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RIGHTS AND SOCIAL CHANGE

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1.1. Abstract

What are the possibilities and potential of law in bringing about social changes for the disadvantaged of society? Can the law, specifically the strategic use of rights, be a resource for social change? Can rights change or improve the social situation for the powerless of society – the poor, minorities, and other disadvantaged groups?[1] The objective of this paper is to examine some of the current theoretical issues in the debate, and to consider the possibilities and pitfalls presented by rights. No attempt is made to be exhaustive, an impractical undertaking given the breadth of literature on the subject; rather the objective is to present an overview. The primary focus shall be rights litigation because it is the most salient feature of rights strategies. But rights are much more than that. The focus on litigation is not to diminish the equally important role that rights play in the broader picture, for example, in creating rights consciousness, or as catalyst, which some argue is much more important than litigation.[2] The case studies in the following pages are purposively diverse and selective but cover the major aspects of rights – litigation, consciousness, leverage, and as catalyst for mobilization – the objective is to be expansive and overarching. The paper is divided into two parts: (a) litigation and rights, and (b) selected case studies.

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1 As defined by the *Guardian/Observer* 'big issues' are, amongst others: asylum-seekers, social exclusion, mental health and homelessness (see http://society.guardian.co.uk/mentalhealth/0,8145,386880,00.html).

2 P Ewick and SS Silbey, *The Common Place of Law: Stories from Everyday Life* (1998); D Engel, 'How Does Law Matter in the Constitution of Legal Consciousness ' in BG Garth and A Sarat (eds) *How Does Law Matter* (1988); M Hertogh (2004) 'A 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich' 31 Journal of Law and Society 4 457

1.2. Introduction

The strategic use of law – specifically rights – by non-governmental organisations advocating to advance social justice issues has long been an established part of the political landscape in the US, Canada, and other jurisdictions.[3] And, with the recent introduction of the *Human Rights Act* (HRA), it has become an emerging field for scholars and a new and untested option for many advocacy groups campaigning on various issues in the UK. While the strategic use of law has long been a component of campaigning tactics in the UK it has not, to date, been as widespread or sustained as it is in Canada or the US or as widely studied by scholars.[4] The movement towards this strategy appears to reflect a growing international phenomenon as seen in the newly emerging democracies of Eastern Europe[5] and other parts of the world.[6]

In some respects the introduction of the HRA is part of a greater global movement where the subject of human rights has come to occupy a prominent role in the discourse of the day. This has yielded some uncomfortable truths, which are that many humans are denied their rights, not only in authoritarian states but also in western liberal democracies. In efforts to address the widening gap between the haves and have-nots, social advocacy NGOs have turned to the law based on the belief that not only is the law capable of addressing the

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3 SLR Anleu, *Law and Social Change* (2010); D Galligan, *Law in a Modern Society* (2006); H Hershkoff (2009) 'Public Law Litigation: Lessons and Questions' 10 Human Rights Review 2 157-81

4 C Harlow and R Rawlings, *Pressure through law* (1992); W Friedmann, *Law and Social Change in Contemporary Britain* (1951); For one of the few studies see: T Prosser, *Test cases for the poor: Legal techniques in the politics of social welfare* (1983)

5 See, for example, T Campbell KD Ewing and A Tomkins, *Sceptical essays on human rights* (2001); A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (2000)

6 See: J Hammond (1999) 'Law and Disorder: The Brazilian Landless Farmworkers' Movement' 18 Bulletin of Latin American Research 4 469-89 (for an examination of rights litigation in Brazil where landless peasants have successfully used the law in expropriating underused farmlands); EA Feldman, *The Ritual of Rights in Japan: Law, Society, and Health Policy* (2000) (for the experiences of Japanese reformers in changing health policy); D Barek-Erez (2002) 'Judicial Review of Politics: The Israeli Case.' 29 Journal of Law and Society 4 611-31 (on the Israeli Supreme Courts continued excursions into areas previously considered non-justiciable***);*** and CR Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (1998) on activism by the Indian Supreme Court; see also: Institute of Development Studies (2006) *The Rise of Rights* www.ids.ac.uk/ids/bookshop/briefs/index.html.

imbalance, but that it is an efficient and effective means of doing so. Proponents argue that strategic uses of rights law are powerful tools in the battle for social justice. Opponents, on the other hand, argue that the inherent ideological biases of rights serve to constrain and limit social movements, and that rights are costly, ineffectual, and ultimately do little to change the status quo.[7]

In view of the divergent positions this paper adopts, as a point of departure, Thompson's (1975) view that law, more precisely the rule of law, must be more than the sham that critical legal or conflict-oriented scholars accuse it of being. According to Thompson 'it may disguise the true realities of power, but, at the same time, may curb that power and check its intrusions'.[8] While some studies have pointed to the law's dearth of successes in addressing matters of social justice, other studies have concluded otherwise because powerless constituents have successfully challenged the status quo. And they have done so with some regularity.[9] There is no question, however, that the results have been decidedly mixed, particularly in certain public policy areas such as, for example, asylum in the UK. This should suggest caution to groups considering rights as a strategy. At the outset, however, the position of this paper is that a strategic deployment of rights holds the potential to advance social justice issues. However, and the evidence is persuasive, it is not a panacea for the various social ills that beset societies.[10] Modern day societies are far too complex and dynamic for a one-solution-fits-all approach, or to expect that any particular approach – for example, rights – can be capable of addressing its myriad of social ills. Barack Obama, former community activist, law professor, and now President of the US, called it an

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7 For a review of these viewpoints see: BG Garth and A Sarat, *How Does Law Matter?* (1998); BG Garth and A Sarat, *Justice and Power in Sociolegal Studies* (1998)

8 EP Thompson, *Whigs and hunters: the origin of the Black Act* (1975), p. 263

9 For a review of various case studies of rights at work see Part B; also DA Schultz, *Leveraging the law: using the courts to achieve social change* (1998); B Swedlow (2009); H Hershkoff (2009)

10 K Makin, 'Unions, Most Minorities Have Left the Court Empty-Handed' *Globe and Mail* (11 Apr 2007) A8

'imperfect tool for social change'.[11] But it remains the case that, particularly in Canada and the US with its established tradition of rights, disadvantaged groups continually turn to the law to advance social justice agendas.[12]

1.3. Part A: Litigation and Rights

Litigation, as a means of effecting social policy changes or advancing causes generally considered to be consistent with social justice, is a relative newcomer to the field of socio-legal inquiry. A former debate in the sociology of law, on various theoretical arguments, which viewed law as a consensus-based set of norms in a society characterized by social contract, or as conflict-oriented and characterized by class-divisions owing to unequal and disproportionate distribution of wealth and resources, seemingly moved onto other areas. The new concerns were more of an applied and practical nature focusing on, for example, the possibilities of using law to change social relations or to even the playing field, and asking if the law should be used to do so. Until recently, attempts at social engineering in the area of social justice were of a relatively modest but no less ostensibly noble nature; examples include laws implemented to promote racial harmony or to address discrimination in the work-place.[13] How such attempts have turned out are empirical questions. Arguably these early attempts can be seen as seminal to the grand-scale attempts of today as evidenced by the recent flourishing of constitutional protection in the forms of Bills of rights. Perhaps one of the more ambitious has been the recent introduction of the *Human Rights Act* (HRA) in the UK which has been called a 'social revolution' and 'the most significant change to British

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11 J Kantor, 'Teaching Law, Testing Ideas, Obama Stood Apart ' *The New York Times* (30 Jul 2008)

12 MM Shapiro and A Stone Sweet, *On Law, Politics, and Judicialisation* (2002)

13 R Cotterrell, *The Sociology of Law: An Introduction* (2nd edn) (1992) p.44

law since the Magna Carta' in view of its announced objective of bringing about a cultural change or 'culture of rights' in Britain.[14]

