

Law and Social Order: The Capacity of Legal Reform to Facilitate Social Change

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Abstract: This essay reviews scholarly literature to explore the potential for legal reform to foster redistributive and participatory social changes in Canada. Distinctions are found among liberal, Marxist, critical race and feminist theories in the potential they recognize for social change through legal reformation. Theories which oppose liberal presumptions about objective justice can be distinguished by views of law as a mechanism of oppression and, alternatively, as a vehicle for resistance to oppression despite strong institutional and cultural constraints on social change. Legal reforms may lack effectiveness when they challenge dominant cultural stereotypes of women, minorities or poor people.

This essay explores the opportunities and limitations of using legal reform to address the social problems of political exclusion and inequitable resource distribution within Canadian society. Law, as the state's instrument for promoting the stability of its society, makes law a reasonable site of contestation by people who find themselves disaffected by the status quo. Political efforts, aimed at increasing the redistribution of society's wealth or including minority groups in Canada's legislative and policy decisions, challenge the existing social order and so promote, temporarily, *instability* within that order. Hence, Canada's law-making institutions tends to favor those advocacy groups whose grievances conserve the existing social order and resists those groups who challenge official definitions of 'collective' Canadian interests, values and norms. The field of sociology is replete with scholarly studies of the relationship between dominant social groups and law, and many have identified interactive mechanisms which reproduce social hierarchies, political exclusions and wealth disparities. Marxist, critical race and feminist theorists have presented strong cases against the capacity of law, in legislation or practice, to facilitate movements aimed at redistributing wealth or accommodating the interests of subjugated groups. Among the challenges to the liberal official view of law presented here, some admit more opportunity for social change than do others. Two broad perspectives on law are distinguished here; law as a mechanism of oppression and as such opposed to liberation movements, and law as a vehicle for resistance to oppression despite strong institutionalized pressures against social change.

Legal reformation has, on an empirical case basis, evidently accomplished justices where they were due, and a liberal perspective views these as evidentiary success of democracy and capitalism in overcoming the elite-group arbitrary rule of the medieval and pre-industrial era. The "Official Version of Law" accommodates this perspective, as our legal doctrine holds itself to be an "impartial, neutral and objective system for resolving social conflict" (Naffine, 1990:24 cited in Comack, 1999:21). Enlightenment-era philosophers and modern laymen alike proclaim the existence of an authority higher than the thinker – such as reason, greater good or other moral hierarchy or natural order – to which the thinker can appeal to make impartial judgments (Kant, 1981; Mill, 2001). In the liberal world view positivism and rationalism

are characteristic of humankind, almost inhumanly so since this Euro-centricity obscures real cultural differences in world views and the respective premises from which reality is rationalized. It is on the basis of this 'objective truth' that state institutions proclaim goals and outcomes of participation and equality, and law has been constructed around those discursive truths. However, critical theorists and advocacy groups have advanced strong cases against liberalism's presumptions and acclaimed accomplishments of individual freedom and political equality.

The official text of law has enshrined liberal democratic assumptions of freedom, equality and the capacity of rational negotiation to reach consensus or else to determine utilitarian sacrifices, and has been criticized by political theorists as such (Pateman, 1988; Comack, 1999; Moore, 2001). Law's commitment to formal equality of all persons and impartiality of judgment – and hence blindness to both difference and history – is a reflection of the liberal individualist ideology of the dominant white male Anglo population by and for whom the legal system was originally formulated. Liberalism exhibits a circular reasoning, whereby the conclusion that democracy is working – that the state justly distributes resources and fosters political participation – is derived from a same premise, of political equality and hence equal access to legal formulation and to state resources generally. The significance of this circularity is that any evidence of inequalities within society demands another theoretical framework for thinking about the relationship between citizens and law.

