can actually exercise a considerable
degree of "legislative" power, is an important one.) The degree of legislative
power is not uniform at every given level; neither is the power of an individual
constant through time: "A father is a legislator for his children, but the
paternal authority will be more or less conscious, more or less obeyed and so
forth" (ibid.).

To some extent this analysis entails what has long been referred to as a
"dual power" approach to political action. It certainly anticipates Foucault's
assertion that "... each individual has at his disposal a certain power, and for
that very reason can also act as the vehicle for transmitting a wider power" (1980, p. 72). And Buci-Glucksmann points out that for Gramsci the factory council movement

"... was essentially an attempt to create the elements of a dual power, to construct, starting from the masses, the foundations for a seizure of power that would shatter the existing state" (1980, p. 165)

Notably, Poulantzas again distances himself from Gramsci in this regard:

"... the dominated classes exist in the state not by means of apparatuses concentrating a power of their own, but essentially in the form of centres of opposition to the power of the dominant classes..." (1980, p. 142).

This enables Poulantzas to argue that it is for the dominated classes to take power through struggles which "... are inscribed in the strategic field of the mechanisms and apparatuses of power..." (1980, p. 151).

The implications of Gramsci’s analysis are examined by Cain (1983) and it is in this context that her overall approach to his treatment of law is most appropriate. It is above all the "discovery" of the "general activity of law" which provides the initiative for new hegemonic strategies with regard to culture, morality, sexuality and indeed to the structures of working class organizations themselves. Nevertheless Poulantzas is surely right to call attention to the political and theoretical costs of this interpretation. In her 1977 essay Cain operated with a distinctly "narrow" conception of law. In the most recent essay, however, it is accepted that "... Gramsci makes no distinction between legal and other norms" and that he is concerned to eliminate the distinction between law and morality "... by making both political and civil society function in terms of the norms of the revolutionary classes..." (ibid.). The danger here is that of losing sight of law as a specific ideological and coercive form; and of being unable to distinguish theoretically between the form of a state legal pronouncement and that of any one of a number of working class organizations. In effect, the dangers of an over-extended concept of law are similar to those of the integral version of state. It may be preferable to retain a clear distinction between "legal" and "non-legal" normative statements, in the same way as the two conceptions of state were both found to have definite uses. The tension is implicit in Cain’s work: in 1977 she characterized law as "... a politically (coercively) supported hegemonic pronouncement" which "... can be issued only from a locus of physical power" (p. 30), and politics and the state "... in terms of physical coercion" (p. 30). In 1983 the normative function of law is central; "order" is substituted for the expanded notion of the state and coercion is diluted to produce the more sophisticated idea of the "compulsory levy". Nevertheless this tension should not be allowed to obscure "... Gramsci’s conception of legal and other powers as capable of being either dispersed or centralized, controlled by one class or another" (Cain, 1983).
Law and Class Unity

Little remains to be said about the educative role of law and its task of building "conformism" in the shape of an active as opposed to a passive acceptance of class hegemony. But what is the effectivity of law *vis à vis* the ruling group itself? We saw that "... through 'law' the State renders the ruling group 'homogeneous'..." (S.P.N., p. 195). Sumner regards this point as a particularly noteworthy feature of Gramsci's analysis. "One of the most interesting points here is that Gramsci points to the ideological function of law in unifying fractions of the ruling class in practice..." (Sumner, 1979, p. 258). However, he does not expand on this point; he may be thinking of Gramsci's remark that

"the State's function is to find a juridical settlement to internal class disputes, to clashes between opposed interests; thereby it unifies different groupings and gives the class a solid and united external appearance" (Gramsci, 1977; pp. 39-40).

The main problem, then, is to understand the way in which the unity of the ruling class as a whole is attempted.

Some light is thrown onto the problem by Poulantzas, who considered the state in relation to the question of class unity:

"... capitalist law appears as the necessary form of a State that has to maintain relative autonomy of the fractions of a power bloc in order to organize their unity under the hegemony of a given class or fraction" (1980, p. 90).