While the US has had its Constitution since the 18th century, it has only been the latter half of the twentieth century that has seen the emergence of organised and concerted efforts directed at using constitutional rights to advance social causes, as evidenced by some landmark US Supreme Court decisions addressing compelling issues such as racial segregation and abortion. Rights litigation in Canada was encouraged by a new constitution in 1982, which included the much debated and agonised over *Charter of Rights and Freedoms*.[15] Just like the HRA in the UK, the *Charter* was promoted as fulfilling the needs of minorities for protection and participation in mainstream Canadian society. More poignantly, when the equality provisions of the *Charter* came into effect three years later, there were scenes of celebrations across the nation. Minority groups, euphoric with the promises of constitutional protection, burst into spontaneous and organised celebrations as if somehow their world had suddenly changed for the better.[16] And this was even before any aspect of the equality provisions had been defined, challenged, or litigated. Not many knew what it would look like but assumed it would be better than the status quo. The mere existence of the *Charter* was the cause for celebration demonstrating a consciousness and belief in the power of rights. Even before the equality provisions came into effect some NGOs, such as LEAF (Women's Legal Education and Action Fund), had begun taking an inventory of policies to challenge and have been at the forefront ever since in promoting equality rights.[17] One can now look back at over twenty-five years of life under the *Charter* and ask if the celebrations

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14 Home Office, *Rights Brought Home: the Human Rights Bill* (1997); BBC, 'Landmark human rights law enforced' (2000) Oct 02 http://news.bbc.co.uk/2/hi/uk_news/951753.stm; C Harvey and British Institute of Human Rights, *Human Rights in the Community: Rights as Agents for Change*. (2005)

15 See: M Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1994)

16 See: P Sharma, *Aboriginal Fishing Rights: Laws, Courts, Politics* (1998)

17 FL Morton, *Law, politics and the judicial process in Canada* (2002)

were prescient or premature. Was it a display of naiveté or perceptive understanding of the possibilities presented by rights? Notwithstanding a fairly mixed-bag of Supreme Court decisions that have mostly favoured powerful interests Canadians 'love their *Charter*'.[18]

1.3.1. Theories of Law and Social Change

Liberal democratic societies with all their promises and guarantees of equality are characterized by immense inequalities and social divides: refugees and new immigrant communities in the UK, for example, are virtually excluded from the mainstream society and live in general deprivation and poverty;[19] indigenous peoples of Canada and Australia live in conditions of despair that rival third-world nations and rank at the bottom of almost all social indices.[20] These are not isolated examples. That such disparities should exist in countries of great wealth and democratic institutions raises profound questions. For the disadvantaged in liberal-democratic societies it has been hypothesised that the law can be a resource for social progress, a tool for bringing about meaningful social change. Notwithstanding the sharp divide in the debate about the role of law in the fight for social causes, it is evident that various NGOs continue to regard the law as an arena where their causes can be effectively advanced. The theoretical suppositions that have given rise to the debate are based on liberal ideals such as, for example, winning legal battles results in social progress. From this premise flow other assumptions: that legal victories serve to legitimatise social struggles; places the issue on the political agenda; and, empowers the litigants. Most prominent is the assumption that the law acts in an even-handed fashion and metes out justice accordingly. While there is considerable research and evidence that have questioned such assumptions and have demonstrated that courts and judges do not act even-handedly, the powerful win most often,

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18 D Butler, 'Charting the Impact of the Charter' *Ottawa Citizen* (15 Apr 2007) A6

19 Child Poverty Action Group, *Parallel Lives: Poverty Among Ethnic Minority Groups in Britain* (2003)

20 J Pilger, 'Under cover of racist myth, a new land grab in Australia' *The Guardian* (24 Oct 2008); P Sharma, *Aboriginal Fishing Rights: Laws, Courts, Politics* (1998)

the have-nots do not come out ahead, and judges are not immune from political pressures, these beliefs persist.[21]

The opposing views can be subsumed under the critical school banner, which sees society as characterized by conflict and class relations of domination and subordination. Critical theorists see law as an arena where the odds are heavily stacked in favour of the powerful, and ascribe naiveté to those who subscribe to the assumed power of law to change the status quo. More practically, they argue, the assumptions overlook one of the greatest sources of inequality, the material conditions of disadvantaged litigants who do not have the means to wage protracted legal battles. The critical school takes the view that litigating for rights is a trap because the objective of law is to maintain and perpetuate the status quo. This view ascribes sinister motives to an ill-defined entity, the powerful, because law is seen an instrument that serves the interests of the powerful of society. Therefore, the most that disadvantaged groups can hope for are symbolic formal victories devoid of substantive content. Critical theorists take particular exception to the constitutionalisation of rights, arguing that its lofty language and promises serve as an ideological weapon seducing the unwary by promises of what is ultimately unattainable.[22] According to Mandel (1994) it is no accident that the very things that make one equal before the law are precisely the very things that makes one unequal in life. Can the law ever broach such divides and contradictions? The answer, according to Mandel and other critical scholars, is no.[23]

The answers, however, are not that readily apparent. The social world is a grey arena and cannot be demarcated conveniently into ‘yes’ and ‘no’ categories. But is there a middle

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21 M Lazarus-Black and SF Hirsch, *Contested States: Law, Hegemony, and Resistance* (1994)

22 M Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1994) ; J Fudge, 'The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts' in T Campbell, KD Ewing and A Tomkins (eds) *Sceptical Essays on Human Rights* (2001)

23 A Hunt, *Explorations in Law and Society: Towards a Constitutive Theory of Law* (1993)

ground? The Canadian experience with the *Charter* speaks to the ambivalent nature of rights and suggests evidence which arguably supports both sides of the debate. Instrumentalists have ample evidence in the form of appellate court decisions, which have not only maintained the status quo but have weakened statutory provisions and policies meant to protect minority interests.[24] However, there have also been a significant number of decisions that have enhanced and promoted minority concerns.[25] Lesser studied has been the impact of the *Charter* in relation to rights consciousness or legal mobilization, but it is clear that the *Charter* has come to occupy a central, and sometimes pivotal, role in Canadian politics and discourse.[26] In a 2002 poll, 82% of Canadians agreed that the *Charter* has had a major impact on the protection of rights and freedoms, and 62% preferred the Supreme Court be the final arbiter on rights, compared to 31% for Parliament.[27]

1.3.2. How Does Law Matter?

When rights are deployed by advocacy groups, law becomes an arena where social justice issues are contested. This process has been variously, and sometimes pejoratively, referred to as the legalisation or judicialisation of politics because wide-ranging social issues are filtered through the lens of law. Critics argue that this has the effect of atomising immense social problems into narrow legal issues, which are then disputed in an arena

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[24] See, for example: P McCormick (1993) 'Party Capability Theory and Appellate Successes in the Supreme Court of Canada, 1949-1992. ' 26 Canadian Journal of Political Science 3 523-40; Fudge, 'The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts' in T Campbell, KD Ewing and A Tomkins (eds) *Sceptical Essays on Human Rights* (2001)

[25] See, for example: R Penner (1996) 'The Canadian Experience with the Charter of Rights: Are there Lessons for the UK' Spring Public Law, 104-25; I Brodie and FL Morton, 'Do the 'Haves' Still Come Out Ahead in Canada' (1998) University of Calgary <http://publish.uwo.ca/~irbrodie/newman.pdf>

[26] This is somewhat anecdotal and is based on observing debates in the House of Commons and generalised review of editorials in major newspapers. Although rare, it is not unusual for the government to refer major policy issues to the Supreme Court of Canada for assessing its Charter 'worthiness' before legislation is passed; examples include the recent reference regarding gay marriages.

[27] www.acs-aec.ca/oldsite/Polls/Poll1.pdf <accessed 10 Dec 2009>

incapable of grasping the nature and complexity of the problems, and of addressing them.[28] But law does matter. The contention is, however, does it matter in important ways? Much legal scholarship has explored questions of judicial impact, 'gap' studies, and the ideological biases of law, and concluded that law does not matter much in the fight for social progress or that it matters differently and not for the reasons assumed by proponents.[29] But, according to Garth and Sarat (1998a), the law is diffused everywhere and impacts upon almost all facets of the social world, often in immeasurable ways.[30] While the instrumentalist school may minimise or even dismiss the role of law in progressive social changes, it is problematic, in this era of globalisation and in view of this continuing debate, to deny its pervasiveness.

