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Evaluating Rights Litigation as a Form of Transformative Feminist Politics

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A Review of *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* by Sherene Razack, (1991) Toronto: Second Story Press, 189 pp.

Is rights discourse and litigation a useful way to redress social inequality? Attempts to answer this question have generated a lively debate, fuelled in Canada, in part, by the entrenchment of the *Charter of Rights and Freedoms*. While there is no common ground on whether rights litigation should be enthusiastically supported or vigorously decried, both sides of the debate have agreed that there are some difficulties with this strategy. Aspects of litigation politics which impose real limits on its transformative potential include: the undemocratic structure of litigation, the difficulties in translating arguments based on a social analysis of subordination into legal categories and conventional legal analysis, and the ability of opponents to progressive struggles to use rights discourse and litigation to further their agenda.¹ But, despite a recognition of these problems, the general tendency amongst progressives is to offer cautious support for this strategy. Any emphasis on the shortcomings of rights litigation is countered by stressing its potential to mobilize social movements, influence the general terms of political debate, change a particular law or doctrine and introduce a variety of perspectives and experiences into the courts which have historically been excluded.² Defenders

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1. Amy Bartholomew and Alan Hunt, "What's Wrong with Rights" (1990) 9 *Law and Inequality* at 1; H.J. Glasbeek, "A No-Frills Look at the *Charter of Rights and Freedoms* or How Politicians and Lawyers Hide Reality" (1989) 9 *The Windsor Yearbook of Access to Justice* at 293; Judy Fudge, "The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada" (1989) 17 *International Journal of Sociology* at 445; Michael Mandel, *The Charter of Rights and the Legalization of Politics* (Toronto: Wall and Thompson, 1989).
 2. Didi Herman, "Are We Family?: Lesbian Rights and Women's Liberation" (1990) 28 *Osgoode Hall Law Journal* at 789; P.J. Williams, "Alchemical Notes: Reconstructing

of this strategy claim that rather than simply totting up the cases, rights litigation should be evaluated in terms of how it contributes to the broader political agenda. To this end, Elizabeth Schneider's insightful catechism is invoked:

Does the legal struggle generally and rights discourse in particular help build a social movement? Does articulating a right advance political organizing and assist in political education? Can a right be articulated in a way that is consistent with the politics of an issue or that helps redefine it? Does the transformation of political insight into legal argumentation capture the political visions that underlie the movement? Does the use of rights keep us in touch with or divert us from consideration of and struggle around the hard question of political choice and strategy?³

Sherene Razack's *Canadian Feminism and the Law* provides an opportunity to explore these questions in the context of the mobilization of elements of the women's movement around the entrenchment of equality rights and the subsequent decision to set up the Women's Legal Education and Action Fund (LEAF) in order to pursue a litigation strategy to give meaning and substance to equality rights for women. Razack frames the four chapters which describe and discuss the origins of LEAF and the early results of its litigation strategy with an introduction which maps the major barriers to the transformation of liberal legal rights by feminist jurisprudence and a conclusion which examines the success feminists in law have had both in challenging rights thinking and obtaining concrete gains for women. *Canadian Feminism and the Law* combines a well-written and careful case study of LEAF's litigation strategy with a suggestive discussion of the theoretical and practical limitations of rights litigation. Ultimately, Razack cautiously endorses a rights litigation strategy. Finding out why she does, is a useful point of entry into the rights debate.

In her introduction, Razack identifies the abstraction and individualism of liberal rights as the major obstacle to the transformative possibility of feminists using the law to promote women's equality. According to Razack, liberalism's

... concept of an independent, decontextualized self functions to suppress our acknowledgment of the profound differences between individuals based on their situation within groups and the profound differences between groups. Without a theory of difference, we cannot make it clear what the relationship is between groups or communities (p. 15).

Ideals from Deconstructed Rights" (1987) 22 *Harv. C.R.-C.L.* at 401; E. Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's Movement" (1986) 61 *N.Y.U.L. Rev.* at 589; Amy Bartholomew and Alan Hunt, "What's Wrong with Rights" (1990) 9 *Law and Inequality* at 1.