The presumption of formal equality inhibits an investigation of how informal power relationships produce unequal judicial outcomes despite formally fair processes. Elizabeth Comack (1999) argues that law's commitment to 'objectivity' and formulaic, consistent administration of justice requires it to abstract individuals from their unique circumstances and histories, and in doing so law reduces real differences into an abstract legal subject, thus creating an appearance of equality. At the same time, and partly due to this formal ignorance of social disadvantage and systemic racism and sexism, the material impoverishment and segregation of many women and ethnicities is naturalized, interpreted in law as a reflection of lifestyle choices made individually. The idea of an objective arbitrator of justice obscures the real privilege which all laws accord to some citizen interests over others. Other critical

sociological works have theorized the various privileges accorded to different social groups.

Marxists were among the earlier sociological theorists which saw law as a mechanism of oppression. From this perspective, law and the state which administers it are designed to reproduce economic and related social inequalities. Gramsci's concept of hegemony provided a framework with which to understand both the popular legitimacy of law and historic social justice advances without relinquishing the oppressive character of the state (1971). In this framework, the state's institutions of media, education and law, among others, promote the dissemination of capitalism-friendly values throughout the population by selectively employing language and ideas about society which frame the state's activities as democratic, just and natural. Hence, social concessions are made to subjugated populations only to the extent that is necessary to convince them that the system is working in their favor, and thus quell political mobilization.

A specific example of how law appears to concede to subjugated populations, is in the sentencing reforms proclaimed in law in 1996, to address the intractable problem of over-imprisonment of Aboriginal peoples in Canada. The legislative reforms to the Criminal Code in Section 718.2 (e), which mandates courts to pay "particular attention to the circumstances of aboriginal offenders" and to seek alternatives to incarceration, can be seen as a reluctant social justice concession made to dampen political mobilization (Criminal Code of Canada, 1985, c. C-41, 1996). Section 718.2(e) was consequently taken up by the Supreme Court of Canada in the case of *R. v. Gladue*. The court's ruling upheld section 718.2(e) yet has not altered the administration of justice. My own undergraduate research into the sentencing of aboriginal offenders suggests law reforms such as section 718.2(e) did not actualize substantive justice for Aboriginal peoples.

How do we make sense of these findings that suggest, contrary to the claims of liberalism that law is the means to equality, law reforms do not transgress conditions of inequality? While Gramsci's framework of hegemony was advanced to understand how elite class domination is maintained within a democracy, critical race theorists have expanded the model of hegemony to include racial domination in society, or alternatively have asserted the preeminence of race, instead of class, as the major site of conflict between law and society's members.

Frantz Fanon was an early theorist of the relationship between racial differences and social order (Julien, 1996). Fanon imagined ideal masculinity to be aggressive and warrior-like, and hypothesized that the widespread apathy, as well madness, among the colonized black population in Algeria was an effect of their colonization. Algeria's long imperialist domination had led to an internalized 'slave' identity, alienated, emasculated and envious of the white masters. This line of reasoning contributed to Fanon's denouncement of cooperative action – such as political or legal reform – as a means to achieving the kind of changes necessary to liberate a colonized population out of their despair. Cooperative action legitimizes the colonial rule and so the formally liberating changes in law would be resisted and subsumed by the existing cultural complacency. Seen from this light, racial domination occurs through cultural appropriation and co-option much like the capitalist domination envisioned by Gramsci (1971). Fanon was convinced that independence had to be forcibly seized, not requested from a higher authority, in order to revive the sense of empowerment and entitlement among the colonized population which would allow their self governance to endure. Fanon's

insights into the role of law in society have been adopted by critical race theorists to understand Canada's enduring racial disparities.