It is important to note that rights do not provide limitless options, and advocacy groups should exercise caution if emphasising such an approach at the expense of other options. First, liberal-democratic societies are not absent of competing and conflicting interests, and it cannot be expected that advocacy groups will have things their own way, or even that they have unity of purpose. Rights hold power and potential but also limitations and constraints. Scheingold (1974), decades ago, had defined rights as 'political resources of unknown value in the hands of those who want to alter public policy'.[31] However, those resources hold not only potential, but also pitfalls. According to Milner and Goldberg-Hiller (2002):

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28 M Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1994); GN Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991); A Hunt, *Explorations in Law and Society: Towards a Constitutive Theory of Law* (1993)

29 See, for example: MLM Hertogh and S Halliday, *Judicial review and bureaucratic impact: international and interdisciplinary perspectives* (2004); S Halliday (2000) 'The Influence of Judicial Review on Bureaucratic Decision-Making' Spring Public Law 110-22; G Richardson and M Sunkin (1996) 'Judicial Review: Questions of Impact' Spring Public Law 79-103; BZ Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (1997); G Richardson and D Machin (2000) 'Judicial Review and Tribunal Decision Making: A Study of the Mental Health Review Tribunal' Autumn Public Law 494-514; M Sunkin and K Pick (2001) 'The Changing Impact of Judicial Review: The Independent Review Service of the Social Fund' Winter Public Law 736-62

30 Garth and Sarat, *How Does Law Matter?*(1998); also: K Hawkins, *Law as Last Resort: Prosecution Decision-making in a Regulatory Agency* (2002)

31 SA Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (1974) p. 7

> It is now well understood that rights are not automatic trumps, that the effectiveness of rights often depends on their use in everyday conversations far removed from the legal processes, and that the role of rights is not only contingent but at times also paradoxical and perverse.[32]

Second, short of an outright revolution, what other options are there but to play by the rules already in place? The courts will not go away, and because rights are almost always contested they may eventually need to be litigated. And even when courts rule on the matter, it rarely settles the question; long-standing disputes, which result in litigation, do not necessarily end with a court's decision, although the 'losing' side may be considerably weakened. Often decisions are scrutinized and analysed for future test-case challenges, and, conversely, the losing position may find a renewal of purpose in defeat, becoming even more determined in its efforts.[33]

According to Garth and Sarat, the current debate about law and society can be generally subsumed, notwithstanding considerable overlap, under the following two analytical frameworks: instrumental and constitutive.[34] The former is grounded in positivism and takes a top-down or court-centred approach to the study of law and its impact, and is dismissive of its ability to transform existing social relations of domination and subordination. The constitutive approach places law at the centre of analysis, but at the same time de-centres formal law by taking a bottom-up approach. This approach argues for the importance of studying law in all its variations because law operates in many arenas outside

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[32] N Milner and J Goldberg-Hiller (2002) 'Reimagining Rights.' *Law and Social Inquiry* 1-18, p.1

[33] Garth and Sarat, *How Does Law Matter?* (1998); Garth and Sarat, *Justice and Power in Sociolegal Studies* (1998) ; Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (1998); Hershkoff (2009)

[34] Garth and Sarat, *How Does Law Matter?* (1998) p.2

the formal terrain. Law is continually interpreted and reinterpreted, and 'in the hands of defiant citizens law can be a source of disorder and egalitarian re-ordering'.[35]

1.3.3. Instrumentalist

The instrumentalist framework seeks to understand the direct effects or impact of law by examining what is most tangible, for example, the outcome of litigation, focusing more generally on the courts and major decisions which are evocative of social progress. In other words, a cause and effect approach asking if a decision – generally one considered to be a landmark – did bring about social changes.[36] Within this framework falls the work of some prominent scholars: law professor Michael Mandel (1994) and political scientist Gerald Rosenberg (1991), both of whom have come down solidly against rights litigation. Rosenberg, in his much debated study, concluded that the US Supreme Court was nothing more than a 'fly-paper' court. His findings generated immense academic support and praise, with many commentators urging social reformers to abandon the expense and empty promises of rights litigation and to focus on other tactics to advance their causes.[37] Rosenberg's (and Mandel's) conclusions are consistent with the views of critical legal scholars insofar as it pertains to the futility of playing by the rules set out by the powerful of society. One of the central arguments of this school is that ultimately law, even law that is supposed to ameliorate social ills, is an instrument of control that serves powerful interests and keeps subordinates in check. In other words, law perpetuates the status quo and legitimises rather than challenges the existing injustices, and therefore cannot be used by the

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35 M McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (1994) p.ix

36 For a fuller review of these issues see: Hertogh and Halliday, *Judicial review and bureaucratic impact: international and interdisciplinary perspectives* (2004)

37 See, for example, reviewers' 'blurbs' on the back cover of Rosenberg's book; see also Mandel (1994) for similar conclusions regarding the Canadian experience with rights litigation.

powerless to advance social causes.[38] The concept of hegemony is introduced to explain why it is that the masses acquiesce and play an apparently willing role in their own subjugation.

The problem with the instrumentalist concept of hegemony is the assumption that exploitation readily seen by others is not by those being exploited. Furthermore, it is problematic to seek cause and effect explanations in the social world, and herein is one of the central drawbacks with instrumentalism. It is difficult to isolate law as the variable being the cause of observable social changes. The social world is in a continual state of flux, and social changes occur over protracted periods of time. They are incremental in nature and diffused throughout society, making it problematic to ascribe the observed or measured changes to any particular cause. Further complicating the task is the existence of numerous competing explanations. When the instrumentalist framework is contrasted with the constitutive approach, some of the shortcomings of the former become apparent. The latter is holistic in outlook and takes an expansive view of the law in recognition of the complexity of interaction between law and society; it seeks to understand the nature of that interaction. Moreover, the constitutive approach argues against seeking cause and effect explanations because law cannot be properly understood in isolation from the multitude of factors which constantly interact with it.

1.3.4. Constitutive

The law provides a framework through which we understand the world or certain aspects of that world. Whereas instrumentalists see law as an independent variable whose impact, for example, on an already constituted social world can be measured, the constitutive approach sees law from a broader perspective, as more of a pervasive and diffused influence, which does not exist independently of society. Rather than asking, for example, about the

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[38] See M McCann, 'How Does Law Matter for Social Movements? ' in B Garth and A Sarat (eds) *How Does Law Matter* (1998); CE Smith, *Courts and the Poor* (1991)

impact of certain court decisions, the constitutive approach examines the role of law in bringing about social change.[39] In other words, according to McIntyre (1994) 'to argue that law is constitutive is not only to maintain that law provides categories (of how the world is seen) but also that it can be used to change ideas'.[40]

How does law work as catalyst? What is rights consciousness? What role do rights play in mobilisation? How are rights used as leverage? It is by addressing such questions, rather than examining the impact of policies or court decisions, that a comprehensive picture of the role of law in social change emerges. The constitutive approach is not so much a singular analytical framework as it is a broadly conceived bottom-up, hermeneutic or interpretive approach to the study of law, its fundamental premise being that law is a constitutive element of society. This marks a discernible shift in the theoretical terrain to a broader view of the law, and of rights. Noticeably the shift has been away from examining rights in the formal legal processes to its 'decentred' and 'contingent' nature, in recognition that the power of rights does not always reside in the courts, or in the courts' interpretation, but elsewhere. It is important, however, to note that the power of rights cannot be assumed. It is not automatic and is dependent upon the circumstances and manner in which they are harnessed by activists.[41] According to McCann (1994), to understand how law affects society it is important to pay attention to the myriad of activities or 'indirect law' which occur outside the boundaries of the conventional, an area of inquiry overlooked by positivists. Law is much more than court decisions, lawyers, statutes, and legal norms. Law is a malleable resource, and it is constantly being interpreted and reinterpreted by individuals and organizations that display a sophisticated and critical understanding of its nuances. Further, social activists and reformers are not naïve and recognize that with all the possibilities that

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39 Garth and Sarat, *How Does Law Matter?* (1998) p. 2

40 LJ McIntyre, *Law in the Sociological Enterprise: A Reconstruction* (1994) p. 112

41 Milner and Goldberg-Hiller (2002) 'Reimagining Rights.'

law presents, it also constrains because law sets the boundaries and defines the parameters by which issues are contested.[42]

That this theoretical shift should occur is not surprising given the limitations of positivism when applied to the social word – something that Eugene Ehrlich recognized in the 1930s when he formulated his views on the 'living law', based on observations that the law was far wider in scope than recognized within its formal terrain.[43] According to Ewick and Sibey (1998), 'the question is not about tracking the causal and instrumental relationship between law and society but towards tracing the presence of law in society'.[44] However this seems a paradoxically vague and ambitious view and raises the criticism that the approach is far too broad to be useful as a framework. How does one, for example, trace the presence of law in society? And furthermore, how does one work around the constraints of rights, particularly of rights litigation, which takes place in a rigid and formal terrain where social issues are distilled into legal categories?