3. Schneider, *supra*, note 2 at 622-23; Razack quotes this passage at 130-31.

Drawing on the postmodern understanding of law as discourse, which she describes as the creation of meaning and the power to regulate what is known, Razack argues that applying feminism to law "requires confronting the boundaries between self and community and coming to terms with the meaning of difference" (p. 21). One way of doing this is to bring women's experience into the courts. But as Razack explains, this process is fraught with difficulties: on the one hand, getting the legal system to work for women will require the transformation of traditional legal concepts, and, on the other hand, the strategy of emphasizing women's experience tends to occlude the relations other than gender which contribute to the specific forms of women's subordination. Despite these difficulties, Razack concludes that it is important to look for the cracks in law where "women's specifically female consciousness in so male a culture" might have "counter-hegemonic impact" (p. 26).

Chapter One traces the change in the meaning of equality from fair play and equal opportunity as used by feminists in the Report of the Royal Commission on the Status of Women in 1970 to an emphasis on fair shares and substantive inequality as developed by feminists during the entrenchment of the *Canadian Charter* in the early 1980s. Razack shows how feminists used the constitutional lobby as an opportunity to

... articulate precisely their vision of equality. The vision of fair shares, while not unique to women, nonetheless became so refined during discussions of the *Charter* that women, at least the professional legal elite, could continue to build on the lobby once the *Charter* was a reality and prepare for the next phase of charterwatching and litigation armed with a precise notion of what equality meant and how they wanted to secure it through the law (p. 35).

The legal elite, as Razack characterizes LEAF's founders, were aware that the successful entrenchment of equality rights was not enough by itself to improve women's situation. They believed that what was needed was a way to ensure that the government's and the courts' understanding of what equality for women required was the same as their own. During the three years before the equality rights were to become legally enforceable, feminist lawyers and academics, joined by some of the more established women's groups, began to conduct statute audits. In these audits, they examined ten areas of women's lives in order to put feminists in a position to prove to the courts that a particular piece of legislation is based on a policy of differentiation between the sexes which is illegitimate. According to Razack, these women shared the conviction "that women could get what they wanted through the system by getting 'the product,' which was a certain way of thinking about equality, into public discourse" (p. 43). Thus, they decided to establish a single national fund which would sponsor (preferably winnable) cases and engage in a complimentary strategy of legal education and lobbying. By adopting an incremental litigation strategy, LEAF hoped to occupy the field of

equality rights in the courtroom and educate the legal profession about women's inequality.

Commenting upon LEAF's mandate, Razack notes, it "is striking how extensively this approach to social change relied on the very liberal notion of the power of reasoned argument" (p. 44). Significantly too, she argues, this vision of the role of legal argument and rational choice contradicted these women's experience. The professional women involved in the constitutional lobby were confronted by the sex-specific nature of their treatment, one which stood in sharp contrast to the experience of men with similar class and race backgrounds. Razack suggests that it was "this sense of gender-based disadvantage that may have led to the resolutely apolitical position taken by most of the women active on Charter issues" (p. 44). Since their exclusion from the status quo was based solely on their gender, this is what LEAF activists sought to use Charter litigation to address. Moreover, the form of their activism, rights litigation, placed a high premium on extensive fundraising since litigation is such an expensive business. This, in turn, reinforced the elite nature of the activity and tended to separate LEAF from other women's groups and broader political movements generally. And, as Razack elaborates, LEAF's focus on fair shares or equality of results did not address the crucial concern of what the standard or norm ought to be; instead, what equality litigation does is accept the organization of society and ensure that men and women, for example, obtain equal benefits. Razack quotes one LEAF activist as reflecting that equality litigation "doesn't allow for wider policy innovations such as less workaholicism, lifelong learning, shifting values to peace, clean environments, except indirectly" (p. 50). These factors worked together to inhibit LEAF from developing a broader political vision and closer ties with other political movements. Thus, LEAF's gaze was drawn towards the public realm, the realm of state action, and away from the private world of the family and workplace.⁴

Although Razack does not discuss it, LEAF's decision to focus on the *Charter* as the instrument of social change limited its political vision. Because the *Charter* only applies to institutions of the state and its laws, private activity, except to the extent it is specifically regulated by the state through law, is beyond the scope of *Charter* redress. Through rights litigation, it is impossible directly to challenge a labour market which has historically resulted in low paying, sex-segregated jobs for women. Nor can one directly address the problem of women's (or men's, for that matter) poverty. Although these social facts may be raised in court as evidence of women's inequality, the *Charter* can only be used to attack any inequalities embedded in or directly fostered by the law, it can not be used directly to confront the social relations which give rise to these inequalities.⁵

4. Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) *Osgoode Hall Law Journal* at 485.