For Poulantzas, "... juridico-political ideology holds a dominant place in the dominant ideology of capitalism" (1973, p. 128). Together with the objective separation of the workers from the means of production, ideology sets them up as "... political and juridical 'individuals-subjects', deprived of their economic determination and, consequently, of their class membership" (ibid.). But this "isolation effect" has another consequence: individual members of the dominant class are also prevented from realizing their own class unity at the economic level. As a result, the bourgeoisie is unable to "... realize its political unity on the basis of a politically conceived common interest..." (1973, p. 284). This is partly because of 'fractional struggles' within the class, and partly because of the continuing struggle with the dominated classes and the fact "... that it finds it particularly difficult to realize its political hegemony *vis à vis* these classes" (ibid.). In this analysis it is the function of the state "... to constitute class unity out of the isolation of the economic struggle" (p. 137). The state "... takes charge, as it were, of the bourgeoisie's political interests and realizes the function of political hegemony which the bourgeoisie is unable to achieve" (p. 284). Without going into minute detail on Poulantzas' position, it is clear that in addition to the economic benefits to the ruling class of juridico-political ideology, there are
also political costs. In effect, he sees the operation of law as dis-integrative in relation to class groupings; it is only at the level of state that class unity is achieved, or at least approximated, in the public sphere. "For the capitalist state presents itself as the strictly political, public unity of the people-nation considered as the abstract sum of formally free and equal legal subjects" (Jessop, 1980, pp. 352–353). Poulantzas therefore helpfully elaborates this aspect of Gramsci's work; at the same time it is clear that for Gramsci the educative role of law in developing social conformism is its more noteworthy feature.

Continuity and Development

Before moving towards a conclusion I want to draw attention to Gramsci's remarks on the nature of concrete legal systems, and in particular the factors constituting a truly durable system and, by implication, the inherent defects of the legal systems of the Western democracies. Gramsci continues to pose the question in terms of the problem of developing a "tradition" in society, "... understood of course in an active and not a passive sense: as continuity in continuous development, but 'organic' development" (S.P.N., p. 195). In this part of the discussion the object of enquiry is the legal system in the "narrow" sense of the legislative and judicial apparatuses. Clearly, an examination of the concept of "continuity" in this sense has extensive ramifications throughout the social structure, not least because of the notion of the "general activity of law" outlined above. However, the justification for this more specific analysis is the distinct echoes it finds in many works of non-Marxist jurisprudence and constitutional law.

For Gramsci, the kind of "juridical continuity required by the capitalist state should be of a "Roman/Anglo-Saxon" as opposed to a "Byzantine/Napoleonic" type (S.P.N., p. 196). The advantage of the former is that its "... essential characteristic consists in its method, which is realistic and keeps close to concrete life in perpetual development" (ibid). The utility of an "organized centre" conceived in these terms is two-fold: it is in a position to adjust readily in response to the changing imperatives of the mode of production it serves; and it is durable enough to withstand attacks from subaltern classes or fractions without sustaining serious damage either in terms of structure or of prestige. What this means in material terms is that it is essential for the system to be based on "... a good archive, well-stocked and easy to use, in which all past activity can be reviewed and 'criticised'" (S.P.N., p. 196). A developed legal system must in other words be flexible and "open"; and it must be seen to respond quickly to criticism, whether this arises on the grounds of inefficiency (or inconsistency), or "injustice". (A parallel in "bourgeois" jurisprudence can be found in Fuller's "principles of legality" (1969) which he puts forward as the test of whether a "legal system" can be said to exist at all.) Now the point I think Gramsci is moving towards is
that the capitalist legal system, based as it ultimately is on exploitation and class rule, can only be "organic"—or "open"—in a limited sense; and there are certain challenges which, if strongly enough put (i.e. supported by a mass popular movement), it could not assimilate. To reiterate what was said in the section on hegemony, any compromises or sacrifices made by the dominant group in forging hegemony "... cannot touch the essential..." (S.P.N., p. 161). Just as there was found to be a chink in the armour of capitalist hegemony in the wider sense, the law extends to its very juridical institutions, which fail to match their own criteria of legality. In more senses than one, therefore, "... every State is organized as a single functional order of legality and illegality..." (Poulantzas, 1980, p. 85).

Conclusions

At this stage some general remarks about Gramsci's view of law can be made in an attempt to clarify its main points. "The revolution which the bourgeois class has brought into the conception of law... consists especially in the will to conform (hence ethic of the law and of the State)..." (S.P.N., p. 260). In the context of Marxist analyses, it is Gramsci's perception of the double face of law which sets him apart: "In law hegemony and coercion are integrally mixed: their unity constitutes the concept" (Cain, 1977, p. 36). But such a connection is found also in the more sophisticated "bourgeois" analyses of law (see e.g. Hart, 1961). The discovery that in Gramsci law is broadly conceived in terms of "norms" recalls Kelsen—a "bourgeois" theorist for whom the "sanction" is an integral part of the concept of law. Indeed, "... one may find, on becoming more familiar with the new paradigm, that quite a number of observations in 'traditional' (bourgeois?) sociology of law are consistent with this orientation" (Kaupe, 1977, p. 140). For Hunt (1981) this is a pointer to a serious defect in Gramsci's work:

"... Gramsci nowhere attempts to grapple with the implications of holding both the 'traditional' thesis on the role of coercion and his own primary focus on hegemony as 'permanently organized consent'" (p. 62).