Sherene Razack, and contributors to her book *Race, Space and Law*, all argue through various historical analyses that law designates the spaces where particular activities are permitted and prohibited and that this process is bound up with the projection of privileged and degenerate identities onto the inhabitants of those spaces (2005:102). Razack's analysis of the trial of two white middle-class boys for the murder of a poor aboriginal woman, Pamela George, links Canada's colonial, racist nation-building past to the modern treatment of natives by the justice system (2005: 123-156). The socio-economic status of the two white boys was constructed, in defense of their character, as a natural endowment for productivity and success, while the 'poor prostitute' status of the aboriginal female was portrayed as an inherent deficiency of her character. This character polarization and naturalization framed the white boys' behavior as a minor out-of-character slip-up and Pamela George's murder as her own pitiful fate, thus totally obscuring the historic and explicit exploitation and assimilation of Aboriginals which forced them to leave reserves for the cities in hopes of finding more secure conditions. Moreover, racial segregation was facilitated within the cities through zoning and 'nuisance' laws which determined the income groups and cultural practices that were permitted in each city neighborhood (Razack, 2005:129). The process of separating the civilized self from the 'other' native materialized spatially in differential privilege to land, state resources and citizenship rights. And Renisa Mawani argues that the regulation of alcohol consumption among natives was a technique for policing their social and sexual interaction with whites (Mawani, 2005). Mawani's close analysis of the sexual and domestic regulation of natives draws attention to the state's active role in socio-moral regulation which is not organized along class lines. Thus, she adopts the Marxist's coercive-mechanism model of law, but adapted to highlight a predominant state interest in ethnic identity, "a strong white Canada" (Mawani, 2005:49).

Jennifer Nelson adopted a similar perspective of legal reform as a mechanism of racial oppression by the dominant white group in her exposition of the birth and displacement of Africville, a racially segregated refugee encampment skirting Halifax (Nelson, 2005).

The author's historical perspective illustrates the manipulation of zoning and behavioral regulatory laws by the dominant group to enforce degenerative circumstances upon the Africville community – by placing the city dump, slaughterhouses and other 'dirty' industries on immediate the perimeter of Africville. Those very circumstances were later abstracted from history and used in the legal discourse to naturalize, and hence depoliticize, the social issue of racial prejudice. Ultimately, what Sheila Dawn Gill calls "the violence of liberal democratic abstraction" justified the displacement and assimilation of the Africville community on grounds of helping the blacks to overcome what was viewed as their own squalor (Gill, 2005:160). Legal reform in the context of Africville was a mechanism for obscuring real oppressions, culminating in a 'commemorative' monument and park on the site of the historic Africville community which, by all indications, was designed to erase the historic subjugation from modern memory. Even in its commemoration of diversity, law was used to obscure substantive conflicts between the diverse groups. If racial discrimination is not *apparent*, it is precisely because it is *encoded* (Nelson, 2005).

While these Marxist and critical race theories present law as a strong structural mechanism of dominant-group oppression, other

critical theorists suggest more potential for law to facilitate social change. Some have identified a disconnection of law, as an encoded text, from the site of its application, in practice (Comack and Balfour, 2004). This analytical perspective recognizes the discretionary power of people occupying institutional roles, such as judges and lawyers. The recognition of agency admits more potential for legal reform to contribute to greater social equality, although strong institutional constraints are also recognized. Critical socio-legal scholarship (Comack 1999, Comack and Balfour 2004, Wright 2001) address the role of neo-conservative societal 'myths' or 'scripts', employed by legal agents within legal practice, in reproducing power inequalities, contrary to the formal remedial purposes of laws. However, despite such resistance to the changes mandated by legal reforms, this framework, of legal practice depending on societal stereotypes, carries the implication that broader changes in societal perspectives can change how law is administered.

Comack and Balfour (2004) interviewed lawyers and examined case studies to expose how systemic discriminations based on gender, race and class are reproduced. The authors engage the concept of "structured action", drawing from Messerschmidt, to illustrate how the structure of the institution of law channels lawyers' behaviors and confines the realm of possible outcomes (Comack and Balfour, 2004:20). The occupational role of both lawyers and judges in to establish or refute credibility, culpability or riskiness of persons, and so they are faced with the task of evaluating character – characterizing – and cannot but engage cultural stereotypes of normal and abnormal, praiseworthy and condemnable. Legal reforms intended to ameliorate historic prejudices in the court system are thus confronted by this adversarial yet 'objective' institutional structure which relies on discriminating between deserving and undeserving individuals. The discretionary powers embedded within the adversarial justice system intervene between politico-legal reforms and material social outcomes, and thus heavily delimits the possibility for social change through legal reform (Comack and Balfour, 2004).