5. Glasbeek, *supra*, note 1.

In Chapter Two, "LEAF's Litigation in Context," Razack examines "to what extent the issues LEAF has taken up, and the manner which it has done so, challenged the social order that oppress women and minorities, and what has been the impact of this challenge?" (p. 68). In doing so, she provides a brief organizational profile of LEAF and overview of its case selection criteria and its caseload during its first three years. Again, Razack emphasizes how LEAF's decision to pursue a proactive case litigation strategy and emphasize legal expertise isolated it from other feminist political campaigns and organizations. As she notes, LEAF activists were aware of this problem, but they believed that it was more important to influence quickly equality rights jurisprudence, rather than to take the time to develop connections with other women's organizations. They believed that this could be done at a latter stage, once the organization had established its legal credibility. She also shows how LEAF could not control the equality litigation agenda; it was forced to respond to *Charter* challenges. Specifically, the *Charter* was used by LEAF's opponents to roll-back women's hard-won rights in the areas of sexual violence against women and women's reproductive freedom. But intervening in existing cases, rather than initiating and controlling litigation, placed severe constraints upon LEAF's ability to frame issues and lead evidence of women's experience. Despite some early *Charter* and some important human rights decisions in the mid-1980s, which established that courts should look at the adverse impact of the operation of a law on disadvantaged groups, LEAF had an uphill battle to persuade the courts to accept women's experience.

Razack claims that "[l]itigation as feminist activity embodies an obvious contradiction: it is in essence the telling of women's stories in a language and a setting structured to deny the relevance of women's experiences" (p. 51). LEAF litigators tried to adduce evidence of women's experience in order to challenge indirectly judicial stereotypes and to raise issues of power and oppression. But all of this had to be accomplished within prevailing legal rules.

LEAF's early attempts to expand the scope of legal liberalism to accommodate a feminist emphasis on context are described and analyzed in Chapters Three and Four. The cases discussed in Chapter Three do not fit into any neat categories. Razack's discussion of the individual cases is insightful and illuminating as she provides LEAF's rationale both for how it approached these cases and the results it sought. However, the cumulative significance of these cases and LEAF's arguments is not apparent from Razack's analysis.

This is because Razack fails to examine the significance of the public/private distinction and the relationship between the various institutions of the state on the transformative potential of rights litigation. In this, she is simply reflecting a gap in LEAF's own analysis. The public/private distinction is used by the courts to determine the scope of the *Charter's* application. For the *Charter* to apply, there must be an element of public *qua* governmental action. Union constitutions, collective agreements (in most cases), and contracts of employment, for example, are examples of private action. What is significant is that *Charter* litigation cannot

be invoked to challenge private action directly. For this, equality rights advocates must resort to human rights legislation which specifically prohibits discrimination in the private sphere. This is what LEAF did in the *Federation of Women Teachers of Ontario* case,⁶ where it sought to defend the right of the FWTO to maintain a sex-segregated union structure, and in *Brooks*,⁷ where LEAF sought to persuade the court that the failure to provide sick benefits to pregnant workers was a form of sex discrimination. In these cases, state action, rather than being the cause of inequality, is the sole avenue through which inequality can be challenged. Second, simply winning the argument about women's inequality does not ensure that women's life situations will be improved. Razack acknowledges this. However, she is heartened by the watershed decisions in *Schachter*, where two levels of courts accepted LEAF's arguments and decided to extend parental leave benefits for adoptive fathers provided under the unemployment insurance scheme to natural fathers.⁸ But what Razack does not mention is the fact that the federal government responded to the first decision in *Schachter* by reducing the number of weeks of benefits available to adoptive parents from 15 to 10 weeks and providing adoptive fathers with the same length of benefits. While this is clearly an improvement for natural parents (the 10 weeks parental leave can be used by the mother or father of the child), adoptive parents are worse off. Moreover, there is nothing in the Charter which would prohibit the government from abolishing sickness, maternity and parental benefits altogether as part of a policy of fiscal restraint.⁹ When it comes to the question of whether or not and how much social and economic resources will be allocated to a particular group or program, the Charter's role is secondary at best, beside the point at worst. What we need is positive state intervention in the private sphere of the market to ensure greater equality, not protection of individual rights from the oppression of a trespassing state.