None other than Alan Hunt (1998), an avowedly Marxist critic of law, who has embraced the options offered by a constitutive view of law and society, suggests a way out of this dilemma. According to Hunt, actors and institutions exist in relation to one another, but not all aspects of that relationship are relevant to the study.[45] Rather, the question to explore is the legal dimension of that relationship. In other words, how is law present in social relations? It is that presence that may be constitutive of a social relationship.[46] However,

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42 See Garth and Sarat, 1998a; McIntyre, 1994; McCann, 1994; Cowan, 2003; Hertogh, 2004; Hertogh and Halliday, 2004; Engel, 1998; Burnstein, 1991. Rights tactics have produced relatively uneven results for the aboriginal peoples of Canada; for example, the Supreme Court of Canada, while seemingly expanding some aboriginal rights, has also imported restrictions where none had been envisioned, which some critics have said were invented out of 'thin air' (in Sharma, 1998).

43 Cotterrell, *The Sociology of Law: An Introduction* (1992) p. 27

44 Ewick and Silbey, *The Common Place of Law: Stories from Everyday Life* (1998) p. 35

45 Hunt, *Explorations in Law and Society: Towards a Constitutive Theory of Law* (1993) p. 8; also personal/email communication (summer 2003)

46 ibid p.16

what is markedly different about Hunt's approach is that he takes on the instrumentalists on their own terms by calling for counter hegemonic measures, which 'rework' or transcend the very elements that are constitutive of the prevailing hegemony.[47] In other words, hegemony also occurs in small groups, or in a particular aspect of social life, when exceptions are taken to the prevailing views and persistent challenges issued by presenting opposing interpretations. This concept is not dissimilar from rights consciousness, where citizens act on the basis of *their* interpretation and understanding of rights, *irrespective* of formal recognition, and sometimes in spite of that recognition if there is a disagreement with the official version.[48] Social activists and organizations can massage the emergence of (rights) consciousness so that it coalesces into a vibrant and powerful force for change.[49]

Implicit in the concept of rights consciousness is a recognition that rights do not necessarily need litigation to hold power or be harnessed by activists, and this view has come to occupy legal consciousness research in the US.[50] From this perspective, litigation then, becomes just one of the tactics to be deployed within the broader range of a rights strategy. To avoid the conflation of rights with litigation, Hunt (1993) suggests disaggregating 'rights' from 'litigation', not because litigation is any less valued but to demarcate its role within a rights strategy.[51] The simplicity and appeal of disaggregation is that the formal terrain may be avoided altogether, which may placate, to some extent, those who regard litigation with concern. However, if the view is that law is constitutive of society, then those seeking redress have the option of negotiating through all its mechanisms, both formal and informal,

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47 ibid p.232

48 For a review of legal consciousness see: L Edelman and M Cahill, ' How Does Law Matter in Disputing and Dispute Processing' in BG Garth and A Sarat (eds) *How Does Law Matter* (1998); Engel, 'How Does Law Matter in the Constitution of Legal Consciousness ' in ibid.

49 See, for example, MacKinnon's (1989) study on the emergence of the women's movement in the US: C MacKinnon, *Towards a Feminist Theory of the State* (1989).

50 M Hertogh (2004) 'A 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich' 31 Journal of Law and Society 4 457

51 Hunt, *Explorations in Law and Society: Towards a Constitutive Theory of Law* (1993) 237

including litigation. Litigation is not necessarily viewed as a handicap by the constitutive approach because law is not viewed as hostile or as an instrument of control. To be sure, there is recognition that law is also a mechanism of regulation and control, but control is not its only function; law is also facilitative.[52] In modern-day societies, characterized by immense complexity and different or competing objectives, law serves many and varied purposes.

Can it then be said that rights are not empty vessels requiring judicial interpretation or litigation to imbue them with power? Do rights intrinsically hold power, which can be applied in creative and innovative or counter-hegemonic tactics by social movements or advocacy groups? If so, how is it that rights acquire this power because the mere existence of rights is nothing more than words on paper? In Canada, for example, a bill of rights predated the *Charter* by at least two decades, and it is almost unanimously agreed that it was a meaningless document ignored by the courts and the general public.[53] Similarly, the US Supreme Court consistently ignored constitutional rights for almost 150 years insofar as they concerned civil rights and liberties.[54] And it was not long ago that a bill of rights was considered unnecessary for the UK – under the assumption that common law, with its foundation in protecting the propertied classes, provided sufficient protection.[55] What are the reasons for the emergence and prominence of rights not only in the US and Canada, but also the UK, a nation noted for a conservative judiciary and, until recently, an absence of a formal 'made in Britain' rights document?[56] According to Epp (1998), the reason for the dramatic changes are several: judicial leadership, constitutional guarantees, rights consciousness, and,

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52 See McCann, 1998; Hunt, 1993; McIntyre, 1994; Schultz, 1997; Ewick and Sibey, 1998.

53 Some observers have wryly noted that one of the few decisions of note under the Bill, *R v. Drybones* [1970] SCR 282, accorded an aboriginal Canadian the 'right' to be intoxicated off reserve (prior to the decision it was illegal for an 'Indian' to be drunk when not within the boundaries of an Indian reservation). See: P Sharma, *Aboriginal Fishing Rights: Law, Courts, Politics* (1998).

54 Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (1998)

55 Harvey, Colin J. and the British Institute of Human Rights, *Human Rights in the Community: Rights as Agents for Change* (2005)

56 Home Office, *Rights Brought Home: the Human Rights Bill* (1997)

most importantly, a persistent push from below, consisting of deliberate and strategic organising by advocacy groups persistent in having their vision heard.[57] While Epp's arguments are not without shortcomings or detractors critical of some of his conclusions and scant attention to activism outside the courts, his arguments and research on ground-level advocacy hold considerable merit.[58] In his comparative analysis of the 'rights revolution' in the US, UK, and Canada, Epp concludes that the development of a support structure – consisting of rights lawyers, organisations, and funding – was central to bringing about a cultural change.

It is worth noting that when activists engage with rights, notwithstanding its conceptual separation from litigation, the decision to litigate remains an option that is not always within their control. The party being challenged may wish to litigate for various tactical reasons of their own, including a conviction in the 'rightness' of their position, to seek clarification of a vague area of law, cause delays, or call the challenger's 'bluff', leaving little option but to go to court. Is litigation, then, something to be feared?

1.3.5. Criticisms of Litigation and Rights

The opposition to rights has to do with more than just theoretical differences. Some of these criticisms are: rights litigation is undemocratic; litigation ties up valuable resources; legal battles take far too long; litigation produces hollow victories; and other (and presumably more effective) options for social progress are ignored or accorded less attention.[59]

The central problem with litigation is one that is shared by both parties to a dispute: litigation can be a gamble, and the outcome, while in many cases predictable, is never

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57 ibid p. 3

58 For a critique of Epp's research see: A Southworth (2000) 'The Rights Revolution and Support Structure for Rights Advocacy' 34 Law and Society Review 4 1203-19

59 For an in-depth review see: SA Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (2nd edn) (2004); see also Hershkoff (2009) for a concise summary.

assured. For example, even the best argued cases can be thwarted by an unreceptive judiciary, and this applies to both parties. While the risks are not shared equally, and the disadvantaged remain at a disadvantage, the outcome is something that neither party can take as a given. For example, the government, for which the law is presumably an instrument of control, cannot always be certain of winning, irrespective of the resources at its disposal, as evidenced by several high profile cases in the UK, US, and in Canada dealing with, for example, indigenous rights, gay rights, pay equity, and asylum rights.[60] Canada, in particular, has had to contend with aboriginal Canadians asserting constitutional rights with considerable vigour, not only in the courts but also in direct negotiations with the government. And the victories have been significant – particularly a recent out-of-court class-action settlement in excess of one billion dollars in compensation for historical wrongs.[61] There have also been several land-claims settlements – each exceeding $100 million.[62] Pay equity battles, as documented by McCann (1994), resulted in settlements in the hundreds of millions of dollars in the US and Canada. Critics, however, argue that such victories are exceptions because the government is the overwhelming victor, and, to be sure, such is the case in the courts of Canada, UK, and the US.[63] Notwithstanding the fact that the odds favour governments, the losses suffered have not been insignificant. However, the problem with a win-lose dichotomy is the equation that winning is everything; in other words, litigation has to succeed for there to be gains by social movements. This is far too hasty a conclusion because even when a case is lost it does not necessarily follow that gains – such as publicity for the cause, other

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60 See case studies (next section).

