Law, symbols and resistance

I just finished reading an article by Peter Gabel and Paul Harris, in which they assert that legal systems operate in favour of the status quo, reproducing power relations that favour those few at the top of the social pyramid with more power than those at the bottom with little power (this my metaphor, not theirs). They further assert that legal systems must be deconstructed in terms of the symbols that act as its vectors, so that the powerless are empowered. Behind their thinking is the postulate that people do not like or trust the legal system. Although this seems an irrefutable argument, I would add another dimension: that as power is displaced from force and political philosophy to symbolic vectors, so people displace their frustration from the local instance of power (that disenfranchises them) to the general system that allows the powerful to turn the meanings of symbols in their favour. This, I think, has important consequences for how we see the operation of legal systems in the West today.

In Western societies, loosely understood, the mass of people have always had an ambiguous relationship to power and its various manifestations in the domain of governance. This ambiguity arose from the fact that most governments, from the time of the Roman Republic, ruled by laws that favoured the reproduction of the status quo – that is, of entrenched interests, whether economic, financial, legal and social. By the early 1800s, however, the power of governments to enforce laws that favoured political and social stability – laws that depended on the heavy-handed use of force such as public executions as "examples", the exile of large numbers of people for the slightest offences (typical of England but also of France throughout the 18th and early 19th centuries) had been seriously eroded by developments over which they had little control or by the unintended and unforeseen consequences of their own social engineering.

For example, the English enclosure laws had successfully forced huge numbers of rural smallholders and tenant farmers (whose land rents were controlled by tradition) off the land and herded them into cities where they could be transformed into industrial workers, but this had disempowered them. People who once had a stake in stability, if only at the local and regional levels, no longer had anything to lose since they no longer had any real or symbolic investments in "the system" – not only did not have land, they had no say in government and were left unprotected by traditions whose power to protect people had been broken by various government decrees (such as the one forcing people to marry outside the circle of kin defined by 3rd cousins, where before people had traditionally been allowed to marry their first cousins, thereby tending to consolidate wealth and land into stable arrangements within villages).

As an example of the first dynamic – events over which governments had little control – cities in this critical period grew in size, creating public health problems since municipal governments had not considered the problem of providing safe drinking water and sewage systems for the masses. Furthermore, the newly enlarged cities were socially promiscuous – without the benefit of traditional social controls, prostitution (and venereal diseases), alcoholism and the ingestion of drugs became a major problem (think of William Hogarth's famous series of etchings on Beer Street, Gin Lane, A Rake's Progress, etc., not to mention the increasing consumption of opium-based laudanum, whose steady and cheap supply was guaranteed by the British control of parts of China that forced Chinese farmers to grow – and consume – opium). Again, people living under these conditions not only felt they had no stake in stability (they had little to lose by disobedience and nothing to gain by playing by the rules), but felt that governments were not working for their benefit.

Not only did the level of resentment increase, it was re-oriented from traditional class hatred (of the landlord, of the local baron, of the local plantation overseer, etc.) to the new power-brokers, governments. Interestingly, the consensus opinion on the history of peasant rebellions now tends to agree that rebelling peasants were inherently conservative and almost always appealed to the king – a distant and mythified figure – to help them with their struggle against "corrupt" local authority (meaning, rural entrepreneurs no longer bound by traditions that had once governed land rents). Invariably, these appeals of course were not entertained, and so the power of the rural bourgeoisie and new agricultural aristocracy only grew, leading to even more resentments towards the status quo.

These resentments towards government were symbolically powerful, since they united older class-based mistrust and newer sentiments tied to the growing realisation that people were now new members of larger communities – the nation, the state – in which they had little say and no interest in upholding by their psychological and emotional allegiance. In other words, their resentments cut across political and especially economic structures identified by classic Marxist approaches and liberal-legalist orientations that dominated much the public debate on governance in the latter half of the 19th century and first half of the 20th. Mistrust was directed against the generalised public domain, whether this be described in class terms, in social terms, or in legal terms. In other words, resentment towards established authority, no matter what form this takes, is now an inherent part of all definitions of Western citizenship, though this does not of course prevent people from giving their allegiance to larger power structures such as the Fascist states of the early part of the 20th century (Italy, Germany, Spain) and to highly-centralised and quasi-Fascist states (France, Great Britain) when this allegiance is seen as a way of reclaiming some social and political capital and some political voice in the system (in these cases, structural resentments are often redirected towards a mythified enemy such as all foreigners or "foreigners amongst us" such as Jews, Gypsies and, in North America, immigrants and Native Indian populations).

It bears pointing out that the displacement of resentment from local targets to generalised social malaise is part of a larger vicious circle: as larger numbers of semi-alienated people with little stake in the status quo grow increasingly unhappy with the subtext of governance – reproduce and uphold established interests – governments for their part increase their intervention and presence in the private domain. New laws are established that impose formal education on everyone, that redefine the family in idealised nuclear terms, that redefine the terms of private social relationships (i.e., non-work related, non politically-based) in technical and legal terms, that redefine sex and marriage as political subjects and not private choices (homosexuality, polygamous unions, non-standard sexual practices become legal or illegal, depending on the context). These are all instances of what Michel Foucault defined as 'normalisation', since the imposition of a symbolic structure on social practice tends to make people feel they must conform to the idealised definition, or makes them feel increasingly resentful when they can not.

Clearly, Gabel and Harris raise an excellent point when they argue against a Rights-oriented approach to the law and to reform, since this merely reproduces the State's absolute power of define all rights (and deny them, if it so chooses). People who espouse this position, in other words, are merely fighting over crumbs, since it is a zero-sum game: what one group or person gains as a "right" can only come, in the long run, at the expense of another group or person, since States never cede *their* power to define and arbitrate.