Joanne Wright contributes to a discussion of the efficacy of legal reformation by exposing how judicial activism is resisted by traditional norms and beliefs about 'common sense' within the court ranks, and by the spin-power of neo-conservative media which instigate popular backlashes against judicial activism (2001). Wright focuses on the R. vs. Ewanchuk rape case and the ensuing public controversy facilitated by a right-wing newspaper, and her analysis provides an example of the limited effectiveness of legal reform. Legal reforms were made in 1992 to clarify the rape-trial resolution process and in this way combat sexist judicial biases which had historically prevented rape convictions in many cases. Yet the original trial judge in the Ewanchuk case entirely neglected to recognize the law which prohibited the defense of 'implied' consent to sexual activity. At the same time the principal of 'innocent until proven guilty' placed the burden of proof on the prosecutors to prove that the victim had not consented. This arrangement favors the offender whenever proof is in question, as is frequently the case in 'he-said she-said' sexual assault cases. We can see here that the very structure of the legal system construct social power disparities, between defendants and complainants, and that the extent of this disparity depends upon the disposition of the judge in each particular case, since the judge holds the decisive power to interpret, emphasize and omit, and thus favor. While the Alberta Court of Appeal was forced to recognize the error of law at the trial level, they were not forced to alter the result. A majority of that court found that the victim's consent was not only implied but *evident* in her moral character, which was constructed

by contrasting her with a conservative script of the virtuous women, as clothed in "bonnet and crinolines" and committed to Christian values and norms (Wright, 2001:176).

This case is an example of how legal agency, in both reforming laws and promoting women to judge positions, is significantly constrained by the structure of law and by other power holders within its institutions, all of which are saturated with traditional societal norms. While the Supreme Court of Canada found Ewanchuk guilty, revealing that his prior acquittal was based on nothing more than "myths and stereotypes", the fact that this finding sparked public controversy testifies to the strong social pressures against judicial activism (Wright, 2001:178). Resistances against the prevailing "societal attitudes" that are embedded in law gets characterized as 'political', while judgments that uphold those prevailing views are dubbed 'objective' (Wright, 2001:201). This circumstance of social preservation, both within civil society and within its institution of law, constrains the progressive legal reform movements. Legal reforms aimed at ameliorating social inequalities have limited effectiveness precisely because they are "dangerous to a legal system that depends on objectivity" (Wright, 2001:192), such as rational democratic one. Moreover, they are the bane of a capitalist society which depends upon social inequalities to maintain high capital gains.

Both the formal text of law and legal practice are constrained by the ideological perspective and social norms of their founders. Canada was a European capitalist colony before it was a democratic nation-state, and that historic commitment is still evident in our modern institution of law. Marxists expose how class inequalities are fundamental to capitalist development, and hence tend to be skeptical of using the political process of legal reform as means to accomplishing social justice (Luxemburg, 1988). Rather, politics is for raising class-consciousness and provoking revolutions. With respect to democracy, Pateman (1988) has argued that the 'fraternity' to which 'liberty' and 'equality' were meant to apply in the drafting France's constitution was limited to a class of white property-owning men, who had taken as a given that their society would be built upon the labor of un-free women and black slaves. They had imagined a relatively homogenous ruling class and so the democratic mechanism was not designed to accommodate class, race or gender contests. Sherene Razack (2005) and other critical race theorists have shown that political inequality between races is intrinsic to the colonial nation-state. And Comack and Balfour have illustrated that the structure of the legal system, including the duty of defense lawyers to provide a best defense that compel them employ gendered societal 'scripts' about where violence is and is not legitimate, propagates male privilege in cases involving violence (2004). All of these approaches admit strong resistance to the use of law as a means of facilitating social change.

Law evidently evolves, as it is not static but rather regularly amended. That evolution is associated with changes in social norms, since modern law certainly doesn't closely resemble the overt gender and racial biases of less than a hundred years ago. Accounts of both judicial and electoral activism are available to support the claims that law is progressive, that the competitive playing field between social classes is leveling, and that the subjugated groups are more materially comfortable than they once were. However, we are wise to consider these cases as exceptions to the rule. Progressive legal reform gains are the products of exceptional discursive struggles which are severely circumscribed by the 'color blindness' of liberal ideology, the adversarial structure of the legal system, and the reactionary activism of social conservatives.

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