61 JJ Llewellyn (2002) 'Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice' 52 The University of Toronto Law Journal 3 253-300; A McIlroy, 'Severance payments' *The Guardian* (03 Jan 2006)

62 There are various types of claims being negotiated by the Canadian government; some address historic grievances and others involve modern-day treaties addressing unresolved issues over resources and lands. See http://www.ainc-inac.gc.ca/al/ldc/index-eng.asp for details.

63 Both Mandel (1994) and McCormick (1993), in their review of Charter litigation in Canada, concluded that the State is the overwhelming victor in the courts of Canada, including the Supreme Court, just as it had been before the Charter; Rosenberg (1991) also concluded the same for litigation in the US Supreme Court.

(concurrent) settlements, rights consciousness, or empowerment – have not occurred, for example, as documented by McCann (1994) in his case-studies of pay equity battles.[64]

When social movements engage in litigation it is judicial policy-making which is sought. Often it is because the political door is inaccessible or has been closed. Many critics, however, regard judicial policy-making or forays into areas of social policy as anathema to democracy and argue that such matters should best be left to elected bodies, which are presumably more accountable. The normative view is that judges should interpret and apply the law to the matter before them, and avoid policy-making.[65] It is argued that judges violate the principles of democracy because they are unelected and not accountable to the general public.[66]

This view, however, is not without problems, the least of which is that it is an idealistic view of democracy and a simplistic view of the complex interplay between the various branches of government and governmental institutions, including the courts, and the public in democratic societies. This criticism does not take into consideration the overlap and difficulties in sometimes separating policy issues from a strict interpretation of the letter of the law. And even when the judgments are strictly interpretation, that interpretation, presumably, must be applied by bureaucrats or policy-makers who seek guidance from decisions to make policy, or issue directions for departments or institutions. In other words, there are both direct and indirect ways in which the courts either make or affect social policy. It is also important to be clear about what is meant by judicial policy-making. For some, it means (illegal or unprincipled) excursions into areas of social policy; for others, it means

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64 McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (1994)

65 M Feeley and EL Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (1998)

66 Cotterrell, *The Sociology of Law: An Introduction* (1992)

judicial activism or judicial policy-making aimed at producing socially desirable results.[67] It is one thing for the judiciary to seek guidance from social policy but quite another when they actively engage in making policy, areas considered to be sacrosanct to the elected; judges readily acknowledge the former but rarely the latter.[68] However, when social activists litigate, it is the latter that they seek. Horowitz cites several examples of judicial intervention in various social policy areas, and concludes that judges have always engaged in 'policy-making not only in areas where there is vague guidance, but also in areas where there is a plethora of statutes and regulations'.[69]

The phenomenon of judicial policy-making had been remarkably absent in the Canadian courts prior to the introduction of the *Charter*, and relatively inconsequential in the UK courts (see Prosser, 1983). It has been argued that the presence of constitutional rights encourages and is conducive to judicial policy-making. Epp (1998) argues that a persistent push from below, by advocacy groups, is also necessary; Shapiro and Stone-Sweet (2002) argue that federalism is another necessary ingredient. Another view is that the public at large demand and expect robust protection of rights that are accorded constitutional status.[70] In some instances, this expectation extends to the state itself as in the case of the UK where the HRA was promoted on this very basis in the government's White Paper *Bringing Rights Home*.[71] Similarly, in Canada, during the early days of the *Charter*, a special government

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67 Feeley and Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (1998) p.5

68 DL Horowitz, *The Courts and Social policy* (1977) p.14

69 ibid p.5

70 See also H Hershkoff (2009) 'Public Law Litigation: Lessons and Questions' 10 Human Rights Review 2 157-81.

71 See, for example, various statements by the Chief Justice of England and Wales, Lord Woolf.

fund was established to assist groups in initiating legal challenges against actual or perceived excesses of the state.[72]

In view of the above, it is then naive to suggest that advocacy groups should avoid the (assumed) undemocratic process of litigation for the (supposed) democratic process of politics for several reasons. What is it that makes rights litigation so apparently undemocratic? First, it is problematic to assume that there is a demarcation point where processes, be they democratic or undemocratic, are readily apparent.[73] Rather it is more a question of degree, and this would suggest a possible empirical query, rather than assuming that judicial policy-making is inherently undemocratic. Second, it is noteworthy that elected officials appoint judges. In many jurisdictions, there is also a lengthy vetting process before judges are entrusted to such elevated positions. If one of the major functions of the judiciary is to act as a check on other branches of the government, how can it be said that when its decision goes against the state, the court is acting undemocratically when it is doing precisely what it is supposed to? How else are the courts to give substance to the liberal ideal of 'protecting minorities from the tyranny of the majority'? It cannot be expected that the legislature or executive will always get it right.

Third, the ability of minority interests to effectively use the electoral process raises several questions. Are MPs any better (or less) informed about social issues than the judiciary? Are they sympathetic or hostile to non-majoritarian causes? Do they take time to study and understand the issues? Does the parliamentary system allow for informed debate, particularly where the governing party has a large majority? Do those agitating for social change have access to their respective MPs? Are MPs open to minority viewpoints if they have been elected by the majority to presumably serve them? Are MPs influenced by

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72 FL Morton, *Law, Politics and the Judicial Process in Canada* (2002)

73 See also Horowitz, 1977: p.17, for a similar discussion.

professional lobbyists who are financed by powerful interests? To assume that the majority would want protection for the minority at their expense, or because it is for the greater good, is just fanciful thinking. It is precisely because disadvantaged groups do not have political clout or access to political institutions that they seek redress from the courts. Often, it is the only accessible option.[74] And, as Hershkoff (2009) argues, an engagement with rights is a form of politics, a challenge to the status quo.[75]

1.4. Part B: Rights at Work (Selected Case Studies)

By far the most extensive work that has been done on the subject, both theoretical and empirical, has been in the US. NGOs comprising social movements as diverse as the civil rights movement of the 1950s, environmental groups, women's groups, and gay-rights activists have used the US Bill of Rights to mobilise and challenge state and federal governments. Some of these movements, particularly the various environmental groups, have made impressive gains, while some have not had as much success, for example, gay-rights activists litigating for recognition of same-sex marriages. In this section, I shall focus on the works of Gerald Rosenberg (1991) and Michael McCann (1994).

1.4.1. Rosenberg's Impact Study of the US Supreme Court

Amongst the decisions most often cited by advocates of rights (litigation) as an example of the effectiveness of law in challenging the status quo and advancing the causes of oppressed or powerless minorities, are the landmark US Supreme Court decisions on racial segregation in schools and abortion rights: *Brown v Board of Education* and *Roe v Wade*.[76] Until recently, it was a commonly accepted view that *Brown* had had a significant impact not

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74 M Malik, 'Minority Protection and Human Rights' in T CampbellKD Ewing and A Tomkins (eds) *Sceptical Essays on Human Rights* (2001) p. 277

75 p. 159-160

76 *Brown v Board of Education* 347 U.S. 483 (1954); *Roe v. Wade*, 410 U.S. 113 (1973)

only on the (eventual) desegregation of schools and other public institutions but also on race relations.[77] While *Brown* and *Wade* were decided several decades ago, these landmark decisions continue to feature prominently in general discussions and scholarly discourse on law and its ability and potential to bring about social change.

In 1991 Professor Rosenberg asked if such views had an empirical basis. He analysed several landmark decisions of the US Supreme Court including *Brown* and *Wade* and concluded that the Court is a 'fly-paper court'. Asking if the Supreme Court can bring about social change, Rosenberg's positivist approach is a search for direct linkage between the decision and its assumed effects. Rosenberg is dismissive of the Court's ability to transform existing relations of domination and subordination, and he concludes that social movements, law reformers, and supporters alike have been misled into ascribing to the Court successes it cannot rightly claim. The findings by Rosenberg created a great deal of controversy; to be sure, some of his criticisms are valid, but his study is not without flaws – the key problem being a positivist approach to a fluid and dynamic subject matter.

