Articles

Rights Discourse and Social Change: A Comment on Kimberle W. Crenshaw

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Kimberle Crenshaw discusses the role that law played, and/or could play, in the struggle for racial equality. She tackles the meaning of the civil rights movement of the 1960's, for the Black community in the United States, through arguing with especially CLS scholars and their rights critique. Since it is obvious that the present situation of Blacks in the U.S. is not the kind of equality the civil rights movement intended to realize, the question arises as to whether the shortcomings can be attributed to "failure of law" or whether other explanations are available.

With respect to possible explanations, Crenshaw starts by marking out three available positions: (1) the neo-conservative one stating that the aims of the 1964 Civil Rights Act have been achieved in the meantime (and therefore its means of, especially, affirmative action can now be abandoned); (2) the liberal one admitting that social change is a long continuous struggle (and therefore stating a failure of law would be premature); (3) the critical stance maintaining that the extension of rights is an improper means for achieving social change anyway (meaning that law reinforces the status quo and thus the oppression of the dominated by the dominant instead). Crenshaw argues that none of these positions is convincing.

The neo-conservative position (which was by and large also that of the Reagan Administration, and will presumably be that of the Bush Administration) can be easily

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unmasked as mere rhetoric: its claim of not mixing up politics and law is highly political in itself. In her criticism of the liberal position, Crenshaw already lays ground for further treatment of the subject. She states a tension in the Civil Rights Act, namely, that it is silent as to whether equality means equality in process (with a narrow scope of protection through the Act) or equality in results (with a broader scope). The answer to this question is dependent on the world view of the interpreter which, in this context, means more or less the acknowledgment of racism as a still present social and ideological phenomenon. (In my view, this hidden ambiguity of the Civil Rights Act seems likely to be the reason for having found a majority agreeing on it in 1964: a then possible coalition of progressive and merely liberal political forces.)

The rights critique of CLS is different. It asserts the inability of law to bring about social change because law as an ideological construct rather supports and nurtures the status quo. The underlying concept for this noting is Gramsci's concept of ideological hegemony, meaning that dominated classes support the actual system because the dominating class makes the dominated believe in law (and the existing order as a whole) as logical, fair, and virtually inevitable. This causes the oppressed to lose sight of their real objectives, and act as if the ideology were real, hence reinforcing the oppressive structures of the moment.

Crenshaw admits the usefulness of this concept for understanding the limited potential of antidiscrimination law-giving with respect to actual social change. Yet, she does not halt at this point. Crenshaw implicitly asks two questions, one from an historical-practical aspect, and another concerning a theoretical implication (yet also of some practical importance): First, was the civil rights movement wrong in pursuing (or, trying to pursue) its goals with legal means? If the CLS rights critique were correct, this would have been a mistake (or, at least, as futile as Don Quixote's fight against the windmills). Second, what has CLS to offer the oppressed groups in order to recognize the ideological trap of dominant hegemony if law does not do it? According to Crenshaw, CLS's rights critique suffers from two interrelated deficiencies: (1) the lack of contextualization, and (2) the lack of a prescriptive analysis.

As to (1): Crenshaw neglects (and, in my opinion, correctly) the analytical distinction between exercising rights and politically effective action (CLS scholars claim that the latter is the important one whereas exercising rights can be "trashed"): "Perhaps the action of the civil rights community was effective *because* it raised the novel idea of Blacks exercising rights" (III.B., emphasis added). The exercising rights context in which Crenshaw sees Blacks is the goal of Black people to be included "in the American political imagination", "not just to get a seat in the front of a bus". Thus, exercising rights was not (only, or, not at all) following dominant ideology (and thereby reinforcing the existing order), but it was the glue of a social movement. It was actually taking the dominant class by their own words and dismantling them as ideology. Crenshaw does not question the inability of law alone to trigger social change; there must be a crisis, a challenge to the existing order recognized by those in power before things are altered. But again:

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Crenshaw sees the crisis created *through* the civil rights movement's strategy to call not on equality alone but on legal equality, so that exercising rights was at least not an historical mistake.

What Crenshaw does not find at all in CLS's writings on antidiscrimination, is tracing the critique back to racism although it was, in Crenshaw's opinion, exactly racism that led to antidiscrimination law. This may be so because no one belonging to the dominant group can grasp what "racism" really means (and of course nobody wants to be called a racist). Things become clearer when Crenshaw defines "racism" as "the whites' consciousness". Then Blacks can be identified and labeled "other". As such they play an important role in hegemonic ideology – without participating in it as Gramscian supporters, because that meant Blacks were unable to imagine a different worldview. On the contrary, it is exactly this having Blacks as Others that hinders oppressed whites to imagine a better world beyond the dominant ideology: it creates a consensus between otherwise non-consenting groups (so between the dominant whites and the white working class), with respect to the existing order. Hence racism is the background, in front of which the Gramscian concept works in the U.S. The only conclusion Blacks can draw from this is to use the tools offered by the dominant ideology (because a counter-concept would not be heard at all) – and to preserve a race-conscious concept of their own (that is mainly one of collectiveness).