In fact he goes so far as to suggest

"... a fundamental unity between the concerns of contemporary Marxist and non-Marxist theories of law which manifests itself in the extent to which both traditions are impaled upon a dichotomy which inhibits their further advance... its general form is the dichotomy between coercion and consent" (p. 65).

But Gramsci makes it quite clear that the bourgeois "ethical state" is in the business of raising the great mass of the population "... to a particular cultural and moral level" (S.P.N., p. 258) only to an extent corresponding with "... the needs of the productive forces for development, and hence to
the interests of the ruling classes” (ibid.). In particular, “... the conclusion should not be drawn that superstructural factors should be left to themselves, to develop spontaneously, to a haphazard and sporadic germination...” (S.P.N., p. 247). On the contrary,

“... once the conditions are created in which a certain way of life is ‘possible’, then ‘criminal action or omission’ must have a punitive sanction, with moral implications, and not merely be judged generically as ‘dangerous’” (S.P.N., p. 247).

More specifically, while the state should be considered as relatively autonomous, “... it is always possible, within the framework of a political periodization, to establish the direct relation of the state to the dominant classes' political interests...” (Poulantzas, 1973, p. 287). The state functions “... as the unambiguous... political power of the dominant classes or fractions” (ibid. p. 279).

The Gramscian analysis is therefore distinguished from its “bourgeois” counterparts because it sees law as just one part of a complex relation of domination. Hunt alludes to the rigorous attempt to develop this analysis in Hall et al. (1978) but concludes that

“... positions of this type are semantic solutions which contribute little to the [resolution of the] difficulties posed by the persistence of the general dichotomy between coercion and consent” (p. 65).

Significantly, having stated what he regards to be the main obstacle to progress, Hunt makes no attempt to surmount it.

But identifying the dichotomy is not as destructive as Hunt suggests, for the dichotomy between coercion and consent is not an equal one. As Poulantzas points out,

“state monopolized physical violence permanently underlies the techniques of power and mechanisms of consent... Violence terror always occupies a determining place” (1980, p. 81).

In brief, an analysis of the relationship between law, state, and hegemony/crisis points to an asymmetry between coercion and consent; thus the total effect of Gramsci's notes is significantly to advance the “radical critique” of law, state, and power:

"The Law is the repressive and negative aspect of the entire positive, civilizing activity undertaken by the State" (S.P.N., p. 247).

It has become clear in the course of this article that a Gramscian analysis of modern law perhaps raises more questions than it resolves. There are real tensions between the narrow and integral conceptions of state and law; and the discussion of Hunt’s criticism (Hunt, 1981) demonstrates the difficulty of introducing new analyses while remaining within a conflict perspective. In
turn these analytical problems may confuse concrete political strategies; although in all candour Poulantzas' differences with Foucault and Gramsci seem to me to be of marginal importance outside a strictly theoretical framework.

Furthermore, the posing of new questions is by no means a retrograde step. Indeed the Gramscian approach to law constitutes a real point of entry into orthodox jurisprudence for Marxist critics of law. Indeed, one consequence of the 'problem' noted by Hunt is that traditional theory can be challenged much more effectively on its own ground.

For Buci-Glucksmann, '... what changes with Gramsci is the very form of Marxist theory, its connection with politics and culture' (1980, p. 397). Femia too observes that,

"... before Gramsci, no Marxist thinker had been sufficiently sensitive to the historical impact of ideologies and consciousness; none saw any point in delving into the intricacies of mass psychology" (1980, p. 3).

Clearly indebted to Gramsci, Poulantzas can state that

"[T]he rule of capitalist law has installed in the very outposts of power the various mechanisms of organizing consent—including, insofar as it masks the State monopolization of physical force, the mechanisms of ideological incultation" (1980, p. 82).

Cain in particular has noted the political avenues opened up by this analysis, and I think it is fair to say that it is implicit in many of the newly emergent forms of socialist political action of the seventies and eighties. I would follow Cain, on this basis, in being optimistic now about "the possibility of politics".

References


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