1.4.2. Critique of Rosenberg and Positivism

Rosenberg's in-depth analysis focuses on areas where it has been popularly assumed that the US Supreme Court has had the greatest impact: civil rights and abortion and, to a lesser extent, the environment. Rosenberg's argument is thought-provoking, but in setting out to test his hypothesis, he sets up some very stringent conditions that most institutions, leave alone courts, could not possibly meet. The first hurdle the Supreme Court would have to overcome is definitional. Rosenberg wants to see social change as 'significant social change' – meaning that the changes would have to have nation-wide impact and affect a large group of people, such as black Americans or women as a group. In other words, groups constituting

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[77] Schultz, *Leveraging the law: using the courts to achieve social change* (1998)

a wide variety of differently situated individuals are seen as homogenous with uniform objectives – a most problematic, if not fatal, conceptualisation. Arguably *Brown* did not mean as much for black Americans living in the Northern states as it perhaps did for those in the South. And most likely *Roe v Wade* did not have much impact for urban middle or upper-class women, or those living in liberal or progressive states. In any event, the conceptualisation of women and black Americans in such a broad-brush manner renders the analysis of questionable value. Rosenberg further clarifies significant social change to mean that litigation which simply sought to change the way a single bureaucracy functions would not meet his criteria, but litigation to 'change the functioning of a whole set of bureaucracies or institutions nation-wide would'. In both instances it is difficult to imagine a situation where both definitional conditions would be satisfied. First and foremost Rosenberg fails to consider the structure of government in the US, particularly the Federal/State division and overlap in jurisdiction over laws and institutions. Further, in view of the incremental nature of social changes, it is improbable that nation-wide institutional changes, which affected large groups of people, would occur that would satisfy the definition – even more so in such a large and diverse nation. In other words, Rosenberg's is an easy argument to make in hindsight because history is devoid of any particular court decisions that have resulted in such wide-scale changes. Even if there wer such a decision, the intervening number of years that it would take for nation-wide changes to occur and the confounding variables of history would make it problematic, in a positivistic framework, to link those changes to the decision.

There are also methodological and theoretical issues in Rosenberg's study that merit criticism. Rosenberg outlines the theoretical underpinnings into two distinct camps: the dynamic court view and the constrained court view. The former views the courts as 'powerful, vigorous, and potent proponents of change' and the latter as 'weak, ineffective,

and powerless to affect the types of social changes desired by reformers'.[78] However, the views are so polarized that it presents them as caricatures rather than analytical concepts. The theories outlined by Rosenberg, which are subsumed under the constrained and dynamic views, are patently outdated and very few, if any, scholars are making such claims today. At least they were not during the time that Rosenberg undertook his study. Many of the references are dated, and with a few exceptions all citations in this section are pre-1982; many are in the 1970s. The dynamic court view is unrealistically positive, and the constrained court is hopelessly negative; in spite of his insistence that he is not setting up a 'straw-man', that is precisely what he does.

Rosenberg approvingly cites Scheingold (1974) throughout his study with particular emphasis on Scheingold's theorising of what he labelled the 'myth of rights'.[79] However Scheingold's theoretical arguments appear to have been accorded empirical validity in Rosenberg's study where he seems to have ignored Scheingold's argument that law is far too complex, requiring a comprehensive approach to analysing issues such as its role in social change. To be sure, Rosenberg does consider the indirect effects of litigation but the analysis is perfunctory, consisting of analysis of newspaper citations (not content) and public polls, neither of which are sufficiently explored.[80] In this respect there is a contradiction between Rosenberg's positivistic approach and Scheingold's theoretical position that law is a potent tool for social change when combined with other tactics, such as political mobilization. Scheingold also cautions that circumstances under which legal tactics may lead to social change can be elusive and hard to determine. The problem is not so much in the approach

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78 Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991) p.2

79 See: Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (1974).

80 See: BC Cannon, 'The Supreme Court and Policy Reform: The Hollow Hope Revisited ' in DA Schultz (ed) *Leveraging the Law* (1998) for a constitutive analysis of how *Brown* served to raise consciousness and as catalyst for mobilization as increasing numbers of activists joined the ranks of NAACP and other civil rights organizations.

itself, Scheingold argues, but in the 'impenetrable uncertainties of the politics of change'.[81] Nevertheless Scheingold, in contrast to Rosenberg, concludes that there are distinct advantages to working towards political change by legal means and urges activists to explore such possibilities.

Rosenberg's work is important not only for its ambitious scope but also for the volume of commentary and rebuttal that it has invited. However, it is difficult to overlook the impression that Rosenberg seems to have worked backwards, from an already articulated conclusion to the development of a hypothesis. The conditions upon which he argues the Supreme Court will produce significant social changes reduces the court's contribution to a 'rubber stamp' formality. If that is indeed the case then the Supreme Court has managed to fool a great number of people, including countless social activists, who have invested immense efforts in attempts to improve the situation for the disadvantaged and have not recognised how the Court has failed them.[82] Studies by McCann and others demonstrate social movements are not that naïve and the nature of rights not that impotent.

1.4.3. Pay Equity and Rights: A Constitutive Analysis

Whereas Rosenberg focused on the Supreme Court as the centre of analysis, Michael McCann's (1994) bottom-up approach focused on the activists involved in the fight for pay equity and on legal mobilisation. This process is described as a situation where a 'desire or want is asserted as a right, and law is seen as capable of addressing those desires or wants'. McCann's self-defined, loosely-interpretive approach combines the conventional analysis of law, as represented by court decisions with an expansive view, centring it firmly on how

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81 Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (1974) p. 213

82 See, also, Swedlow's (2009) case study on how US Ninth Circuit courts acted to protect eco-systems in the Pacific Northwest; Swedlow argues that the case study 'invalidates' Rosenberg's theory. He also suggests a 'reformulation' of Rosenberg's theory by broadening what are fatally narrow, and as argued above, self-serving, definitional shortcomings in The Hollow Hope (1991).

ordinary activists understand the law, and their interpretation of rights. McCann examines: a) how social activists viewed and interpreted the law and used rights counter-hegemonically (strategically) to reframe their objectives as social justice issues; b) how rights were employed to organise and mobilise over certain issues; c) how it was used as leverage in bargaining, particularly in avoiding lengthy and costly court battles and encouraging employers to negotiate settlements; d) how law served as a catalyst, for example, in organizing protests and uniting workers; and, e) how it gave rise to a rights consciousness.

In examining how women's groups across the US used rights and mobilised in their battles over pay equity reform, McCann concludes that 'legal norms shaped the terrain of the struggle' and, in turn, as news of court victories or negotiated settlements were widely trumpeted across the country, 'litigation and other tactics provided activists with an important resource for advancing their cause'. As extensively documented by McCann using standardized surveys, in-person interviews with 140 union and feminist activists across the US, content-analysis of newspapers, and case studies of specific pay-equity battles, the fight was not easy. Not only did the women's groups battle all levels of government and various private and public institutions, but also gender stereotypes and labour unions. The fight, which had been building momentum, started in earnest in 1981 following the US Supreme Court's decision that rejected a county government's wage policy – where female prison-guards, doing essentially the same job, were paid significantly lower wages than their male counterparts. As McCann documents, activists found considerable strength in the court's affirmation of their position. The decision served as a catalyst for women's groups as they mobilized across the US, rejuvenated by a new found ally in the form of the US Supreme Court.

In the following years, however, many other battles were fought in and out of courtrooms. While many such battles were lost, particularly in the waning years of the movement, many were won resulting in significant changes in the economic status of large groups of people. During the peak of the wage-equity reform battles, many large-scale employers and organizations fearing lawsuits, witnessing court victories for pay-reform and having to contend with agitating employees, settled for hundreds of millions of dollars. Many were compelled to do so by activists unafraid to use the leverage afforded by law. McCann provides several examples. One of the most interesting was the campaign by Washington State public employees who had nothing to show for years of lobbying until the filing of a lawsuit, which resulted in legislative action by the state promising to redress pay equity issues. The lawsuit proceeded to judgment, where the court ordered the state to pay $377 million in back wages, but on appeal the state won. Despite this the union continued to pressure the state and to avoid further legal action the state agreed to a $100 million settlement in pay-raises. According to the activists, the lawsuit, even though unsuccessful in the courts, was the key in resolving the matter.[83]

McCann's case studies are thorough, and his methodological approach rigorous. Looking beyond the courts he demonstrates the malleability of law and the potent resource that it represents in the form of rights. It is McCann's argument that, because judicial victories produce uneven results, it is in the strategic uses – such as leverage in bargaining and negotiating, or as rights consciousness – that the power and potential of law in addressing questions of social justice lies. McCann's work challenges Rosenberg because he takes a more expansive approach rather than Rosenberg's narrowly focused positivistic framework.

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[83] McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (1994) p. 154-55. The battle for pay equity has also been waged in Canada and while the fight is far from over, there have been some settlements. The Federal government settled with some of its clerical workers at a cost of over $3 billion, or about $30,000 per employee (http://www.slis.ualberta.ca/cap03/regan/canada.htm). In the private sector Bell Canada settled for $56 million with its employees after unsuccessfully pursuing legal remedies to avoid pay equity (http://www.payequityreview.gc.ca/4432-e.html).