In Chapter Four, Razack shows how LEAF was able to bring women's experience of domination and subordination into court in cases involving sexual harassment, rape and women's reproductive choices. She identifies LEAF's argument in *Andrews v. Law Society of British Canada*¹⁰ as pathbreaking because the Supreme

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6. *Re: Tomen and Federation of Women Teachers Association of Ontario* (1987), 66 D.L.R. (4th) 565 (Ont. C.A.).
 7. *Brooks, Allen, Dixon v. Canada Safeway* (1989) 89 C.L.L.C. 17, 012 (S.C.C.); [1989], 1 S.C.R. 1219.
 8. *R. v. Schachter* (1990), 90 C.L.L.C. 14, 005 (F.C.A.)
 9. Razack reports that in November 1988 Attorney General of Ontario Ian Scott told his audience that the recent modifications to the spouse-in-the-house rule which were introduced as a result of a Legal Charter challenge had cost taxpayers \$80 million. He added: "I've got to give consideration to cancelling the whole welfare program for those women. That way there won't be any discrimination because there won't be any benefit given" (p. 130).
 10. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

Court of Canada rejected the similarly situated rule (formal equality) and instead adopted an approach to equality rights under the *Charter* which requires a court to examine the historical disadvantage of a group and consider substantial inequality. Although *Andrews* was not a case about women's daily reality, Razack claims that LEAF used the approach it developed there in subsequent cases involving sexual harassment and rape, thereby "revealing its contrast to an individualist, rights-balancing perspective and confirming LEAF's growth into an explicitly radical and feminist organization" (p. 107). In these cases, as well as those involving reproductive choice, LEAF presented evidence in support of its argument that men and women have a different and unequal reality. This argument was explicitly accepted by the Supreme Court of Canada in *Janzen/Govereau*,¹¹ where the Court held that sexual harassment against individual women was an instance of broader sexual discrimination by men against women. However, with the exception of Justice Wilson's decision in *Morgentaler*,¹² in the rest of the cases the courts did not specifically endorse LEAF's arguments regarding the historical disadvantage of women, although in several instances LEAF was not unhappy with the courts' final results.

Having finished her discussion of LEAF's strategy, Razack concludes by asking the crucial question: What counts as winning? She is careful to distinguish the litigator's answer from that of the historian. From a litigator's point of view, it is the court's final order that counts. But, as Razack notes, courts often come to the "right conclusion for the wrong reasons" (p. 128). In a few cases, the courts gave the right result based on the right reasons (an analysis of women's historical inequality). In others, the courts came up with the right result for reasons which did not explicitly refer to women's inequality. Moreover, simply obtaining the right result for the right reasons (no mean feat in itself) is not sufficient to improve women's situations. As Razack shows, women's equality was harder to secure when it required a change in bureaucratic practice, especially where that change required additional governmental expenditure. Thus, Razack concludes that

... [n]either a legal nor a political challenge can be sustained without regard to the alternative values one espouses or how to win recognition for them politically. In this sense, legal challenges that end up on the bureaucratic treadmill, as many do, cannot result in long-term gain unless there is a clearly articulated political vision and one that finds support in the feminist community (p. 130).

But, according to Razack, a broader political vision is precisely what LEAF lacked. The questions Schneider offers as a guide to social movements for evaluating the direction of their rights litigation strategies presuppose both a larger political analysis and some accountability to wider political movements.

11. *Janzen/Govereau v. Platy Enterprises* (1989), 89 C.L.L.C. 17, 011.

12. *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

Surely, before we can evaluate LEAF's litigation strategy we need an answer to the initial question of what broader political vision of social transformation LEAF endorses. Only then can we evaluate whether a particular strategy, rights litigation, brings the organization closer to its ultimate goal. However, Razack acknowledges that LEAF has recognized the need to extend itself in these directions, and to this end it is working in coalition with immigrant and women's communities in some of the newer challenges.