Insofar, Crenshaw sees in the rights discourse an appropriate (even if not sufficient) means for social change with respect to racial equality. A mere critique of the existing order "from the outside" would have accomplished less, if anything at all. Utilization of legal rhetoric led to an ideological and political crisis that consequently "triggered efforts to legitimate and reinforce the authority of the law in a way that benefited Blacks" (Part D.III.). However, Crenshaw does not overlook the danger arising from the now established Black middle-class inasmuch as they drop out of the ongoing struggle for equality. Her remedy is the creation of a "counter-hegemony by maneuvering within and expanding the dominant ideology" (Part D.IV.) along with (and that's again the most serious challenge to Blacks) the minimization of "the political and cultural cost of engaging in an inevitably co-optive process in order to secure material benefits" (Part E.).

The question that was always present throughout the conference – "What is Law?" – was implicitly reformulated by Crenshaw in the way that she asks if law, and the rights it provides, may be a suitable tool for social attainments, or for social change in general. I think the best corroboration for Crenshaw's analysis is to ask if it is applicable also to other societal groups being dominated. I think, e.g., of Native Americans in the U.S., the foreign workers (especially from Turkey) and foreigners asking for political asylum in West Germany, and women on both sides of the Atlantic.

Of course, the historical conditions under which the domination of these groups occurred and have been maintained, are different from each other. Moreover, the vision of the Blacks in the U.S. – racial equality – and racist ideology as the basis for the hegemony

presently found, as described and analyzed by Crenshaw, do not fit exactly. But if we extend the vision to equality of all human beings, and extend racism to sexism and hostility towards foreigners, it becomes obvious that the structure is similar if not the same: racism as well as sexism or hostility to foreigners function to label the Other.

By this, I do not say that the social conditions and situations of Blacks, foreigners, minority Natives, and women are substantially alike; I claim this only on an abstract, structural level. But, what then is the unifying bond with respect to the law? I think that it is due to the fact that the legal world in advanced societies is white men's order. This might be the reason why CLS could formulate the rights critique as it did: the crits just could not perceive the importance of law as a tool for improving social conditions because they were, at least in the beginning, mostly white males. Thus they themselves did not struggle for inclusion in the dominant class, and therefore they had no vision of the kind described by Crenshaw: they belonged to the societal group that is, and has always been, privileged by, and responsible for, the law as it is. (By saying this I do not mean that the crits or other critical white males are satisfied with the law as it is, or are not sympathetic towards the underprivileged. On the contrary, I acknowledge their sympathy for Others and the struggle some of them wage because they are Leftists. However, I think it makes a difference when one struggles out of a choice, compared to when one is born Black or female or Native American which cannot be changed by will.)

What are the options available to minorities facing the dominant order of white men? Consequently to Crenshaw's paper, I see two possibilities: (1) an adaptation to the dominant order, and (2) the establishment of a counter-concept. The first option does not seem promising because it includes that the Others' societal groups will never really belong to the dominant class (if that happened, it would not be this anymore), and the second way is deficient because a counter-concept will never be heard. Nevertheless, a combination of both might provide for a chance (if of course not a guarantee) for social change. I think both are necessary, in the long run, inasmuch that the adaptation may help arrive at short-term improvements that are better than no change at all. This means taking the dominant seriously, taking their talking of equality literally. But it means adaptation to white men's order only so far as the legal tools they provide are used. (And of course there is an irony in this.) But, the second way is by no means dispensable. It is needed to fill the gap that becomes visible when the dominant ideology is dismantled by means of taking the rulers seriously. And that is the lesson we can learn from Kimberle Crenshaw's story: a counter-concept is necessary above all for the struggling Others themselves because such movements would be jeopardized by falling apart (and being divided by the still dominant class) if they have no counter-concept to stick to after half-way achievements.

I think when attempting to answer the question whether or not the law may be a tool for social progress, one firstly has to determine what progress means. Progress as such has been, and still is, judged to be positive by the hegemonial ideology, but that cannot last

long any more. Progress without a vision, or a concept at least, is nothing. When we have a goal and proceed in order to attain it, we can define progress. The same is true for legal development: if we have no objectives, we cannot measure it unless we remain on a merely descriptive level. (Maybe that's why so many scholars are attracted by autopoiesis: it leaves the goal open, a black box – or, is it rather an early surrender to the various groups of Others and the concepts they could and should develop?)

In sum, I think of Kimberle Crenshaw's paper as an excellent example of what is missing in most CLS writings on rights critique: the link between law as a system and law as a medium (to put it in Habermasian terms) – a medium not only of dominant policy-makers but also as a tool in social and political struggle, i.e., in the hands of oppressed societal groups. What law is cannot be answered by a single definition. When talking in and about law we should make it clear whether we are considering law as a mere self-affirming system or as an instrument to achieve social change. I agree with the rights critique insofar as law will never be the only means by which social change may be attained. Social change cannot be described in legal terms alone unless we go back to such problematic categories like "divine law", "natural law", or Kelsen's "basic norm". Aiming at justice may be a universal principle, and it is presumed that law helps to provide justice. But law is bound to historical situations, and thus, in my opinion, it can neither define justice nor only establish permanently and universally valid criteria for arriving at a definition of justice because law is recognized, and justice realized, only through and by acting people.