For those who define law in a narrow sense and seek to determine the direct impact, or cause-and-effect of litigation, the approach by Rosenberg has much to offer. However, in this respect, the conclusion or findings, while easily predictable, provide a rather limited understanding of how law operates in the larger world, outside official forums, which McCann argues is far too important to neglect.

1.4.4. A Constitutive Analysis of School Underfunding

The study by McMahon and Paris (1998) examined a highly complex chain of events dealing with underfunding of poorer school districts in the state of New Jersey. The authors utilised McCann's framework in an attempt to demonstrate the potential and effectiveness of law in mobilising and empowering reformers.[84] The study focused on a succession of court battles brought about by activists during the period of 1970 to 1997 aimed at increasing funding for schools catering to mostly Hispanic and Black Americans. For the activists, many of whom had never been involved in social policy challenges, the objectives leading up the decision of the New Jersey Supreme Court were modest. Their organisation was skeletal at best and focused initially on a legal interpretation of certain provisions of the state constitution. However, when the Court ruled in favour of the activists (to their surprise) they found a renewed sense of purpose and they responded with vigour by mobilising, organising, and re-organising in response to successive and continuing court battles. While there were many setbacks, the activists were successful in redefining the frame of reference to the degree that school funding issues are now almost entirely debated according to those terms. For example, the issues of race and poverty must now be factored into school funding decisions whereas, prior to the court battles, these were non-issues. However, the degree to which

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[84] KJ McMahon and M Paris, 'The Politics of Rights Revisited: Rosenberg, McCann, and the New Institutionalism' in DA Schultz (ed) *Leveraging the Law* (1998)

either the courts or local governments actually consider such issues, remains an empirical question.

As documented by McMahon and Paris, the ever-changing political climate in the state, from cooperative to oppositional, and counter mobilisation efforts by opposing groups, presented the activists with few other options but to seek changes through the courts. During that period the courts were a relatively constant ally. It was in the courts that the activists succeeded in having their vision realised and saw it translated into policy imperatives insofar as such issues (race and poverty) had to be considered in funding decisions. According to McMahon and Paris the immediate results of the court battles were disappointing, because the state effectively thwarted the activists by legislation and other dilatory tactics, but the activists persisted and turned to the courts. Through successive court victories they built upon their vision by introducing issues of equality, race, and poverty not only in funding matters, but also on the subject of educational reform. However, the fight is far from over as there continues to be determined opposition by both the richer school districts and the political leaders of the state. While the poorer districts have managed to make significant gains in budgetary allocations, an immense divide remains.

If anything, the above study serves as a reminder that law and rights are not without peril. A determined opposition and the changing tides of political will, combined with counter-tactics, can do much to stifle activists seeking to bring about social changes.

1.4.5. Role of Rights in Litigation: Prison Reform, the Environment, and Gay Rights

The case studies of prison-reform litigation by Feeley and Rubin (1999) presents an argument for the legitimacy of judicial policy-making.[85] Notwithstanding differences of

[85] Feeley and Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (1998)

opinion on what is considered their proper role, judges do engage in policy-making and Feeley and Rubin set out to demonstrate just how it is that they do so. Their analysis examines how rights brought about significant changes in an area long neglected by government and the courts. Feeley and Rubin argue that notwithstanding the claims of various judges that their intervention in reforming American prisons was merely an interpretation of the Eighth Amendment, prohibiting 'cruel and unusual punishment', it was anything but. This, according to the authors, was policy-making as the degree and extent of judicial intervention, along with the nature of orders that were imposed, could not have been derived from the narrow scope of the Eighth Amendment.[86] How is it, the authors ask, that so many separate and uncoordinated federal courts, without guidance from the Supreme Court or the government, moved in the same direction towards reforming American prisons: 'where one would have expected uncertainty, retrenchment, and disagreement, there was only relentless unanimity'.[87]

According to Feeley and Rubin, prisoners had been complaining to the courts since the 1930s about the conditions of their confinement and almost all such lawsuits were routinely dismissed notwithstanding the Eighth Amendment. However, starting in 1965, federal courts began to incrementally place prisons under court orders or injunctions ordering changes and restructuring various institutions. By 1995 prisons in 41 states and the entire correctional systems of 10 states were under comprehensive court orders. Not only did the judges impose a comprehensive set of judicially enforceable rules but they also ensured that the orders were implemented by delegating that duty to other agencies. According to the authors, the judges 'derived these rules from their own perceptions of morality, sociology,

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[86] ibid p 14

[87] ibid p 145

and existing literature on correctional issues'.[88] As explained by the authors, the inhumane conditions in American prisons cried out for reform. However, once major restructuring had been completed, the movement naturally waned and the courts seemingly lost interest in prisoner's rights once the worst abuses had been effectively dealt with.

1.5. A Rights Strategy for the Environment

A complementary view of rights litigation holds that social policy issues can be made much more palatable if framed as being for the greater good, in the best interests of society. The assumption is that wide public support will reduce opposition, making it easier to implement policy changes. Perhaps the most successful of all social movements, in terms of sustained public support and mobilisation, has been the environmental movement in the US, which succeeded in bringing to the forefront protection of the environment. Notwithstanding Rosenberg's analytical framework, it is also one of the few areas in which both positivist and interpretive frameworks lead to the conclusion that rights significantly altered the landscape. Gary Coglianese's (2001) examines how the environmental movement, which had long existed as a fringe player, transformed itself during the 1960s and 70s and became an important player in American politics. This provides a case study on pushing the boundaries, which the movement did so via a sustained engagement with rights combined with grassroots organising, public information events, protests, and political lobbying.[89]

What gave impetus to the movement were a series of major ecological disasters, oil spills, gas blowouts, and wild fires, alongside the apparent immunity of those responsible. According to Coglianese, rights tactics, similar to that practiced by the civil rights movement, were adopted by environmentalists, leading to some significant legal victories. While the

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88 ibid p 14

89 G Coglianese (2001) 'Social Movements, Law, and Society: The Institutionalization of the Environmental Movement' 150 University of Pennsylvania Law Review 85-118

movement's objective of gaining constitutional protection for the environment failed, the initial victories in court served as a springboard for increased legal activity as the movement focused primarily on a legislative agenda. Under pressure the US Congress responded and a plethora of laws and statutes were created. The Environmental Protection Agency (EPA) was also created to oversee enforcement of these new laws. As Coglianese explains, the movement did not neglect other venues and worked diligently to inform the public and garner their support and, in the process, the movement gained both governmental and industrial allies. When, during the Reagan Administration, the environment took a backseat to economic issues, the movement turned to the laws it had helped create to maintain what had already been achieved and to keep a spotlight on the issue. The movement also filed numerous lawsuits against corporations, resulting in penalties, and against the EPA, where it was felt that the agency was being less than diligent or not proactive in fulfilling its mandate. The movement transformed the legal landscape and, according to Coglianese, the planet and its inhabitants are the better for it. Arguably the results of such efforts have resulted in cleaner air, cleaner water, and preservation of other natural resources.[90]

Coglianese cites several reports and data attesting to measurable reductions in toxic waste and pollution but acknowledges that contrary conclusions are also possible using the same data. It remains open to argue that the environment continues to suffer from degradation and the advances or changes achieved have fallen far short of what is necessary. In other words, the movement's tactical focus on legislating protection and litigation possibly distracted it from considering the potential in, or the pursuit of, other tactics. This is the position that Rosenberg (1991) presents in his analysis about the ineffectiveness of litigation.[91] However, Rosenberg's conclusions also suffer from what Coglianese

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[90] ibid p 93-99

[91] Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991) p 271

acknowledges in his assessment of the environmental movement – that different conclusions are possible using the same data. Nevertheless, some measure of success must be attributed to the movement's strategy for transforming the manner in which the environment is now regarded by industry, government, and the public. This is not to say that the movement can rest on its laurels or be satisfied with its successes – environmental issues continue to be highly contested and much work remains – but this case study does offer valuable lessons to social reformers on how a formerly fringe movement was able to reframe issues, legally and otherwise, so that they became everyone's concern. One of the possibilities this suggests for activists is how to transform minority issues into majority issues so that promotion of minority issues is not only seen as not contrary, but as beneficial to the interests of the majority.