From an historian's perspective, a proactive rights litigation strategy must be evaluated in terms of how it transforms power relations in society and not simply on how it redistributes benefits. Referring to the work of Michael Mandel on the legalization of politics, Razack acknowledges that "Charter activities, like equality activities on the whole, exert a force that negates transformation and keeps the focus on a fairer distribution of resources" (p. 135). According to Mandel, this is because rights litigation detaches form from substance and leaves power relations untouched. By contrast, Razack adopts a more sanguine view of Charter litigation on the ground that "[f]eminists in the courtroom are primarily concerned with resisting this built-in feature of the discourse in which they work, insisting on transformation and on context" (p. 135).

For Razack, the transformative power of rights litigation lies in the ability of organizations like LEAF to name women's oppression in court. She, like many cautious supporters of rights litigation, emphasizes the counter-hegemonic potential of rights discourse.¹³ But it is difficult to see how naming women's experience in court has such a potentially transformative effect. As Razack notes, in several of LEAF's early cases the courts simply ignored LEAF's evidence of women's experience in reaching its decisions. And even when the courts rely on a contextualized understanding of women's inequality to reach a decision, it is not clear how this change in legal discourse is transmitted into the broader political debate or, even more importantly, how it contributes to social change. Although she is critical of LEAF's approach to social change through reasoned argument (pp. 43-44), it is not clear that Razack's stress on the importance of bringing women's experience before the courts is substantially different. In both cases, what is missing is a theory of social change.

Razack emphasizes the importance of looking for cracks in the law where feminist values may seep in to change the system. But the problem with this strategy is that it does not allow us to distinguish cracks which are cosmetic from ones which may be structural. Analyzing law as discourse does not distinguish between forms of law, the different levels of the social formation in which law operates or the different capacities of opposing groups to mobilize legal challenges. Simply characterizing law as discourse and describing discourse as "the twin operation of power and knowledge" (p. 19) begs more questions than it answers.

13. Herman, *supra*, note 2; Bartholomew and Hunt, *supra*, note 1; Schneider, *supra*, note 2.

It may well be that a postmodern analysis of law has a great deal to offer feminists,¹⁴ but this is not demonstrated by Razack's suggestive remarks.

The same is true of Razack's attempt to complicate the concept of women's experience, which is crucial for feminist jurisprudence, by invoking a postmodern emphasis on difference. She is critical of the concept of women's experience employed by LEAF not only because it sets up a dichotomy between men and women, but also because of the unacknowledged universalism concealed in the phrase (p. 24). Razack fears that unless the differences between women are acknowledged and explored by feminists, this concept will tend to foster the agenda of elite women at the expense of disadvantaged women. By this she means that feminists should be careful to attend to how race and class differences between women impact upon the development of a feminist political agenda. But it is unclear how her emphasis on the differences between women advances the political debate any further than LEAF's attention to the double disadvantage, such as race and class, which some women experience. Although Razack identifies the need to use analytical models which are based upon the indivisibility and simultaneity of oppressions, (p. 133) she does not provide us with any guidance about how this may be done within a postmodernist framework.

Canadian Feminism and the Law provides an excellent case study of the origins of LEAF and its litigation strategy. Sherene Razack's analysis of how the litigation process and traditional equality doctrines filter out women's experiences of subordination and LEAF's attempt to counter these tendencies by developing a feminist approach to equality rights litigation is subtle and thoughtful. Many of her comments about law, rights discourse and women's oppression, although not developed, are suggestive of lines of inquiry which those of us interested in the rights debate as it relates to feminism and progressive social movements should explore. The problem is that until Razack provides some account of how social change occurs and how various forms of oppression are involved in social relations it is difficult to accept her cautious endorsement of rights litigation. What is needed is a fuller account of the social theory informing Razack's assessment. However, this theoretical endeavour must necessarily be supplemented by precisely the kind of detailed case study which Razack provides if we are to be confident in our evaluation of the transformative potential of the politics of rights.

14. Carol Smart, *Feminism and the Power of the Law* (London: Routledge, 1989).