Their claim, however, to a radical engagement by lawyers to deconstruct the legal system and its subtexts to their disempowered clients appears to me to be utopian dreaming, since, as I have argued, resentment towards entrenched power is now a structural feature of citizenship. Indeed, one can argue that the aim of post-19th century governance technologies is to transform all individuals into citizens, from private entities (*objects*, in the epistemological sense of having an autonomous existence) into public *subjects*, from social beings to political and politicised entities. Perhaps they have a point when a person is more or less *begging* the courts – to redress a perceived or real wrong, for example, in cases of divorce or in small-courts claims for bad loans or incomplete services. In this case, the simple act of *asking* for justice implicitly acknowledges the power of the state to arbitrate disputes. Gabel and Harris seem to argue that people should not be doubly subjugated, by asking and by their participation in the rituals of power, whose aim is of course to induce awe and subjugation in 'normalised' *subjects*. Not surprisingly, their own examples are hardly germane to illustrate the symbolic power of the judicial system, since they focus on two well known and highly political examples, where savvy and articulate people championed by lawyers determined to make a political point (and not simply win the case at any cost) challenged the assumptions of authority by delegitimizing the symbols of power (in these cases, decorum and demure behaviour by the accused).

In contrast, one can hardly imagine that a person *accused* by the Crown of, say, petty theft or of wife-beating is worried about the implicit symbolism of a Crown or of black judicial robes. They have more immediate worries, such as not mastering sufficient cultural capital to *appear* as decent citizens (signalled of course by attire and grooming that conform to the judge's or jury's expectations of "decency"; facial tattoos, squinty eyes and mullets may be symbols of power, but they are more appropriate to the trailer court than the courtroom). It is hardly conceivable that the defendant's lawyer could call into question the hidden potentials of power when the case is ostensibly about simple justice. And of course all lawyers, even one's own lawyers, have a bad reputation to overcome. It is not so much that engaged lawyers must "fight the system (of symbols)" or "stick it to the (symbolic) man" as it is that they are part of the problem: lawyers would do better to explain *their own* rhetoric and jargon than deconstruct *the court's* rhetoric and rituals, since they are the primary "caregivers" (to borrow a medical metaphor) to people in distress (whether rightfully or wrongfully accused). One of the fictions by which Western liberal democracies exercise and reproduce power is that class privilege does not exist. This may be an easy fiction for a highly-educated and well-spoken lawyer (let's say, for the sake of argument) to believe implicitly (as a 'normalised' subject who is part of a larger belief system), but it is a little less obvious to the structurally disempowered who tend to be more victims than victors in any judicial conflict – visible minorities, the unemployed, the under-educated, the shy (meaning, with no training in formal public speaking) and even the stupid (they may not be stupid, of course, but the normalisation of power relations by means of manipulating symbols means that 'decent' people tend to believe in a form of social Darwinism – the accused wouldn't be there if they weren't guilty or stupid). Lawyers, in other words, should deconstruct themselves as part of the system as much as they deconstruct the power of symbols attached to the judicial system.

Another weakness of Gabel and Harris' argument is that they seem to assume that because the hidden agenda of lower-level courts is to maintain social order at the local level (in other words, acting as agents of entrenched power) that people will automatically be disempowered. Most people in the middle classes, which by now are in the majority in the West, have a powerful stake in social order. They are the ones whose investment in roads, schools and

hospitals (through their taxes) makes the system work in the interests of entrenched elites, true, but it also gives them some degree of power and say in the management of the system. It is a happy congruence of interests, the government (representing in part these elites) and the 'people', the middle classes who co-exist in a kind of implicit power-sharing agreement. Most people might therefore agree with Gabel and Harris' assessment of the hidden subtext of power implicit in the "front line" operations of the judiciary, but they would not be troubled with it; on the contrary, it is probably a source of reassurance that lower courts are efficient at the expense of ideological refinement (the domain of the supreme court, the authors argue). It seems to me presumptuous to argue that lawyers should explain this to their clients, when people intuitively know it because they heartily approve it.

In any case, one can hardly ignore their point, that power is partly channelled through rituals and thus through the manipulation of symbols. In other words, power has been displaced from the exercise of force to the deployment of symbols. But so has resentment been displaced, from local and real authority figures to 'global' and symbolic power, from the local landlord to the government as an iconic representation of all authority. Resentment and feelings of powerlessness are thus also heavily symbolic, to the point that they are psychological and emotional states of being rather than reactions to particular instances of power. It is a structural feature of contemporary citizenship and therefore the basis for effective resistance to instances of hegemony, *if* power differentials are not so great. I have mentioned at least two instances, the redefining of marriage/incest and the enclosure laws. I can also mention a third example, closer to home.

Take for example cases in which so-called family law allegedly acts on the behalf of children. In Native communities, children often seem abandoned by their biological parents. Natives rarely impose western-style discipline on children, and children know they can depend on any responsible adult in the community for primary care – they just take food and clothing from anyone, as they need it. Everyone understands this, and parents rest easy knowing everyone partakes in raising children. When the Canadian government decided to extend its power by sending social workers into Native communities in the 1960s, they saw chaos because they had been trained in normalised system of power relations, in which government had for decades defined what was 'normal' and what was not for families. Certainly, none of these definitions included Native values and ideas of family structures. Native children were thus often taken away from allegedly irresponsible parents and placed in White foster homes; later, the government showed that it was "sensitive" by taking away children and placing them in *Native* foster care! Again, the law, as Gabel and Harris point out in their conclusion, is not only about legal precedents but also about moral principles and social power.

Peter Gabel and Paul Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law", J. Arthur and W.H. Shaw, Readings in the Philosophy of Law, Prentice Hall, New Jersey, 2001