1.6. Gay and Lesbian Rights

The battle for gay rights, in the US in particular, has also been framed as one involving issues of fundamental rights, but the activists have been thwarted by a coalition of powerful conservative forces.[92] For many in same-sex relations what is missing is legal recognition, which carries with it several other rights that those in conventional marriages take for granted. However, the attempts by the gay rights movement to gain legal recognition of same-sex marriages backfired in Hawaii, where the battle had culminated after the movement failed to win legal recognition in other states. This was not a court battle but, nonetheless, a battle involving rights as citizens were asked to vote on a constitutional amendment seeking to block same-sex marriages. As documented by Hull (2001), the movement's attempts faced stiff resistance from opponents, who in turn sought the

[92] See JP Heinz A Southworth and A Paik (2003) 'Lawyers for Conservative Causes: Clients, Ideology, and Social Distance' 37 Law and Society Review 1 5-50 on how conservative organizations use the law to advocate for their vision of rights.

constitutional amendment.[93] The failure of the gay rights movement resulted in the passage of the federal *Defense of Marriage Act* and similar legislation in over thirty other states. According to Hull the movement worked hard to persuade voters that they had a stake in the issue and that a constitutional amendment was a slippery path that could result in the derogation of the rights for other segments of society. However the opponents countered with moral arguments and framed the issue as protecting the institution of marriage, and not about denying civil rights. Hull's study suggests that the force of a determined and organised majority, opposed to minority concerns, places severe limitations on rights for advancing social issues. By most measures, the battle in the US is a losing one for activists.[94]

Same-sex marriage in Canada is a non-issue but it was not always so. The battle over same-sex marriages effectively ended in Canada when events culminated in three different provincial judges ordering a reluctant federal government to amend the *Marriage Act.* The highest courts in Ontario and British Columbia ruled that prohibitions against same-sex unions violated the equality rights of the *Charter*. The BC Court of Appeal gave the federal government until July of 2004 to amend the Act accordingly. The Ontario Court of Appeal in June of 2003 went even farther and refused to allow a grace-period, ordering that couples seeking same-sex unions be issued marriage licenses with immediate effect. The Ontario government complied but marriage laws are the jurisdiction of the federal government, which gave uncertain signals but did suggest that the law would be changed in the face of various provincial court decisions.[95] During that period, however, gay marriages became legal in Ontario and in other parts of the country activism continued in the form of public gay

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93 K Hull (2001) 'The Political Limits of the Rights Frame: The Case of Same-Sex Marriage in Hawaii' 44 Sociological Perspectives 2 207-32

94 R Archibold and A Goodnough, 'California Voters Ban Gay Marriage' *The New York Times* (05 Nov 2008)

95 C Clark, 'Government steers vote on accepting same-sex ruling' *The Globe and Mail* (13 June 2003)

wedding ceremonies.[96] In addition to its intangible and human elements, such as respect for different lifestyles, legal recognition of gay unions carries with it a multitude of substantive rights in the form of pension, taxation, and other benefits. In Canada the battle has been long and hard but recent evidence in the form of successive high court rulings indicates the success of rights in transforming the situation of gays and lesbians.[97] In 2002 the government of Canada, pushed by the provincial courts, enacted legislation legalising gay unions.

1.7. Conclusion

What becomes apparent, following a review of the case studies by McCann, McMahon and Paris, and Coglianese, is that in the hands of committed, organised, and persistent groups, rights hold potential for improving the life situations of the disadvantaged and to bring about social change. What is also clear is that the battlegrounds for social change are heavily contested, and that social changes take many forms (often being subtle, incremental, and manifesting over varying periods of time). Sometimes the results are tangible – as in pay equity settlements or the measurable decline in toxic emissions – and sometimes the changes are intangible – such as the worth of human dignity in the recognition of gay rights.

The strategic deployment of rights presents possibilities and pitfalls for social movements. Rights have resonance, power, and potential but are not a panacea for the many social problems that are an inherent part of modern societies. Clearly many NGOs believe in the potential and power of rights – that a guarantee of rights must mean something, and when there are actual or perceived shortcomings or breaches, governments must be held accountable. This belief is not without substance. NGO advocacy groups engage with rights

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96 Canadian Press, 'Ontario Appeal Court rules in favour of same-sex marriage' Ibid.(in *The Globe and Mail* 10 June 2003)

97 See Fudge, 'The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts' in T Campbell, KD Ewing and A Tomkins (eds) *Sceptical Essays on Human Rights* (2001)

in a deliberate, strategic, and organised manner to bring about social changes. NGOs are not naïve and have more than just an intuitive understanding of law. In the case studies examined what stands out is the level of sophistication demonstrated by non-legal actors, the ordinary people who are constantly structuring and restructuring their relationships with law, determined to have their vision of their rights realised.

One of the key strengths of rights is that they can be deployed to challenge the prevailing hegemony.[98] To apply an analogy consistent with instrumentalism, it would be as if an ally of the powerful is turned against them, engaging them using their own language and terms to point out injustices, making the wrongs difficult to avoid or ignore. What is also clear is that law and society (including social movements in that society) interact in a more dynamic and bi-directional fashion than has been generally recognized by those seeking direct cause and effect relationship. The relationship is complex, constantly changing, but it is not inherently exploitative because law serves many functions. Law is regulatory but also facilitative. The objective of the case studies was to illustrate not only the range of possibilities offered by rights but also the pitfalls that rights based strategies present. Asking if rights can be an effective resource for bringing about social change presents theoretical and methodological problems such as, for example, how to measure success. The positivist focus on cause and effect – or the 'win or lose' dichotomy – tends to understate the role of rights and offers an incomplete picture but the constitutive is not without shortcomings. How then can successes be measured? How is it to be defined? What must have transpired for it to fall within the ambit of progressive social change? These seemingly simple questions belie the complexity at the heart of the matter because of the problems in measuring efficacy or success. What constitutes effectiveness or success differs amongst advocacy groups, and is dependent on the objective(s) of the group seeking changes. Further, and crucially, social

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98 Hunt, *Explorations in Law and Society: Towards a Constitutive Theory of Law* (1993)

movements rarely have things their own way. Important issues are continually contested in an environment that can be unpredictable and hostile, particularly where the status quo or long-held beliefs are challenged. Those issues, and the environment in which they are contested, do not remain static, they continually change and evolve.

The experiences of both American and Canadian activists offer valuable lessons for those seeking to harness rights in the UK. While Rosenberg's conclusion, that activists should devote limited resources to other channels to advance social issues, is well taken, it does not necessarily follow that those other options, such as the political process, would be more effective or receptive to the interests of disadvantaged groups. Rights are important, they are global and they are everywhere.[99] As demonstrated by the case studies in the preceding pages, rights do not always require the courts, or other official forums, to bring them to 'life'. In the hands of activists, working at the ground level, rights have the potential to change the paradigm of engagement in positive and powerful ways. While the possibilities are not limitless, rights do have potency and provide activists with the means to affect or bring about change. As McCann argued, rights, in defiant hands, can be a source of power. However, as demonstrated by McMahon and Paris in their study of school funding in New Jersey, this is no easy matter, particularly when faced by powerful opposing forces which can also counter with the currency of rights. Such obstacles were also observed in the prison-reform study by Feeley and Rubin. In this instance, however a determined judiciary recognized the cruelties of America's prisons and effectively reined in the excesses.

What lessons can be drawn from the preceding case studies for future research? First and foremost, success is relative, social change is incremental and engagement with rights is a long process, taking decades for measurable variables to become apparent. Further, rights

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[99] See: Hammond (1999) 'Law and Disorder: The Brazilian Landless Farmworkers' Movement'; Milner and Goldberg-Hiller (2002) 'Reimagining Rights'; Feldman, *The Ritual of Rights in Japan: Law, Society, and Health Policy* (2000).

cannot be taken for granted because what may have worked in one situation may not in another. It also requires a determined judiciary and a social issue that cries out for reform.[100] The case studies by McCann, Epp, and Coglianese make clear that possibly the most important element is sustained engagement with rights by determined activists committed to their vision of social justice. In almost all the case studies there is an apparent common ground in the debate regarding the usefulness and efficacy of using law to advance social causes. It is here, and not in the direct effects, that one will find or realise the potential and power that rights presents for social progress (particular via indirect means such as leveraging the threat of a lawsuit). What is also apparent, from the diverse range of case studies examined, is that rights are not a panacea for addressing the myriad of social justice issues confronting society.

[100] Feeley and Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (1998)